Applicant Number

BOARD OF BAR EXAMINERS

OF THE DELAWARE SUPREME COURT

2009 BAR EXAMINATION

Monday, July 27, 2009

9:00 a.m. – 12:00 p.m.

Questions 1 - 4

QUESTION 1

Akinville School District ("the District") is located in Sussex County, Delaware. You are a first-year associate at the law firm that represents the District. One of the senior partners has asked you to assist in handling a number of legal matters that have arisen recently in the District.

The school board ("the Board") is the governing body responsible for approval of all administrative decisions within the District. In September 2008 Robert Bowden was named the superintendent of the District. Assume that the superintendent has authority to make decisions on behalf of the District.

Your senior partner has questions based on the facts below. In answering his questions, you should avoid analysis of any provisions of the Uniform Commercial Code ("UCC"). In addition, you should avoid analysis of any issues raised by the public bidding laws.

1. On March 16, 2009 the Board entered into a contract with Perennial Paving Contractors, Inc. ("Perennial"), a Delaware corporation. Under the terms of the contract, the District agreed to pay Perennial $20,000 to pave the parking lot outside the District's new administrative office building. The District planned to move into the new building on May 1, 2009. The contract contained a "time is of the essence clause" under which Perennial was scheduled to begin work on the parking lot on May 4, 2009 and to complete the work by May 15, 2009. Due to a delay in the site survey, however, the District was not able to move into the property until July 16, 2009. As a result, Perennial was not able to begin work on the parking lot until July 22, 2009. Perennial plans to sue the District for this delay.

Please discuss any causes of action Perennial may bring against the District and Perennial's likelihood of success on these claims.

2. James Josephson is the athletic director for the District. Mr. Josephson was hired in 2005 under a contract of employment with the District that, by its terms, is subject to renewal on an annual basis. In the first week of May 2009, the Board voted not to renew Mr. Josephson's contract due, in large part, to the poor performance of the high school basketball teams over the last few seasons. Mr. Josephson is irate and has threatened to sue the District. Mr. Josephson claims that before he signed the initial employment contract he had a conversation with a member of the Board during which the Board member assured him that as long as the high school football team had a winning record he would keep his job. There is no mention of any such condition in Mr. Josephson's written employment contract. Mr. Josephson also claims that he turned down another job in order to take the job with the District based on the assurance by the Board member. As it so happens, the football team has had a winning record each season since Mr. Josephson was hired.

Please discuss any causes of action Mr. Josephson may bring against the District and his likelihood of success on these claims. For the purposes of this question, assume that the Board has satisfied all requirements for timely notice of non-renewal under both the employment contract and applicable law.

3. In January 2009 the Board granted exclusive rights to Sunny Soda, Inc. ("Sunny"), a Delaware corporation, to sell soft drinks in the District's schools. In return for these exclusive rights, Sunny agreed to install a new floor in the high school

gymnasium. The new floor was completed on March 3, 2009. Recently, however, the Board has been under intense pressure from parents in the community to rescind the contract with Sunny because of the alleged detrimental effects of soft drinks on the health of the students.

Please discuss any causes of action that Sunny may have against the District if the Board gives in to the community pressure and votes to rescind Sunny's exclusive rights to sell soda in the schools. Further, discuss Sunny's likelihood of success on these claims.

4. On July 2, 2009 Robert Bowden entered into an oral agreement with Crystal Cleaners ("Crystal"), a Delaware Corporation, under which Crystal agreed to clean the uniforms for all the athletic teams in the District for the next school year. The school year begins on August 24, 2009 and ends on June 30, 2010. In order to be able to accommodate such a large new client, Crystal recently purchased four new washing machines. The Board has now found a cleaning company who is willing to clean the uniforms for $5000 less than the price upon which Bowden and Crystal had agreed. On July 17, 2009 the Board met and decided it would like to sign an agreement with the new cleaning company. The Board wants to know whether it must honor the agreement between Bowden and Crystal.

Please discuss any causes of action that Crystal may bring against the District if the Board refuses to honor the agreement between Bowden and Crystal. Further, discuss Crystal's likelihood of success on these claims.

5. In April of 2009 the District signed an agreement to purchase a fifty-acre plot of land in southern Sussex County on which the District planned to build a new elementary school. The agreement set a closing date of September 15, 2009. In June 2009 the District received the results of an environmental assessment that it had ordered. The assessment showed that at some time in the past a manufacturing plant had been located on the property that had resulted in the deposit of toxic chemicals on the property. Until the disclosure of the assessment, the seller was unaware of the presence of the chemicals on the property. The District asked the seller to clean up the affected area, which the seller did at considerable expense. Last week the District received a new environmental assessment showing that the chemicals have been completely removed from the affected area and there are no traces of chemicals left on the property. The report concluded that there is no threat to the health or safety of anyone who would be present on the property.

Despite this report, the Board is hesitant to go forward with its plan to purchase the property and construct an elementary school. The Board is concerned that if the public learns that the District built an elementary school on a site where toxic chemicals were found, there will be public outcry against the District. The Board now wants to repudiate the agreement and not go forward with the purchase of the property.

Please discuss any causes of action the seller may have against the District if the District refuses to go through with the sale. Further, discuss seller's likelihood of success on these claims.

QUESTION 2

Ann, Brenda and Denise were sorority sisters at the University in Dover, Delaware. During the 2007 spring break, they decided that it would be a good idea to start an internet dating service for the University students.

The women agreed on the name "Cyber Set-ups" for their service. Brenda thought that they should make their business relationship official, so she drafted an agreement which all three of them signed on May 1, 2007. In its entirety, the agreement stated:

> This 1st day of May, 2007, the undersigned agree to form a partnership known as Cyber Set-ups for the purpose of conducting an internet dating service for students of the University. We agree that we will all share equally in the gross returns of the business.

Brenda also drafted a statement of partnership existence to be filed with the Delaware Secretary of State. During the afternoon of May 1, 2007, she started walking to the Secretary of State's office. It was a beautiful day, however, and she stopped to play volleyball with her friends on the campus quad. She never filed the statement and never told Ann and Denise that she did not file it.

Using the money that Denise contributed to the enterprise, the women were able to develop a first-class website and were able to create quite a stir on campus with their advertising campaign. Cyber Set-ups launched its website on September 1, 2007 and was instantly very popular with the students.

The popularity of the website led to the signing of advertising contracts with several local businesses. Each of the advertising contracts was signed on behalf of Cyber Set-ups by Ann, Brenda and Denise. One of the contracts was with Campus Pizza which was owned by Phil, who was a friend of Ann and Brenda. Pursuant to the contract, Campus Pizza agreed to buy one year's worth of pop-up ads for a fixed sum. Campus Pizza made an initial payment under the contract. The balance was payable in installments. Campus Pizza never made any additional payments. Cyber Set-ups ran all the ads it agreed to run for Campus Pizza, however, and Campus Pizza became the most popular restaurant on campus.

Brenda also negotiated two other agreements. First, in exchange for Cyber Set-ups' agreement to make a monthly payment of $100, the University agreed to allow Cyber Set-ups to use the University's name in connection with its business. Second, in response to a request from her friend Frank who had helped her draft the May 1, 2007 agreement, Brenda agreed to give $1000 of Cyber Set-ups' cash to Frank in connection with an investment that Frank was making in Hedge Fund, LLC -- a hedge fund which specialized in highly speculative and risky investments. As part of that deal, Brenda agreed that Cyber Set-ups would be responsible for .5% of any additional capital contributions that Frank was required to make to Hedge Fund, LLC. The only person who signed the contract with the University and the contract with Frank was Brenda. The signature block on the contracts indicated that Brenda signed in her capacity as Chief Operating Officer of Cyber Set-ups which was the title that was printed on her business cards. Business cards for each of Ann, Brenda and Denise had been approved by all three of the women. Ann and Denise were not aware of either the agreement with the University or the agreement with Frank.

Ann's brother Ed -- who was a 15 year-old sophomore in high school -- knew how popular Cyber Set-ups was and wanted to become involved in the business. Since he knew many of the local business people, he offered to help out with the advertising sales after school. On October 15, 2008, Ann and Brenda voted to admit Ed as a partner. Denise was studying abroad at the time and did not vote.

When Denise returned from overseas, things took a turn for the worse. Denise was not happy with the recent decline in the business and felt that Ann's website design needed to be updated. Denise was also furious that Campus Pizza had not made the required payments. She suggested that Cyber Set-ups sue Campus Pizza to recover the money. Ann, Brenda and Ed were disinclined to sue Campus Pizza because of their relationship with Phil.

Ann was frustrated by Denise's attitude and the fact that she did nothing for the business other than contribute money at the outset. Without telling anyone else, Ann started another internet dating service called Dover Dates and essentially stopped working for Cyber Set-ups. Dover Dates quickly surpassed Cyber Set-ups in popularity on campus.

That was not Cyber Set-ups' only problem, however. While overseas, Denise incurred considerable credit card debt which she did not pay. Delaware Bank -- the issuer of her credit card -- obtained a judgment against Denise in the Delaware Superior Court. Delaware Bank then obtained a charging order on her interest in Cyber Set-ups from the Delaware Court of Chancery and subsequently foreclosed on that interest.

Delaware Bank then called a meeting attended by Brenda and Ed. Delaware Bank set forth its plans on how Cyber Set-ups could expand its business and compete more effectively with Dover Dates. Delaware Bank expressed the view that it had "stepped into the shoes" of Denise. Consequently, Delaware Bank stated that it had the right to manage the day-to-day operations of Cyber Set-ups.

Despite its difficulties, at all times, Cyber Set-ups had sufficient assets to satisfy any obligations to creditors.

* * *

1) Did Ann, Brenda and Denise validly form a partnership on May 1, 2007? Why or why not?

Regardless of your answer to Question 1, for each of the remaining questions, assume that a partnership was validly formed on May 1, 2007.

2) Was Ed validly admitted as a partner on October 15, 2008? Why or why not?

3) Cyber Set-ups did not make any payments to the University for use of its name. The University sues Cyber Set-ups. Can the University recover from Cyber Set-ups? Why or why not?

4) Hedge Fund, LLC made a capital call on its investors which Frank paid. Frank requested that Cyber Set-ups pay its share, but Cyber Set-ups did not pay. Frank sues Cyber Set-ups. Can Frank recover from Cyber Set-ups? Why or why not?

5) Is Delaware Bank correct in its view that it has the right to manage the day-to-day operations of Cyber Set-ups because it has "stepped into the shoes" of Denise? Why or why not?

6) Are there are any causes of action that Denise can pursue? Explain your answer.

7) *For purposes of this question, assume that (i) on December 31, 2008, Cyber Set-ups was still in business; (ii) the partnership was validly in existence and (iii) the partners were Ann, Brenda, Denise and Ed.* Effective January 1, 2009, internet dating became illegal in Delaware. Notwithstanding the new law, half of the partners wanted to continue the business and half did not. The ones who did not want to continue the business hired you as their lawyer. What do you recommend that they do?

QUESTION 3

Beginning in March 2005, 10 separate lawsuits were filed around the country and served against Green, Inc. ("Green"), a national pharmaceutical company incorporated in Delaware. The Plaintiffs in these lawsuits sued Green for Green's alleged negligence in the production and manufacture of an arthritis medication named Genesis, that allegedly caused serious allergic reactions to certain patients who used it.

Upon receipt of these complaints, Green immediately notified its insurance company, Essential Insurance Co. ("Essential"), which provided coverage of $20 million, and requested that Essential defend it in connection with the 10 lawsuits. Green also was an additional insured on an insurance policy issued to one of Green's chemical suppliers, Larkin, Ltd. ("Larkin"), which produced one chemical component for Genesis. Larkin's insurer was Old Reliable Co. ("Old Reliable") and it provided insurance coverage of $10 million to Larkin (and Green as an additional insured). Green gave appropriate notice of the 10 lawsuits to Old Reliable as well.

After conducting a claims analysis, Essential denied coverage to Green on the ground that Green allegedly knew or should have known that Genesis could have adverse side effects on certain segments of the population prone to allergies.

* * * * *

On January 15, 2006, Green sued Essential, but not Old Reliable, in the Delaware Superior Court ("Superior Court"), asserting that Essential had breached its obligations to Green by not providing the payment of defense costs incurred in the 10 underlying cases, and for a declaratory judgment that Green was entitled to the payment of its defense costs and indemnification with respect to any judgments that might be rendered against it in the 10 lawsuits. Green retained the Delaware firm of Cromwell & Fairfax LLP to represent it in this insurance coverage action. Its lead partner, Art Andrews ("Art"), filed the above-referenced complaint. At the end of the complaint, Green specifically requested "that this action be tried to a jury." Essential also retained a Delaware law firm, Longstreet & Lee, P.C., whose lead counsel was Cathy Caine ("Cathy"). Essential's answer denied the claims asserted by Green for insurance coverage. Essential's prayer for relief made a "demand for a trial by a jury of twelve jurors" and also asserted "Trial By Jury Demanded" in the caption. Shortly after filing its answer, Essential filed a motion for judgment on the pleadings based upon Green's failure to join Old Reliable and Larkin as defendants in the case. The Court denied Essential's motion, and the action proceeded.

1. Explain whether the Court was correct in not granting Essential's motion for judgment on the pleadings.

2. Explain whether Essential and Green have properly pleaded for a trial by a jury of twelve.

* * * * *

Fact discovery commenced and Essential's document requests led Green to produce approximately one million pages of documents, including electronic documents such as Excel spreadsheets and thousands of e-mails among Green's employees. Green withheld from production thousands of pages of e-mails, including memoranda and handwritten notes involving its General Counsel, Bill Baker ("Bill"). Art prepared a privilege log in which he listed each of the withheld documents and asserted a work product and attorney-client privilege as to each of them. One of Art's associates advised him after most of the document production had been completed that there were 100 e-mails on which Bill was either an author or recipient that had been produced to Essential's counsel. On learning this information, Art immediately sent a letter to Cathy identifying each of the e-mails that had been produced and requested their immediate return or destruction because they had been produced accidentally. Cathy immediately advised Art that any privilege had been waived because the documents had been produced weeks before and Art and his associates would have to suffer the consequences of their sloppy document production practices. Cathy asserted that the e-mails from and to Bill were also not privileged because they discussed the marketing of Genesis, the manufacturing process for Genesis, and draft SEC filings disclosing matters to the public related to the 10 lawsuits. Art was so outraged by Cathy's response that he immediately filed a motion to compel pursuant to Superior Court Civil Rule 37 and requested the Court to compel Essential and Cathy to return or destroy the allegedly privileged documents. The Court addressed this motion in due course and issued its decision.

3. Discuss all the issues that the court should consider in addressing Art's motion to compel and explain how the court should rule and why.

* * * * *

In developing her case for trial Cathy retained both testifying experts and consulting experts on various aspects of the case. One of the testifying experts retained by Cathy was Denise Dukes ("Denise"), who was a well-known expert in the field of pharmaceutical products. Cathy also retained as a consulting, non-testifying expert, Edwin Edwards ("Edwin"), who had been involved in the pharmaceutical industry for many years. In order to prepare Denise to testify at deposition and also at trial, Cathy and her litigation team provided Denise with thousands of documents that Green had produced in the case. Copies of those same documents were also provided to Edwin. Cathy had one of her associates provide to Denise a summary of many of the documents given to Denise so that Denise could determine quickly which of the documents she needed to review in detail. Also, Edwin and Denise consulted frequently, both orally and in writing, with respect to various aspects of Denise's prospective testimony.

Eventually, Art deposed Denise. Art asked Denise whether she had had any discussions in connection with preparing her opinion with any individual with experience in the pharmaceutical industry. Cathy interposed a privilege objection and instructed the witness not to answer. Art learned in the deposition that Denise had looked at the summaries of documents prepared by Cathy's associate, even though those summaries had not been listed on the group of documents that Denise had reviewed in preparing her opinion. After the conclusion of the deposition, Art and Cathy had several meetings discussing Cathy's instructions not to answer and her refusal to produce the document summaries that were given to Denise. Art thereafter filed a second motion to compel, seeking: 1) to resume the deposition of Denise with respect to Cathy's instruction not to answer, and 2) to require the production of the summaries prepared by Cathy's associate. The Court is now considering the motion to compel.

4. Discuss all the issues that the court should consider in addressing Art's second motion to compel and explain how the court should rule and why.

* * * * *

After the completion of discovery, Essential filed a motion for partial summary judgment as to one of its defenses to coverage that would not resolve all issues for trial. After briefing and argument, the court denied Essential's motion for partial summary judgment. Ten (10) days after the court's opinion denying the motion for summary judgment was docketed, Cathy filed an application with the trial court for an interlocutory appeal. In Cathy's application, she stated that the interlocutory appeal should be granted because it would reduce the time and expense at trial if the Supreme Court reversed the trial court's decision and because the issue was novel. The trial court issued an order denying Essential's application for certification of an interlocutory appeal 22 days after the application was filed. The next day, Cathy filed Essential's notice of appeal to the Supreme Court, requesting the Supreme Court to hear the appeal notwithstanding the trial court's decision to refuse certification.

5. Did Cathy comply with all the requirements for filing her application for certification of interlocutory appeal to the Superior Court and notice of appeal to the Supreme Court? Please explain.

QUESTION 4

You have been appointed to represent Jon Jones ("Jones"). He has been charged with:

- Escape after Conviction
- Conspiracy 1st Degree
- Criminal Solicitation 1st Degree
- Burglary 1st Degree
- Robbery 1st Degree
- Rape 1st Degree
- Assault 1st Degree
- Perjury 1st Degree
- Murder 1st Degree
- Possession of a Deadly Weapon during the Commission of a Felony
- Trafficking in Cocaine.

Jones wants to know which of these eleven charges he is facing are supported by the State's evidence. For any charge not supported by the evidence, he wants to know why, and what the most serious lesser charge is that the evidence does support, and why. After reviewing the facts below, please discuss each of the eleven charges in answering Jones' questions.

The prosecution has provided all the State's evidence, which establishes the following, all of which occurred in Delaware:

On March 22, 2009, Jones was at the Delaware Correctional Center, where he was awaiting trial after being held in default of bail on a Felony Stalking charge. That night, Jones hid in the back of a garbage truck, and when the garbage truck left the prison, so did Jones. Once on the outside, he went to see his friend Ken Keene ("Keene").

Keene was happy to see Jones. Keene had had a long-running dispute with Tom Thompson ("Thompson"), and he wanted revenge. He told Jones that he wanted to kill Thompson, but said he was unsure how to commit a murder and not get caught. He asked Jones whether Jones would help him plan the murder. Jones said he would. He asked Jones whether Jones could get him a murder weapon. Jones said that he could.

They shook hands, and decided to drink some whiskey to celebrate. As Keene went to get the whiskey, he had a stroke, and died.

Jones left and walked a short distance to visit another friend, Larry Lawrence ("Lawrence"). His conversation with Keene made him think about the people with whom he had had disagreements. When he met up with Lawrence, he mentioned how much he hated their mutual acquaintance, Ursula Urso ("Urso"). They discussed Urso for more than an hour. During this time, Jones told Lawrence exactly where Urso lived, what hours Urso was home, and reminded Lawrence that Urso always had at least $5,000 cash in a pillow in her home. Jones told Lawrence that he should go over to Urso's home that night, wear a disguise, bring a gun, and rob her of the $5,000. Jones told him it "would be a piece of cake." Lawrence, after some thought, said it was too risky, and asked Jones to leave.

Jones again left. As he was walking, trying to figure out what to do next, he noticed the lunchtime crowd going over to the bank. Thinking about money, he immediately decided he'd go to Urso's home himself and get the $5,000. When he got to the house a few minutes later, he went around back, broke out a window, and entered the living room. As he looked around, inside the house, he saw a man he did not know coming down the stairs, yelling at him. Jones put up his hands in a defensive stance. When the man took a swing with his fist at Jones, Jones deflected the blow, and the man's fist hit the plaster wall. He screamed out in pain, his knuckle broken. Jones took the opportunity to run to the front door, which he opened, and he then ran from the house.

Jones now saw that he was near a high school. He saw various students leaving school. He followed one who walked off by himself. He saw the student light a cigarette. Jones walked up to the student, Peter Peterson ("Peterson"), and asked him how old he was. Peterson said he was sixteen. Jones asked Peterson whether he could lend him some money. Peterson said no. Jones then told Peterson, "You don't understand, you are going to give me all the money you have or I am going to beat you senseless." Peterson pleaded, "Don't hit me," and handed over twenty dollars. Jones took the money and walked away.

Jones now recognized that he was in a seedy part of town. He saw a woman, Anna Anderson ("Anderson"), sitting in the front of a van. They made eye contact, and Jones wandered over to her. He asked her whether he could have sex with her. Anderson said he could if he had $100. He said he'd pay her $100, and she told him to come on in to the back of the van. As they took off their clothes, he told Anderson that it would be $20 then and he'd have to owe her the other $80. She said no, for $20, all he could get was oral sex. Jones then forced her to the floor of the van, ripped off her remaining clothes and had sexual intercourse with her. She struggled a little bit, but was afraid that if she did any more, Jones would hurt her. After Jones finished, he put on his clothes, gave her the $20, and left. Anderson then called the police, but was concerned that the police might not believe her considering her occupation and lack of any injury.

As Jones walked away from Anderson's van, he realized he had no money. He remembered a place in the woods near where he used to live, and recalled that he'd hidden some drugs there. He thought that he could probably get some money by selling the drugs. So he set off in that direction. By now, however, he noticed that there seemed to be many more police in the neighborhood than usual, and he was concerned that they were looking for him. He saw Jenny Jenson ("Jenson"), a State Trooper, following him. He rounded the corner of a building, and crouched down. Jenson followed around the corner, and Jones stood up and swung his right fist at her. She saw it coming, and yelled, "Oh, no!" Jones struck her very hard, on the arm, knocking her down. Jenson was unhurt, and when she got up, Jones was gone.

Jones thought maybe he could get some money from a bank. He'd had good credit before his Stalking arrest. When he saw a branch of the Fourth National Bank of Delaware, he went in and filled out a credit application. The application stated that federal law required that the application be made under oath, and Jones signed his name indicating he understood that. The application said that no loan would be granted to anyone who had ever been arrested for a felony, so even though he knew that his Stalking arrest had been for a felony, he denied that he had ever been arrested for a felony. Once he submitted the application, he was disappointed to learn that there was a waiting period before any loan would be made. When he left the bank, he was angry.

Jones remembered that he had been on his way to get his hidden drugs. As he started to walk, he saw Willy Williams ("Williams"), an old friend from high school, walking in the same direction. He remembered that in high school, ten years earlier, Williams had had to quit the football team after taking an EKG and being diagnosed with a "bad heart" for which stress or excitement could be fatal. Jones wondered if Williams had ever recovered from the "bad heart." Sure that Williams would get the joke, he came up behind him, and yelled, "Quick! Your house is on fire and your children are inside!" Williams turned around and fell dead of a heart attack caused by Jones' statement.

Somewhat alarmed, Jones left his dead friend, and went into a nearby department store. Thinking he needed some protection, he saw a knife with a six-inch blade, slipped it into his waistband so that it would look like some sort of "work knife," and walked out of the store without paying for it. As he walked along without a sheath for the knife, he thought that it was perhaps more dangerous to him than it was useful to him, and, since it hadn't cost him anything, he discarded it.

A few minutes later he got to the place where he had hidden drugs. Once there, he found a baggie that he had left there before containing half an ounce (14 grams) of cocaine. He put that in his pocket and walked back to town to sell it. On his way, he was stopped by the police and arrested. The police found the cocaine, and seized it.

Applicant Number

BOARD OF BAR EXAMINERS

OF THE DELAWARE SUPREME COURT

2009 BAR EXAMINATION

Monday, July 27, 2009

1:30 p.m. – 4:30 p.m.

Questions 5 - 8

QUESTION 5

Oklahoma Slugger, Inc. ("Slugger"), a Delaware corporation, is the world's leading manufacturer of wooden baseball bats and other baseball equipment. Although Slugger's business prospered in the 1990s, the 21st century marketplace has proven more difficult. Slugger has failed effectively to penetrate the internet market, and has struggled to keep pace on the cost side with its competitors. As a result, by the end of 2005, its stock price had dropped from a high of $90 to just under $50 per share.

In early 2006, Slugger's board of directors, led by its founder and chairman, Gil Fox ("Gil"), considered a number of potential strategic alternatives to enhance shareholder value. After careful consideration, the Board approved an investment agreement (the "Investment Agreement") with Benchmark Bats ("Benchmark"). Benchmark, which was founded by former major league baseball star Chico Carrasco ("Carrasco"), has a substantial Internet marketing presence, and unlike Slugger has achieved significant market penetration in Latin America and Asian markets. At the time it entered into the deal with Slugger, Benchmark was wholly owned by Carrasco, who was also Benchmark's chairman and CEO.

Under the Investment Agreement, Slugger purchased approximately 50.1% of Benchmark's outstanding common stock, for which it paid $25 per share, or a total of just over $2 billion. Although Slugger expressed a strong desire to purchase 100% of Benchmark, Carrasco did not want to sell all of his interest. Indeed, although the Investment Agreement gave Slugger a majority ownership position in Benchmark, Carrasco insisted on retaining control of the Benchmark board of directors, and the Investment Agreement entitled him to nominate four of Benchmark's seven directors, and obligated Slugger to vote its shares for the Carrasco nominees.

Over the next two years, the results of Slugger's investment in Benchmark were mixed, and Slugger's stock price stagnated.

On May 23, 2008, a story appeared on the New York Times "Dealbook" website reporting rumors that Sportco, Inc. ("Sportco"), a leading global sporting goods manufacturer and Slugger's largest and fastest-growing competitor, was planning to make a proposal to acquire Slugger for $65 per share in cash. Sportco's potential proposal had an approximate total value of $9 billion, and represented a 30% premium over Slugger's unaffected trading price on May 22, 2008. Although Sportco is a much more profitable company than Slugger, and its market capitalization is almost double Slugger's, its balance sheet is highly leveraged, and in light of its heavy debt load, several press reports in the days following the "Dealbook" article describe the rumored proposal as a "stretch" for Sportco.

In response to these rumors, on May 29, 2008, Gil convened a special meeting of Slugger's board of directors (the "Board"). The Board consists of nine directors, including: (i) Gil Fox, (ii) Gil's son, A. Chilstrom Fox ("Chil"), who also serves as Slugger's president and chief executive officer, (iii) Sam Smith ("Smith"), Slugger's chief financial officer, and (iv) Stu Jackson ("Jackson"), a long-time friend and ally of the Fox family. The remaining directors hold no management positions with Slugger, and have no material ties to the Fox family. In addition, all of the non-management directors are substantial stockholders in Slugger, holding at least 100,000 shares each.

At the May 29 special meeting, the Board had comprehensive discussions with its legal and financial advisors about the rumored Sportco proposal. These discussions supplemented the reports the Board received at every meeting on Slugger's financial condition, financial projections and long-range plans. The Board also briefly discussed Slugger's continuing interest in buying the remaining 49.9% of Benchmark. The Board concluded that since there was no offer on the table, it was premature to make any decision regarding any potential transaction and no public response was necessary or appropriate. Press reports promptly characterized Slugger's response (or lack thereof) as a "stiff-arm" to Sportco.

The "Dealbook" rumors proved to be true. On June 11, 2008, the Board received a letter from Sportco detailing the terms of a proposal to acquire Slugger pursuant to a merger in which each Slugger share would be converted into $65 in cash. The letter stated that Sportco had obtained financing commitments for the full $9 billion purchase price, and that its offer was a "firm proposal," subject only to negotiation of definitive documentation and Sportco's completion of due diligence. The letter also stated that if a deal were consummated, Sportco intended to ask Gil to serve as vice chairman of the surviving company (which would be called "SportSlugger"), and for Chil and Smith to serve in unspecified senior management positions.

The following day, Chil received a phone call from Carrasco, who expressed concern over the possibility that Sportco might acquire Slugger and thereby become Benchmark's new majority owner. Carrasco expressed his willingness to "help in any way we can." At a meeting the next day, Chil discussed with representatives of Benchmark a potential acquisition by Slugger of the Benchmark stock it did not already own.

Rumors of Slugger's interest in acquiring the remaining 49.9% of Benchmark began to circulate immediately. In response, Sportco sent a letter to the Slugger Board on June 16, stating that its $65 per share offer was based on the "current assets, business and capital structure" of Slugger, and that Slugger's Board should consider the "potential adverse consequences" that any transactional alternative to Sportco's proposal could have on the ability of Slugger's stockholders to receive the premium cash consideration of the Sportco offer. Media reports speculated that Sportco would abandon its deal if Slugger bought the remainder of Benchmark.

On July 7, 2008, the Board met to discuss Slugger's strategic alternatives, including its ongoing discussions with Benchmark. Slugger's management made a presentation with respect to the implications of a transaction with Benchmark, including: (i) Slugger's longstanding interest in acquiring all of Benchmark; (ii) the value that control of the Benchmark board could provide to Slugger; and (iii) the fact that an acquisition of Benchmark would not alter the Board and management structure of Slugger, thus enabling Slugger's existing management team to continue its efforts to cut costs and improve profitability. Slugger's financial advisor expressed its view that Sportco's $65 offer was "inadequate from a financial point of view," and informed the Board that Slugger's purchase of the remaining 49.9% of Benchmark could possibly preclude Sportco from acquiring Slugger, especially if Slugger leverages itself heavily to complete a Benchmark deal. As no prices had yet been discussed between Benchmark and Slugger, the financial advisor offered no opinion as to the attractiveness from a financial point of view of a possible purchase of Benchmark. On July 8, 2008, Slugger issued a press release and sent a letter to Sportco reflecting the Board's determination that the $65 per share offer was inadequate. After a full discussion, the Board rejected the Sportco proposal as inadequate, and directed management to negotiate the best transaction it could with Carrasco for the purchase of the remaining 49.9% of Benchmark.

Word of a possible Benchmark deal leaked almost immediately, and it was widely reported that Slugger's response to the Sportco proposal would be an acquisition of the rest of Benchmark.

<u>Question 1:</u>

<u>Assume for the purposes of this Question 1 only</u> that after intensive negotiations with Carrasco, the Board unanimously approves Slugger's acquisition of the remaining 49.9% of Benchmark it does not already own, for a total purchase price of $6 billion (the "Benchmark Transaction"), and authorizes management to borrow the entire $6 billion.

A Slugger shareholder ("the Shareholder Plaintiff") files suit in the Delaware Court of Chancery, seeking an injunction to stop the Benchmark Transaction on the ground that the Board breached its fiduciary duties by approving it.

Discuss the Shareholder Plaintiff's arguments, and the Board's likely responses. What standard of review should the Court apply in considering this claim? Has the Board complied with its fiduciary duties? How should the Court rule?

Your answer should focus on the corporate law issues, and should not discuss procedural standards for injunctive relief.

* * * * *

<u>Assume for the purposes of Question 2 that no transaction with Benchmark has yet been negotiated</u>.

On July 8, 2008, Chil informed Sportco's representatives that the Board was close to making a decision regarding other strategic alternatives, including a potential transaction with Benchmark, and that if Sportco was interested in pursuing a transaction with Slugger, Sportco should submit its best proposal for an acquisition of Slugger.

The following day, representatives of Sportco reported to Chil that it was prepared to increase its proposal to $70 cash per share (representing a 40% premium over Slugger's unaffected stock price), that such a proposal would not include a financing or due diligence condition, and that the revised proposal represented Sportco's "best and final" offer.

Later that day, the Board met to discuss the revised proposal. The Board discussed the possibility of making a counter-proposal to Sportco at a higher price, but determined that in light of Sportco's characterization of its offer as "best and final," doing so could jeopardize the $70 "bird in the hand." It therefore directed management to negotiate the best terms it could for a transaction at $70 per share.

Over the next 72 hours, the terms of a proposed Merger Agreement reflecting the $70 per share acquisition were hammered out in negotiations between Slugger and Sportco. On July 13, 2008, the Board met to review the proposed Merger Agreement.

The Merger Agreement contained a "no-shop" provision that prohibited Slugger from soliciting an alternate takeover proposal from a third party, or entering into any negotiations or discussions regarding any "acquisition proposal" other than the Sportco acquisition, unless the Board first determines in good faith that such acquisition proposal would constitute a transaction more favorable from a financial point of view to Slugger's stockholders than the Sportco deal. Sportco also agreed in the Merger Agreement to appoint three current or former directors of Slugger (two of whom will be Gil and Chil) to the SportSlugger board of directors for a three-year term following the Merger.

At the July 13 meeting, after lengthy and comprehensive presentations and discussion, and receipt of an opinion from Slugger's financial advisor that the $70 Merger price was fair from a financial point of view to Slugger's stockholders, the Board approved the Merger Agreement, and the transactions contemplated thereby, as being in the best interests of Slugger and its stockholders, and recommended that Slugger's stockholders vote in favor of the Merger. The following day, Slugger and Sportco publicly announced the Merger.

<u>Question 2:</u>

The Shareholder Plaintiff files suit in the Delaware Court of Chancery, seeking to enjoin consummation of the Merger on the ground that the Board breached its fiduciary duties by approving the Merger Agreement with Sportco.

Discuss the Shareholder Plaintiff's arguments, and the Board's likely responses. What standard of review should the Court apply in considering this claim? Has the Board complied with its fiduciary duties? How should the Court rule? Please include in your discussion an analysis of the directors' interests and the "no-shop" clause.

Again, your answer should focus on the corporate law issues, and should not discuss procedural standards for injunctive relief.

QUESTION 6

In July 2008, Frank Farmer ("Farmer") decided to sell his corn and soybean farm in Sussex County, Delaware. The price of corn and soybeans had skyrocketed, and, since he purchased the farm, the land itself had more than doubled in value.

Ida Investor ("Investor"), a hedge fund manager, sent an email to Farmer promising not only to purchase his tract for $1 million, but also to arrange for Farmer to continue farming the land. Specifically, Investor offered to let Farmer keep 75% of the crop production's annual net cash flow, with the 25% balance paid to Investor's hedge fund. Investor cautioned in the email, however, that this arrangement was subject to a fair valuation of the farmland and of the net cash flow. Investor also conditioned the deal on Farmer making a minimum quarterly payment of $5,000.

Farmer called a friend, Ernie Expert ("Expert"), seeking advice on how to go about valuing the farm's acreage and the net cash flow from crop production. Expert told Farmer that he would prepare, for a fee, a "comprehensive marketing brochure based on my years of experience as a real-estate investor and stock-market follower." Expert then prepared the brochure. In it, he analyzed Delaware farm sales and trends according to a formula promulgated by the nationally accredited Delaware Realtors Association, of which Expert was a member. He also summarized years of commodity prices, which he compiled from a database maintained by a national financial newspaper. Based on this research, Expert "certified" that Farmer's farmland was worth $1 million, with a projected net cash flow of $100,000 per year for at least the next decade. Thrilled, Farmer told Expert that Expert would be "an integral part" of the sale negotiations.

Eager to complete a deal, Farmer turned to Laura Lawyer ("Lawyer") for advice on how to go about structuring the sale and leaseback. Lawyer, who was also representing Farmer's brother, Bob ("Brother Bob"), in a sale of his farm business, offered to represent both Farmer and Brother Bob in common for a reduced fee. Brother Bob and Farmer agreed to the joint representation. In an email to Lawyer and Brother Bob, which copied Expert, Farmer thanked Lawyer for her assistance and expressed his hope that Expert's valuation opinions would "hold up."

Expert then sent an email to Farmer and Lawyer that echoed Farmer's sentiments. Expert pointed out that recent data, not available at the time he prepared the brochure, arguably signaled a softening of the corn and soybean markets. In fact, Expert explained, the new data might suggest that Farmer's net cash flow could be considerably less than $100,000 per year in the near future.

Despite Expert's email, Farmer accepted Investor's terms. Farmer and Investor signed a purchase and sale agreement in August, with Expert's "certified" brochure fulfilling Investor's fair valuation requirement. Brother Bob, in reliance on the brochure, agreed to rent Farmer some of his crop processing equipment in exchange for 1% of Farmer's net cash flow. After receiving Investor's $1 million payment, Farmer immediately expended the funds.

As the first quarterly payment to Investor came due, crop prices were plummeting. Farmer sent an email to Lawyer seeking clarification of his obligations under his contract with Investor. As a courtesy, Farmer copied his accountant (who had had no role in structuring the sale and leaseback of the farm) on his email to Lawyer.

By reply email, Lawyer suggested to Farmer a number of interim remedies. First, she recommended that Farmer show Investor the most recent commodities prices listed in the local newspaper as proof that he was acting in good faith. She also suggested procuring a notarized statement of the local farm bureau representative discussing corn and soybean sales in Sussex County.

Following Lawyer's advice, Farmer obtained copies of the local newspaper, along with a declaration of the publisher that his paper had disseminated crop prices daily for over a hundred years. Next, Farmer asked a friend at the Sussex County farm bureau to prepare and notarize a history of crop sales throughout the county. Although not the bureau's regular practice to do so, the friend agreed to prepare the document as a favor to Farmer. Farmer then forwarded these materials to Investor. In the end, however, Farmer failed to pay Investor the first minimum quarterly payment. Farmer also failed to pay Brother Bob the promised 1% net cash flow.

Investor filed suit against Farmer for fraudulent inducement. Brother Bob also sued Farmer to rescind his agreement and to recover damages for the lost use of the crop processing equipment. In anticipation of a consolidated trial, the parties filed numerous motions in limine regarding the admissibility of various items of evidence.

Specifically, the parties seek resolution of the following questions; for all questions, please explain your reasoning:

1. If the statement of the local farm bureau representative, offered into evidence by Farmer, only summarized crop sales data from 1970-1990, will there be any threshold impediment to its admissibility based on the rules of evidence governing relevance and its limits?

2. If offered by Farmer at trial, would the newspaper listings of commodities prices or the farm bureau's statement be self-authenticating? Will either be admissible under the "business records" exception to the hearsay rule?

3. In defense of Investor's fraudulent inducement claim, Farmer intends to offer Expert as an expert on the subjects of farm appraisals and crop production net cash

flows. Would Expert, if offered at trial, be qualified to testify as an expert concerning these subjects?

4. In Brother Bob's action against Farmer, Brother Bob seeks to admit into evidence Farmer's email to Lawyer that expressed his hope that Expert's valuation would "hold up." May Farmer withhold this email as privileged?

5. Farmer intends to rely on Expert's valuation in defending against Investor's fraudulent inducement claim. On cross-examination of Farmer, may Investor use the email in Question 4 above under the "at issue" exception to attorney-client privilege (putting aside the admissibility of the email, per the previous question)?

6. May Farmer withhold as privileged his email to Lawyer that copied Expert? May he similarly withhold his email to Lawyer that copied his accountant?

7. Assume that Farmer, convinced that Expert withheld vital sales information from him, were to call Expert as a fact witness. Will the rules of evidence allow Farmer to attempt to impeach Expert?

8. During her cross-examination of Farmer, Investor would like to introduce into evidence the email from Expert to Farmer concerning the softening of the corn and soybean markets. Will Farmer be successful in arguing that the email should be excluded as inadmissible hearsay?

QUESTION 7

Music Star is a popular console video game franchise that is a modernized analog of karaoke. Instead of singing, the player must virtually perform along with rock songs using special controllers modeled after a guitar, bass, or drum kit, by following along with "notes" that scroll along the game screen in time with the music. Music Star is produced by Acoustix Industries ("Acoustix"), which is a corporation organized under the laws of, and which has its principal place of business in, Delaware.

Acoustix's strategy is to contract with a celebrity musician to be the "face" of each version of the game. In each case, the celebrity's likeness appears in the game and on the game box. Rather than numbering each successive version of the game, or designating it by the year in which it is released, each version of the game is named for the celebrity musician with which it is associated, for instance, "Music Star: Angus Old Edition" or "Music Star: Ashby Lee Edition."

For its 2009 edition of the game, Acoustix approached Gaius Brand ("Brand") to be the celebrity endorser. Brand was selected because of his immense popularity; he had been one of the top selling artists for the past several years, including having 2008's best selling album.

On January 1, 2009, Brand and Acoustix executed a contract for Brand to be the celebrity endorser of Music Star (the "Contract"). The Contract obligated Brand to have his likeness used for the game and related promotional materials. In exchange, Brand was paid $1,000,000.

Brand is an outspoken critic of what he perceives as the prevalence of violence in our society and refuses to endorse any product that promotes violence. Accordingly, Brand was unwilling to agree to the Contract with Acoustix unless it contained a clause promising that none of the tracks used in "Music Star: Gaius Brand Edition" would promote violence. Acoustix agreed, and such a clause was included in the Contract the parties signed.

On January 15, 2009, Acoustix's President sent a letter to Brand enclosing a copy of the list of tracks to be included in Music Star: Gaius Brand Edition and the lyrics of each track. The letter asked Brand to review the tracks list and lyrics and instructed him to contact Acoustix on or before January 27, 2009 if he had any objection to any of the songs. The letter continued:

> Please be advised that the game will be final on February 27, 2009. Our distributor will immediately thereafter begin making copies of the game so that it can be boxed and shipped to stores in order for it to be on shelves in time for its scheduled release on April 14, 2009.

Brand read the letter quickly as he was preparing to leave for a national tour that week. He did not respond to it.

On February 1, 2009, Acoustix began a promotional blitz for Music Star: Gaius Brand Edition, advertising it in advance of its release.

On April 1, 2009, while on a tour stop in Milwaukee, Brand was questioned by an entertainment reporter who had played an advance copy of the game. The reporter told Brand, correctly, that some of the tracks included on the game contained violent lyrics, the most serious example of which was the song "Johnny." The lyrics of that song describe, literally, a boy named Johnny biting and punching classmates and teachers. Metaphorically, the lyrics tell the story of a boy shooting himself at school. The reporter asked Brand to comment upon the possible tension between Brand's stance against endorsing products that promote violence and the inclusion of "Johnny" and similar songs on Music Star: Gaius Brand Edition. Brand refused to comment.

You represent Brand. On April 2, 2009, he asked you to initiate a legal proceeding against Acoustix. You drafted a complaint containing a count for breach of the clause of the Contract promising that none of the tracks in "Music Star: Gaius Brand Edition" would promote violence, and praying for the following relief: (i) preliminary and permanent injunctive relief enjoining Acoustix from selling "Music Star: Gaius Brand Edition"; and (ii) damages. You filed the complaint, which was verified by Brand, in the Delaware Court of Chancery and served it upon Acoustix.

1. After you served the Complaint on Acoustix, you filed a motion for a preliminary injunction. Discuss the following:

> **(a) what are the elements you would need to establish in order to win Brand's motion for a preliminary injunction, and what facts would you argue support those elements; and**
>
> **(b) what would Acoustix argue in opposition to the motion, and what affirmative defense(s) would you expect Acoustix to raise? What are the elements of, and what facts you would expect Acoustix to argue to support, the affirmative defense(s) it raises?**

2. After you served the complaint on Acoustix, Acoustix moved to dismiss the prayer for damages, arguing that the Court lacks subject matter jurisdiction to grant that relief. What would Brand argue in response to that motion?

* * *

Frank owned a large tract of land in Dover, Delaware that he wanted to subdivide and develop into a residential neighborhood. Needing capital for that endeavor, Frank approached his friend Jordan for a loan. Frank and Jordan executed a loan agreement that required Jordan to loan Frank $1,000,000 for ten years, and, in exchange, required Frank to repay the loan at "<u>8%</u>" annual interest and transfer to Jordan two particular lots from Frank's tract of land once the land was subdivided. Upon execution of the agreement, Jordan caused $1,000,000 to be wired to Frank's bank account.

After the land was subdivided, land values in Frank's development rose rapidly. Frank wrote Jordan a letter explaining that, because of the rise in the value of the lots he had promised her, he no longer felt it would be a fair deal for him to give Jordan the lots. Enclosed with letter was a check made out to Jordan in the amount of the appraised value of the lots on the day Frank and Jordan signed the loan agreement. Jordan did not cash the check, and came to you for legal advice.

3. Jordan says that she would like to obtain specific performance of the provisions of the loan agreement requiring Frank to transfer two lots to Jordan. What are the elements that Jordan must establish to succeed on such a claim? What facts should Jordan rely on to establish these elements? (In your response, you should disregard the issue of the applicable burden of proof.)

4. Assume for this question only that Jordan showed you several e-mails that she exchanged with Frank while negotiating the loan agreement. The e-mails demonstrate that early drafts of the loan agreement provided for an interest rate of 8%, but the parties subsequently agreed upon an interest rate of 9%, and subsequent drafts reflected that agreement. However, the final version of the loan agreement that was executed, next to the words interest rate, "<u>8%</u>" is typed in the blank. What relief would you seek on Jordan's behalf to assert a claim for 9% interest, and what elements must be established to obtain that relief?

QUESTION 8

On New Year's Eve, Jack went to Nick's Neighborhood Bar and Grill in Wilmington, DE to meet his good friend Jill. Jack and Jill both arrived at Nick's around 7:00 to begin celebrating. As soon as they arrived, they ordered drinks, and Nick, the owner and bartender, happily filled their order. Both Jack and Jill continued to drink without a break until midnight. By this time of night, both Jack and Jill were slurring their words, were having trouble standing up straight, and were extremely loud. When both Jack and Jill ordered one more drink before they left, Nick hesitated before serving them because he realized they were intoxicated. However, because he was very busy, he decided it would just be easier to serve them rather than trying to talk them out of drinking anymore.

After finishing off his last drink, Jack was ready to call it a night and he asked if Jill would like to come over to his place. However, Jill had been flirting all night with Mark, who was at the bar with his friend Steve. When Mark heard Jack suggest that Jill come back to his place, Mark began yelling at Jack and told Jack that it was time for him to leave. When Jack failed to comply, Mark began lunging at Jack as if he were going to hit him, though he never made contact. Jack was visibly startled by this. Mark's friend Steve, being more aggressive than Mark and tired of the lengthy exchange without any action, finally took a swing at Jack. The punch broke Jack's nose.

Jill, in tears over what had just happened to Jack, grabbed what she thought to be her keys and ran to the parking lot. She realized that she had grabbed Jack's keys instead. Not wanting to go back in where the fight might be continuing, she took Jack's car and headed for her house. Jill was driving erratically, and when she approached the intersection of Market and High St. in Wilmington, Jill accidently crossed into the lane for oncoming traffic. At that same moment, Tom, a 17 year old who had been at an alcohol-free New Year's Eve party, ran the stop sign at Market and High without slowing down while changing CDs in his CD player. Tom and Jill were in a head on collision. Both Jill and Tom were seriously injured.

Tom's brother, Fred, was sitting in the passenger seat of Tom's car. The seatbelt, designed and manufactured by Always Reliable Seatbelts, malfunctioned during the accident because of a design defect, which caused Fred to fly through the windshield. He was seriously injured.

For each of the following questions, apply Delaware law.

1. Could Tom successfully sue Nick's Neighborhood Bar and Grill under the theory that its service of alcohol to Jill, when she was visibly intoxicated, caused the accident? Explain your answer.

2. What intentional tort claims, if any, could Jack assert against Mark? Explain your answer.

3. What intentional tort claims, if any, could Jack assert against Steve? Explain your answer.

4. What intentional tort claims, if any, could Jack assert against Jill? Explain your answer.

5. What tort claims, if any, should Tom bring against Jill? What are the elements of this claim or claims? Explain your answer.

6. Assume for purposes of this question only that Jill was ticketed for driving 25 miles over the speed limit when she collided with Tom. What additional theory of civil liability might Tom bring against Jill? Explain your answer.

7. (a) Could Jill use Tom's negligence as a defense in an action by Tom alleging Jill was negligent? Will the applicable doctrine act as a complete defense to negligence? Explain your answers.

(b) Assuming Jill may use Tom's negligence as a defense, what standard of care governs Tom's conduct? Explain your answer.

8. Could Fred successfully sue Always Reliable Seatbelts alleging strict tort liability? Explain your answer.