

## QUESTION 1

Contemporary Chip, Inc. (“Chip”) is a Delaware corporation that develops and manufactures processors that are used in laptop computers. Chip’s board of directors (the “Board”) is comprised of five members, each of whom stands for election annually. All five members of the Board are outside directors.

Chip has two outstanding classes of stock, common stock (“Common Stock”) and Series A Preferred Stock (“Series A”). Under Chip’s Certificate of Incorporation (the “Certificate”), the holders of Common Stock have all of the rights and privileges typically afforded holders of common stock of a Delaware corporation. The Certificate provides that the holders of Series A have no voting rights, but do have certain special economic rights. Among those rights is a senior dividend preference, which provides that Chip cannot pay any dividends to other stockholders in any fiscal year unless each share of Series A has been paid a dividend of at least 10 cents per share in that year.

Seeking additional capital to finance its ongoing research and development operations, Chip enters into negotiations with Better Laptops Limited, Inc. (“Laptops”). Those discussions eventually culminate in an agreement between Chip and Laptops whereby Chip will create and issue to Laptops a new series of preferred stock, Series B Preferred Stock (“Series B”), in exchange for a substantial capital investment by Laptops. Under the proposed amendment to the Certificate to carry out that agreement and create Series B, Series B would have special economic preferences. Among other things, Series B would be entitled to a senior dividend preference, such that in the event the Board determines to pay a dividend, the holders of Series B shares would be entitled to be paid a dividend before the holders of Series A or Common Stock.

The Board passes a resolution approving the amendment to the Certificate described above to effectuate the creation of Series B, and further resolving to recommend that the stockholders approve the amendment.

**1. Must the approval of Series A, voting as a separate class, be obtained to effect the proposed amendment to the Certificate? Why or why not?**

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Chip's most recent product, the X300 chip, was released approximately three years ago. It immediately drew accolades for its cost, stability and performance. Chip does not, however, build or sell computers. Rather, it sells the chips that it produces to laptop manufacturers such as Sony, Dell and Laptops, which in turn install them in laptops.

Laptops identifies Chip as an attractive acquisition target and sends a confidential written merger proposal to the Board. The proposal explains that, in Laptops' opinion, a merger would create synergies by combining the supply (processors) and the demand (laptop manufacturing) in one company. The combined company would have an advantage over its competitors because it would be the exclusive source for laptops containing the X300 chip. Laptops offers to acquire all of the shares of Chip's outstanding stock for \$10 per share.

After receiving Laptops' merger offer, the Board convenes a special meeting to consider it. At that meeting, the Board receives presentations from Chip's chief technology officer (the "CTO") and chief financial officer (the "CFO"). The CTO is a Ph.D, has been with Chip since its inception in 2006, and has been responsible for overseeing all of its research and development

efforts. The CFO has over 20 years of corporate finance experience and has been with the company for five years.

The CTO reports that Chip's most recent project, the X900 chip, is nearing the end of the second of three stages of experimental testing. The early tests all showed promising results, and it is, the CTO reports, 75% likely that the chip will pass the third stage of testing as well, which would open the door for the X900 chip to be used commercially in laptops. She further reports that the X900 chip would, if ultimately successful in its trials and brought to market, represent a dramatic improvement over the current X300 technology such that it would be the new industry standard for laptop processors. It would, however, take over one year to complete the testing and development of the X900.

The CFO reports that Chip's financial prospects are strong and that it has been consistently exceeding expectations for the preceding year. She further reports that the progress of research and development of the X900 chip remains a confidential trade secret and therefore has not been shared with the public. The CFO states that she, in consultation with Chip's outside financial advisors, believes that Chip's net profits would likely double overnight if the X900 chip makes it to market.

After receiving the CTO's and the CFO's reports, the Board considers the merger offer from Laptops. At the close of its discussions, the Board concludes unanimously that: (i) the time is not right to pursue a merger, and instead Chip's stockholders would be better served if Chip remained an independent business given the probability of successfully marketing the X900 chip; and (ii) Laptops' offer grossly undervalues Chip. The Board states its conclusions in a letter to Laptops rejecting its merger offer and declining to enter into merger negotiations.

**2. What standard of review would the Delaware Court of Chancery apply if a Chip stockholder challenged the Board’s decision to reject Laptops’ merger offer and decline merger discussions, and what are its elements? What arguments should the Board make that its decision to reject Laptops’ merger offer and decline to enter into merger negotiations satisfied the applicable standard?**

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Disappointed over the rejection of its merger offer, Laptops commences a hostile tender offer to acquire all shares of Chip stock that it does not own for \$10 per share. The Board responds by adopting a stockholders’ rights plan (the “Rights Plan”) for the purpose of preventing Laptops from acquiring Chip at an inadequate price. Under the Rights Plan, if any person or entity acquires more than 15% of the Common Stock, all of the other Chip common stockholders would have the immediate option to purchase at a discounted price one additional share for each Chip common share they currently own (thereby doubling their shareholdings and diluting that of the acquirer), unless the Board revokes the Rights Plan.

**3. As a prerequisite to invoking the business judgment standard of review, what standard of review would the Board first have to satisfy if a stockholder challenged the Board’s decision to adopt the Rights Plan in the Delaware Court of Chancery, and what are its elements?**

**4. What arguments should the Board make that its decision to adopt the Rights Plan satisfies that standard of review?**

\* \* \* \* \*

Chip owns 91% of the common stock of a subsidiary known as Direct Computing, Inc. (“Direct”). Direct has no outstanding stock other than its common stock. Direct has no subsidiaries. Chip decides to merge Direct with and into Chip by way of a “short form” merger under 8 *Del. C.* § 253 for \$4 per share (the “Direct Merger”). Chip concludes that merging Direct with and into Chip would save both corporations considerable amounts of money on overhead.

Chip retains InvestCo Investment Bank (“InvestCo”) to provide a fairness opinion regarding the purchase price for the minority shares of Direct. InvestCo has been Chip’s regular investment banker since Chip’s founding in 2006. Approximately 15% of InvestCo’s revenue during that period has been attributable to engagements by Chip. After a thorough analysis, InvestCo concludes that the price Chip offered in the Direct Merger is fair to Direct’s minority stockholders.

The Direct Merger is approved by the Chip Board, and the Direct Merger closes in accordance with 8 *Del. C.* § 253. Chip is in the process of preparing a disclosure statement to disseminate to the former stockholders of Direct to announce the merger and its effective date (the “Merger Disclosure”).

**5. What legal standard would the Delaware Court of Chancery apply to determine whether InvestCo’s prior relationship with Chip must be disclosed in the Merger Disclosure? What arguments should be made that the facts regarding InvestCo must be disclosed?**

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The Merger Disclosure is sent to all of Direct’s former stockholders seven days after the effective date of the Direct Merger. Floyd, who was a record stockholder of Direct continuously from its founding until the Direct Merger, receives the Merger Disclosure and concludes that the price paid by Chip for the minority Direct shares is too low. The following day, Floyd sends a letter to Chip stating: (i) his name and address; (ii) that he was a record holder of Direct common stock at the time of the Direct Merger; and (iii) that he “demands appraisal of all of his Direct shares pursuant to 8 *Del. C.* § 262.”

**6. What are the requirements for a former Direct stockholder to perfect his appraisal rights in connection with the Direct Merger? Has Floyd perfected his appraisal rights? Why or why not?**

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Several former Direct stockholders perfect their appraisal rights and file a timely petition in the Delaware Court of Chancery for appraisal of their shares (the “Appraisal Action”).

**7. Will the Delaware Court of Chancery consider the savings Chip will realize after the Direct Merger due to reduced overhead in determining the fair value of the shares in the Appraisal Action? Why or why not?**

**8. May the Delaware Court of Chancery award to the stockholders an amount lower than the price that Chip paid in the merger?**

**\* \* \* \* \***

## QUESTION 2

Arthur and Zack spend many nights together at the Wilmington Pub. While they generally get along, Arthur resents Zack's financial success and feels that Zack looks down on him. One day, after consuming several pitchers of beer, Arthur complains to Zack about his job. Zack says to Arthur, "You are a worthless drunk; it is a wonder you have a job." Zack then walks outside to get some fresh air.

Arthur is enraged. He sees that Zack has left his car keys on the bar, so he takes them and storms out the door. As he leaves, he tells Mickey, the bartender, "Tell Zack I said thanks for the wheels; he's got enough dough, he can get another car." Arthur gets in Zack's car, starts the engine and pulls out of the parking space and into the parking lot. He sees Zack standing about 100 yards away and accelerates toward him screaming, "Zack, you will never put me down again!" Arthur strikes Zack with the car. As a result of the impact, Zack is paralyzed from his waist down and will be confined to a wheelchair for the remainder of his life.

After striking Zack and damaging Zack's car, Arthur flees. He decides that the best place to hide out for the night is at his cousin Beverly's house. Beverly has been watching the late news before Arthur arrives and has seen the story covering what happened at the Wilmington Pub. Beverly sees the damage to the vehicle and asks Arthur what happened; Arthur simply responds, "I lost my temper and ran into Zack – he had it coming, though." Arthur tells her that he knows the police are looking for him and that he needs a place to "lay low" until things cool down. Beverly tells Arthur to pull the car into her garage and to go inside and get some sleep. She then returns to the garage and scrubs the car inside and out.

When he wakes the following morning, Arthur sees that Beverly has cleaned up the car but decides that it is not enough. He says to Clyde, Beverly's husband, "Help me burn Zack's car." Clyde is unaware of the events at the Wilmington Pub, but he figures he has nothing else to



do, so he agrees to help Arthur. Clyde, a convicted felon, does not ask any questions about the car; he feels the less he knows, the better. They fill several large canisters with gasoline and drive to the Christina marshlands in northern Delaware. Clyde follows Arthur in his car so they have a way to get home after setting fire to the car. They arrive at the planned location, douse the car with gasoline, set it on fire, and then quickly flee the scene together in Clyde's car. Zack's car is heavily damaged in the fire.

As they drive away from the scene, Clyde passes Officer Miller, who is stopped in his police car at the end of the access road to the Christina marshlands. Officer Miller looks up in time to see the driver of the vehicle and the vehicle registration tag; he enters the number into his laptop computer. He learns that the license of the registered owner, Clyde, is suspended and that there is an active warrant for him for failing to pay traffic fines. The computer also displays a digital image of Clyde. The photograph matches the person Officer Miller observed driving the vehicle, so he stops the car.

Officer Miller approaches the driver's side of Clyde's vehicle and asks both Clyde and Arthur to provide their names. Clyde answers honestly. Arthur, knowing he is wanted, gives the name of his brother, Richard. Officer Miller checks both names and learns that Arthur has given him a false name. He orders both occupants out of the vehicle and places them in custody in the back of his police car. He then searches Clyde's car. He finds a loaded revolver under the driver's seat and 100 rounds of ammunition in the center console. Officer Miller seizes this evidence and allows Clyde to call Beverly to arrange to have Beverly pick up the car. Beverly agrees to pick up the car. Officer Miller takes Clyde and Arthur to the police station and leaves Clyde's car on the roadside for Beverly to pick up.

During the ride to the police station, Officer Miller detects an odor and states aloud to no one in particular, "I smell gasoline." Clyde then says, "It is probably me; Arthur spilled half a

can on me when we were taking care of that car.” Officer Miller then hears a police radio broadcast advising that the car involved in the Wilmington Pub rundown was found burned in the Christina marshes.

When they arrive at the station, Officer Miller places Arthur and Clyde in separate holding rooms. He first speaks with Arthur, who tells him that he will not answer any questions without his lawyer. Officer Miller then speaks with Clyde. He properly reads Clyde his *Miranda* warnings and Clyde agrees to waive his *Miranda* rights. Officer Miller asks Clyde about burning the car. Although he is an adult, Clyde repeatedly states that he wants to speak to his mother before he answers any more questions. Officer Miller responds, “I understand, but I want to talk to you about the fire.” Clyde then provides a very detailed confession.

**1. For each criminal act, identify and discuss the charges the prosecutor can bring against Arthur, Beverly and Clyde. Your answer should identify the elements of the charges and the facts that support each charge.**

**2. Identify and discuss the impact of Arthur’s impairment on his *mens rea* for any of the offenses.**

**3. Identify and discuss any issues pertaining to the traffic stop and search of Clyde’s vehicle conducted by Officer Miller and their likely resolution by a court.**

**4. Identify and discuss any issues pertaining to the statements secured from Arthur and Clyde in the police vehicle and at the police station and their likely resolution by a court.**

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### **QUESTION 3**

Susan, a Delaware resident and a stockholder of ABC Corporation, a Delaware corporation (“ABC”), determines that Dan, a Delaware resident and a director of ABC, has been profiting at the expense of ABC. Dan, who owns a business that directly competes with ABC, has misappropriated certain business opportunities for his own business that Susan believes belong to ABC. Dan’s misappropriation of ABC’s business opportunities has cost ABC \$60,000.

Susan decides to file a derivative complaint against Dan on behalf of ABC. She intends to assert two claims against Dan: (1) a claim seeking a declaration that Dan breached his fiduciary duties under Delaware law to ABC and its stockholders, and (2) a claim for damages in the amount of \$60,000 to redress the harm to ABC from Dan’s misappropriation of ABC’s business opportunities.

Susan retains you to represent her in the lawsuit.

**1. In which Delaware state or federal court(s) may Susan properly file her complaint? Explain your answer.**

\* \* \* \* \*

For purposes of the remaining questions, assume that you file Susan’s complaint, asserting the two claims set forth above, in the Court of Chancery of the State of Delaware.

**2. In addition to the complaint, what documents, if any, must you file with the Register in Chancery to commence Susan’s lawsuit?**

**3. Is Susan entitled to a jury trial as a matter of right? Explain your answer.**

\* \* \* \* \*

Fifteen days after Dan is served with the complaint, but before he has filed an answer or otherwise responded to the complaint, Susan learns of new allegations against Dan and wants to amend her original complaint.

**4. Do you need Court approval or Dan's consent to file an amended complaint? Explain your answer.**

\* \* \* \* \*

Dan responds to the amended complaint by filing an answer. The parties then engage in discovery. During discovery, Dan serves Susan with a request for production of fifty (50) categories of documents, fifty (50) interrogatory requests, and fifty (50) requests for admission. Susan believes that Dan's discovery requests are improper and irrelevant to the lawsuit. You therefore file a motion for a protective order under Court of Chancery Rule 26(c).

**5. What is the standard for the scope of permissible discovery under Court of Chancery Rule 26?**

**6. What is the standard applicable to a motion for protective order under Court of Chancery Rule 26(c)?**

**7. Is there a limit to the number of interrogatories, including all discrete subparts, that Dan is permitted to serve under the Court of Chancery Rules? Explain your answer.**

\* \* \* \* \*

Assume that the Court of Chancery denies Susan's motion for a protective order and orders Susan to respond to all of Dan's discovery requests within thirty (30) days. Susan wants to appeal the Court's ruling immediately to the Delaware Supreme Court. Two days after the ruling, you file an application with the Court of Chancery for certification of an interlocutory appeal. The Court of Chancery enters an order refusing to certify the interlocutory appeal. You then file a timely notice of appeal with the Delaware Supreme Court.

**8. What criteria will the Delaware Supreme Court apply to determine whether to accept Susan's interlocutory appeal?**

**9. Is the Delaware Supreme Court likely or unlikely to accept Susan's interlocutory appeal? Explain your answer.**

\* \* \* \* \*

After the close of discovery, you determine that adequate grounds exist for Susan to move for summary judgment on both claims. You therefore file a motion for summary judgment.

**10. What is the standard applicable to a summary judgment motion?**

\* \* \* \* \*

The Court of Chancery enters an order granting summary judgment in Susan's favor on her first claim (declaratory judgment), but defers ruling on her second claim (damages).

**11. Is the Court of Chancery's order with respect to Susan's first claim (declaratory judgment) a final judgment? Why or why not?**

**12. If Dan wants to pursue a final appeal (not an interlocutory appeal) of the Court of Chancery's order with respect to Susan's first claim (declaratory judgment) prior to resolution of Susan's second claim (damages), how would he do so under the Court of Chancery Rules? Explain your answer, including the applicable standard.**

\* \* \* \* \*

Now assume that the Court of Chancery enters an order granting summary judgment in Susan's favor on both claims, under which Dan must pay damages to ABC in the amount of \$60,000, plus interest. Twenty-one (21) days after the Court of Chancery's order is entered on the docket, Dan files a notice of appeal with the Delaware Supreme Court.

**13. Is Dan's notice of appeal timely filed? Explain your answer.**

**14. If Dan moves for a stay of the Court of Chancery's order pending appeal, in which court must his motion be filed and what is the applicable standard?**

\* \* \* \* \*

After you receive Dan's opening brief in support of his appeal, Susan raises the possibility of filing a motion to affirm the Court of Chancery's order.

**15. What is the standard applicable to a motion to affirm?**

\* \* \* \* \*

Susan's motion to affirm is denied. After full briefing and oral argument, the Supreme Court issues an order denying Dan's appeal and affirming the Court of Chancery's summary judgment ruling. Dan seeks reargument.

**16. In addition to the motion, what document must Dan file with the Supreme Court Clerk to properly seek reargument under Supreme Court Rule 18?**

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#### **QUESTION 4**

Gail Grantor is the wife of Bill Grantor, the founder of Billco, a highly successful and valuable company. Gail and Bill have three children together, Richard, Sally and Tammy. Bill retired from Billco, but retained 100,000 shares of Billco stock ("Billco Stock") worth millions of dollars. The Billco Stock is held in a brokerage account, which also holds \$1,000,000 in cash ("Account"). Despite their wealth, Bill and Gail live a very modest lifestyle. Bill handles all of their finances, and Gail devotes much of her time to her church ("Church").

Shortly after his retirement, Bill dies, leaving his entire estate to his elderly widow, Gail. After Bill's death, Gail becomes more friendly with her neighbor, Nick. Nick is in his early 20's and spends a significant amount of time helping Gail with her daily needs such as transportation, house repairs, etc. Nick also helps Gail with her finances. In doing so, Nick learns about the Account and the Billco Stock, and that Gail has no will. Nick suggests to Gail that she hire his friend, Alan Attorney, to assist with her estate planning. Nick also mentions to Gail that he has always hoped to own Billco Stock.

Gail takes Nick's advice and hires Alan. Alan first meets with Gail at her home. Gail appears to Alan to be lucid, and she properly introduces him to Richard and Tammy, both of whom are present, along with Nick. Alan suggests to Gail that she set up a trust ("Trust") to hold and ultimately distribute the assets in the Account.

In accordance with Gail's instructions at the meeting, Alan drafts the Trust, which includes the following provisions:

1. Nick will be the Trustee;
2. The entire Account will be held and managed by the Trust;
3. Upon Gail's death, 20,000 shares of Billco Stock will be transferred to Nick; and
4. Upon Gail's death, the remainder of the Account, including all cash and the remaining Billco Stock, will be transferred to Gail's children, in equal shares.



After the Trust document is prepared, Gail meets with Alan at his office. Alan's associate and Nick are also present. Gail is appropriately dressed for the meeting and appears to both Alan and his associate to be alert, competent and lucid during the entire meeting. As Alan organizes the documents for execution, Gail asks Alan relevant questions about possible adverse tax consequences that could result from the Trust. Gail executes the Trust document, which Nick and Alan's associate sign as witnesses. Gail also executes the documents necessary to transfer the Account into the Trust.

Ten months after the Trust is executed, Nick tells Gail that he wants to quit his job and travel. Although the Trust does not expressly permit the Trustee to make loans, Gail tells Nick that he can make loans from the Trust if he believes it is the right thing to do. Thereafter, Nick lends himself \$1,000,000 from the Trust ("Loan") at 2% interest on an unsecured basis. Several banks had previously refused to issue Nick an unsecured loan in that amount, and none would lend Nick money at less than 5% interest. However, Nick reasons that the 2% interest rate is fixed and the Account's variable money market rate could potentially decrease to below 2%. Nick also begins to pay himself a monthly "Trustee Fee" from the Trust, even though the Trust is silent as to Trustee compensation.

A year after executing the Trust, Gail is hospitalized with advanced dementia. At that time, she is 90 years old and completely unable to communicate. Following Gail's hospitalization, Sally finds a copy of the Trust and begins to investigate. Sally discovers that, both shortly before and after executing the Trust, Gail told others that she was going to marry the much younger Nick, although there was no factual basis for Gail's belief. Sally also hires a physician who, after visiting the incoherent Gail in the hospital, opines that Gail could not have been competent at the time the Trust was executed. This is contrary to the opinion of Gail's

personal physician, who actually met with Gail the morning that she executed the Trust document and advised Alan at the time that Gail seemed “perfectly normal.”

On January 31, 2012, her 91<sup>st</sup> birthday, Gail dies without a will. Richard, Sally and Tammy all survive Gail, and Sally thereafter timely initiates an action in the Delaware Court of Chancery (“Chancery Court Case”).

**1. Identify and discuss the legal theories Sally should assert to prevent the distribution of any Billco Stock to Nick pursuant to the terms of the Trust.**

**2. In the Chancery Court Case, Sally also asserts claims against Nick. Identify and discuss the arguments Sally may assert to recover damages to the Trust resulting from the Loan, to have all compensation paid by the Trust to Nick returned to the Trust, and to recover her attorneys’ fees. Also, identify and discuss the arguments that Nick may assert in response.**

**3. For purposes of this question only, assume that the Church is the only charity to which Gail gave donations in her lifetime. Also assume that the Trust includes a provision directing that, upon Gail’s death, 10,000 shares of Billco Stock will be transferred to Gail’s “favorite charities.” Sally seeks to prevent any distribution under this provision of the Trust. The Church properly intervenes in the Chancery Court Case to compel the transfer of 10,000 shares of Billco Stock to the Church. Identify and discuss the arguments that Sally and the Church should raise in support of their respective positions. What, if any, remedies can the Court provide?**

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## QUESTION 5

Founder, a Delaware resident, develops an idea for a product he calls the “FingerPad.” The product is similar to a tablet computer, but has a small chip that can be strapped to the user’s finger allowing the user to control the computer by movements of his or her finger in the air. However, Founder needs assistance resolving a technical issue with the FingerPad and asks his brother, a computer programmer who lives in New Jersey, for help.

On January 2, 2010, Founder and Brother orally agree that they will be 50-50 partners in developing the FingerPad and their business will be called “FP Enterprises Company” (“Company”). Founder has already invested \$500,000 of his own money in the development of the FingerPad, which they agree will serve as his contribution. Brother does not contribute money, but agrees to provide the relevant research and development. They shake hands, stating, “We are now 50-50 partners in making the FingerPad a reality.” They also agree that Founder will file a statement of partnership existence with the Delaware Secretary of State, although Founder never makes any filing with the state.

Brother and Founder work exclusively out of Brother’s garage in New Jersey on development of the FingerPad. Using Company’s money and equipment, Brother is able to develop a new technology that resolves the technical problem. However, knowing that it will take several years to make FingerPad commercially viable, Brother tells Founder that Brother intends to patent any technology developed in his own name and to license that technology to third parties on a non-exclusive basis. By doing so, Brother hopes to generate income for Company in the period before the FingerPad is ready to sell. With Founder’s permission, Brother files and records patents that identify Brother as the patent owner, using his personal law

firm, IP Consultants LLP, to record the patents. IP Consultants LLP bills Company \$250,000 for its work, which is never paid.

Investor, a wealthy friend of Founder and Brother, agrees to become a partner in Company and invests \$10 million to fund the development of the FingerPad on the condition that he is protected from personal liability. On February 1, 2011, Founder, Brother and Investor execute a written agreement as follows:

#### JOINT VENTURE AGREEMENT

This Agreement is entered into among Founder, Brother and Investor. The parties hereby agree that each is a member in FP Enterprises Company (“Company”). The purpose of the Company is to develop, market and sell the FingerPad.

It is agreed that Founder and Brother each are receiving a 1/3 interest in Company in exchange for money and/or services previously rendered and to be rendered developing the FingerPad and managing Company.

It is further agreed that Investor is receiving a 1/3 interest in Company in exchange solely for a contribution of \$10 million and that Investor shall be a passive Investor with no obligation to participate in the business or management of Company and shall not be individually liable for the debts of Company.

No partner may withdraw from Company without the unanimous consent of all parties to this Agreement.

This Agreement shall be governed by Delaware law.

This constitutes the entire agreement among the parties.

Dated: February 1, 2011

The next day, Founder files a fictitious name filing with the Prothonotary’s office in Delaware.

The finger chip that controls the FingerPad contains a highly toxic and very expensive metal alloy called “tinium.” In June 2011, Brother, with the knowledge of Founder but without

the knowledge of Investor, signs a contract with Supplier that obligates Company to purchase a minimum of \$20 million of tinium over the next 24 months. In September 2011, the government announces sweeping new restrictions on the use of tinium because of its toxic properties. As a result, it becomes impracticable for Company to use tinium in the FingerPad.

On December 1, 2011, Founder, Brother and Investor meet to discuss the future of Company. Brother states that he is withdrawing as a partner so that he can go out and market the technology and related patent rights, which he claims to own, to other parties including competitors of Company. Notwithstanding Brother's statement that he is withdrawing as a partner, Founder and Investor agree to continue the existence of Company.

After the meeting, Company gives notice to Supplier that it will not purchase the remaining amounts of tinium called for under its contract. Supplier immediately sues Company for breach of contract, seeking damages.

**1. Did Founder and Brother validly form a partnership on January 2, 2010? State the arguments both for and against your conclusion.**

**2. Regardless of your answer to Question 1, assuming a valid partnership was formed on January 2, 2010, was it governed by Delaware law? Why or why not?**

**3. Assume that a valid partnership was formed on February 1, 2011. Was the Company (a) a general partnership, (b) a limited partnership, or (c) a limited liability partnership? For each form of entity, explain why or why not.**

**In Answering Questions 4 Through 7, Apply the Law Applicable to General Partnerships.**

**4. Are the technology and patents developed by Brother in 2010 property of Brother or of Company? Explain.**

**5. If Supplier is successful on its breach of contract claim against Company, can Supplier recover on the judgment from Investor? Explain.**

**6. IP Consultants LLP sues Company and its partners for its unpaid fee. If IP Consultants succeeds on its claim, is Investor personally liable for IP Consultants LLP's fee? Explain why or why not.**

**7. Discuss the effect of Brother's statement at the December 1, 2011 meeting that he is withdrawing as a partner on each of the following:**

- (a) Company's status as a partnership.**
- (b) Brother's status as a partner.**
- (c) Brother's obligations and duties under the partnership agreement and applicable law.**
- (d) Brother's partnership interest.**

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## QUESTION 6

Paul's Poultry ("Poultry") is a Delaware chicken farm that raises broiler hens for sale to local poultry processing plants. On April 1, 2011, Poultry contacts Mid-State Manufacturing ("Manufacturing"), a leading manufacturer of poultry supply equipment, to inquire about purchasing a new ventilation system for several of Poultry's hen houses. During the conversation, Poultry tells Manufacturing's agent that Poultry needs a custom ventilation system capable of maintaining the appropriate levels of humidity, ammonia, and carbon dioxide in the hen houses in outdoor temperatures exceeding 90°F. Poultry and Manufacturing thereafter enter into a written agreement pursuant to which Poultry agrees to purchase ventilation systems for four of its hen houses at a price of \$5,000 per system for delivery on or before July 1, 2011. The written agreement signed by both Poultry and Manufacturing includes the following provision in small print on the back of the agreement:

Manufacturing hereby expressly disclaims all warranties, either express or implied, and Manufacturing neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of the item(s) subject to this agreement.

On June 30, 2011, Poultry accepts delivery of the ventilation systems. However, during an early July heat wave, the ventilators malfunction, and 7,500 hens in houses two through four die of carbon monoxide poisoning. In addition, due to the high levels of ammonia caused by the malfunctioning ventilators, the 2,500 hens in house one grow to a weight of less than three (3) pounds, which is well below the five (5) pound commercially accepted weight of an average broiler hen. As a result, Poultry is unable to fill a \$100,000 purchase order from Chuck's Chicken, and is forced to sell the underweight hens to a spent hen facility at a price of \$10,000. Poultry thereafter sends a notice to Manufacturing informing it of the defective ventilators.

On the same day the ventilators are delivered, Poultry sends a purchase order to Frank's Feed ("Feed"), a Delaware corporation, for the purchase of 500 pounds of chicken feed per month for a period of 24 months, to be delivered on or before the 15<sup>th</sup> of each calendar month commencing July 15, 2011, at the rate of \$7.00 per pound of feed. Following receipt of the purchase order, Feed sends Poultry a written acknowledgment accepting the terms contained in the purchase order and containing the following additional terms:

Poultry shall pay interest of 1½% per month on payments made more than ten days after delivery.

This agreement shall be governed and construed in accordance with the laws of the State of Nevada. Poultry and Feed agree that the courts of the State of Nevada shall have sole jurisdiction of any dispute arising under this agreement. Poultry submits to the personal jurisdiction of the courts of Nevada.

No further communications are exchanged between the parties, and on July 15, 2011, Poultry accepts its first delivery of chicken feed. Additional feed deliveries are made and accepted on August 10 and September 13, 2011 although, due to a temporary inventory shortage, on October 15, 2011, Feed delivers just 425 pounds of feed, but promises to deliver the additional 75 pounds of feed within a few days. Dissatisfied with the partial delivery, Poultry rejects it and terminates the contract.

Faced with Poultry's rejection of the October delivery and termination of the contract, Feed enters into an agreement with Wally's Warehouse ("Warehouse") to store the rejected feed lot, for which Feed receives a duly executed warehouse receipt containing the following provisions:

Upon return of this receipt and payment of all charges and liabilities due the undersigned Warehouse as may be accrued at the time of presentation, 425 pounds of chicken feed will be delivered to bearer.



Depositor hereby declares the value of goods to be not in excess of \$1.00 per pound. Claims by depositor must be presented in writing within ten days after delivery of the goods.

Following notice to Poultry, Feed thereafter enters into an agreement with Helen's Hens ("Hens"), pursuant to which Hens agrees to purchase the 425 pounds of feed rejected by Poultry at a price of \$1,700 (\$4.00 per pound). On November 1, 2011, Hens tenders a check drawn on BigBank made payable to Feed for the rejected lot in exchange for the warehouse receipt. Feed's President thereafter proceeds to QuickCash, a local check cashing firm, where he endorses the back of the check and tenders it to QuickCash in exchange for \$1,500 in cash.

Meanwhile, Hens arrives at the Warehouse to pick up the feed for the rejected lot, and learns that it has been destroyed at the Warehouse. Hens immediately notifies Feed of its rejection of the lot and contacts BigBank with instructions to refuse payment on the check. QuickCash thereafter presents the check for payment which BigBank denies based upon Hens' stop payment order.

**1. Identify and discuss any claims that Poultry has against Manufacturing, any defenses available to Manufacturing, and any damages or other remedies potentially available to Poultry.**

**2. Identify and discuss any claims that Feed has against Poultry, any defenses available to Poultry, and any damages or other remedies potentially available to Feed.**

**3. Identify and discuss any claims that QuickCash has against Hens or Feed, any defenses potentially available to Hens or Feed, and any damages or other remedies potentially available to QuickCash.**

**4. Identify and discuss any claims that Feed has against Warehouse, any defenses potentially available to Warehouse, and any damages or other remedies potentially available to Feed.**

**\* \* \* \* \***

## QUESTION 7

SocialPage is the world's most popular online social network. Founded in 2005 by Zoe, then a college student in Delaware, SocialPage has grown to more than one billion users and billions of dollars a year in revenue. Although SocialPage became a publicly-traded company last year, Zoe continues to own a controlling stake in the company, making her the world's youngest billionaire.

In 2011, Carmen, a professional photographer, files a lawsuit in Delaware state court, claiming that she has a contract with Zoe, entered into shortly before SocialPage's founding, that makes her an equal partner with Zoe in SocialPage and thus entitled to half of Zoe's controlling interest or its monetary equivalent. Carmen's complaint contains numerous excerpts of emails she says were exchanged between her and Zoe concerning their agreement.

SocialPage and Zoe admit that Carmen and Zoe entered into a written contract, but say that it was only for work by Zoe building a web site for Carmen's photography business. SocialPage and Zoe deny that Zoe and Carmen ever discussed SocialPage, let alone have a written agreement regarding it. They insist that the document on which Carmen relies is a forgery, that the emails quoted in Carmen's complaint are fabricated, and that this lawsuit is nothing more than an attempt by Carmen to extort money from SocialPage and Zoe.

During discovery, SocialPage and Zoe hire Marley, a private investigator, to search for more information about Carmen. Marley discovers that Carmen has a 2003 felony conviction in Delaware for assaulting a business partner and a 2000 misdemeanor conviction in Delaware for falsifying business records (for which she served no jail time), and was forced to declare bankruptcy in 2011. Marley interviews Carmen's former roommate, Penny. Penny shows Marley her diary, which contains an entry from 2005 mentioning SocialPage and quoting Carmen as saying to Penny, "This contract with Zoe is going to make me rich someday!" Penny is subsequently injured in an accident,

as a result of which she loses her long-term memory and is unable to recall anything about her conversation with Carmen.

Marley also interviews Rocco, a reporter and author of a best-selling book on SocialPage and Zoe, who says that based on his experience extensively interviewing Zoe and reviewing thousands of pages of SocialPage source material, he believes that the emails quoted by Carmen in her complaint are fabricated because “the language in those emails does not read the way that Zoe writes or talks.”

SocialPage also hires Ginger, a forensic analyst, to examine what Carmen claims is the original copy of the alleged contract. Ginger prepares a report in which she concludes that the alleged contract is a forgery because the words referring to SocialPage were written with an ink that was not available until 2008.

In addition, Ginger examines Carmen’s computer and finds among its contents a file called “Zoe Invoice,” which appears to be a scanned copy of an invoice for work performed by Zoe for Carmen in 2005. This document does not make any reference to work on SocialPage or a deal concerning SocialPage. Carmen insists that the “Zoe Invoice” file is a fake, planted on her computer by SocialPage and Zoe during Ginger’s forensic examination.

The case proceeds to trial.

**In answering each of the following questions, apply the Delaware Rules of Evidence. Explain your reasoning. If you believe facts necessary to reach a conclusion to a question are unknown, identify those facts and explain how they would affect your conclusion.**

**1. During cross-examination of Carmen, Zoe’s attorney seeks to introduce into evidence a copy of the “Zoe Invoice” file found during Ginger’s forensic examination of Carmen’s computer as evidence to corroborate what Zoe says are the actual terms of her**

agreement with Carmen. Carmen's attorney objects that Zoe has not laid a proper foundation for the document's admissibility. Explain whether the proffered document complies with the "best evidence rule," describe the ways in which the document can be authenticated, and evaluate whether (and how) Zoe can establish the document's authenticity.

2. During cross-examination of Carmen, Zoe's attorney for the first time seeks to question Carmen about her 2000 and 2003 convictions. Explain whether this line of questioning is permissible. If Carmen denies the existence of these convictions, are certified records of those convictions admissible for use during the cross-examination? Explain your answer.

3. Zoe's attorney then seeks to question Carmen about her 2011 bankruptcy. Carmen's attorney objects. Is testimony on the topic admissible? Explain.

4. Zoe's attorney seeks to introduce into evidence Penny's diary entry concerning SocialPage and Carmen's statement, in lieu of calling Penny as a live witness. Carmen's attorney objects that the proffered evidence is inadmissible hearsay. Is Carmen's attorney correct? Explain.

5. Zoe's attorney calls Rocco as a witness to testify about his conclusions concerning the alleged emails between Carmen and Zoe. Carmen's attorney objects to his testimony. Is Rocco's opinion admissible? Explain your answer.

6. Zoe's attorney calls Ginger as a witness to testify about the results of her forensic analysis of Carmen's copy of the contract, including her opinion that the contract is a forgery. Carmen's attorney objects. Discuss whether Ginger's opinion is or is not admissible into evidence, including what factors the court will consider in evaluating the admissibility of her opinion.

7. During cross-examination of Zoe at trial, Carmen's attorney asks Zoe if she reviewed any documents in preparation for her testimony. Zoe says that her attorney showed her documents while preparing her to testify. Carmen's attorney asks her if any of those documents refreshed her memory for the purpose of testifying. Zoe answers yes. Carmen's attorney then asks Zoe to identify all of the documents that her attorney showed to her. Zoe's attorney objects that disclosure of that information is protected from disclosure pursuant to attorney-client privilege and work product immunity. Is Zoe's attorney correct? Explain your answer.

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## QUESTION 8

Dan, the son of a successful farmer, and his two sisters are devised a large tract of land (“Farm”) with a dwelling, barn, and other improvements near Farmington, Delaware, in their Father’s will. The will states: “I give, devise and bequeath Farm equally to my children.” Dan is estranged from his sisters. Of the three siblings, only Dan lives in Delaware, and the sisters have never shown an interest in Farm. The executor gives Dan and his sisters a deed confirming the devise. The will and the deed are both silent as to the form of tenancy Dan and his sisters have received.

Dan later begins to date and subsequently marries Mary. Dan and Mary reside on Farm and cultivate agricultural products for sale. Mary has little or no contact with the sisters and fears that if anything happens to Dan, she will be denied an interest in the land if Dan does not “put her name on the deed” to Farm. Dan is easily persuaded by Mary, and a deed is prepared and recorded so that Mary will succeed to his interest in Farm if she survives him.

Unfortunately, with the economy turning downward and farming becoming less profitable, discord begins to develop between Dan and Mary after nine years of marriage and two small children. In what becomes the worst year of Dan’s life, Mary divorces Dan. Mary and the children move into a house near Rehoboth Beach where she can look for work in retail sales at the one of the nearby outlet stores. Although there has been no settlement of their marital property issues or an award by the Family Court, Dan offers Mary a cash advance on the distribution of marital assets. With that money, a loan from a bank (“Bank”), and another loan from the seller (“Seller”), Mary buys a house. Both Seller and Bank secure their loans with mortgages. Bank’s mortgage is recorded the day of closing, but due to a mistake in the lawyer’s

office, Seller's is not recorded until the next day. Mary is unable to find a job and falls behind on her two mortgage payments, and the Bank forecloses on the house.

Dan decides to give up farming altogether. He leases Farm to Jerry, but only after Jerry demands and receives upgrades to the barn for a proposed dairy operation.

Dan takes the income from Farm and buys a home in Dewey Beach. Dan decides to rent his house in Dewey Beach to Susie and Tom, a young professional couple. The couple signs a one year lease for \$1,500.00 per month. Susie is employed by the State, and Tom is a restaurant owner. Six months after moving into the residence, Susie receives a promotion at work and is assigned to the Wilmington office of her employer, which is over 90 miles from Dewey Beach. Tom's restaurant begins to fail, and the two of them are unable to continue paying their monthly rental payments on time. They attempt to renegotiate their rent, but Dan is unwilling to agree to a lesser rent. Meanwhile, the hot water heater in the house fails. Susie and Tom promptly advise Dan, who has it fixed in three days. Susie and Tom send Dan a certified letter indicating that since he failed to provide them with hot water for three days, they are terminating their lease.

After learning about Dan's farming operations and about Farm's being leased, Dan's sisters decide to claim an interest in the income and profits of Farm.

**When responding to each of these questions, explain your answers.**

**1. What tenancy is created when Dan and his sisters inherit the Farm?**

**Are there rights of survivorship created?**

**2. Does Dan owe his sisters rent for his occupancy and use of Farm?**

**3. Do the sisters have a claim to a portion or all of the rent paid to Dan by Jerry? Do the sisters have a duty to pay for the barn upgrades?**



**4. What does Dan have to do to ‘put Mary’s name on the deed’ to Farm?**

**May Dan convey a survivorship interest in Farm to Mary?**

**5. Assume for purposes of this question only that Dan dies after the divorce but before the property division case is concluded. What is Mary’s title interest in Farm? Does Mary succeed to Dan’s interest? Can Dan devise his interest in Farm to someone other than Mary?**

**6. In the foreclosure action, which of Bank or Seller has the priority interest in Mary’s house?**

**7. What recourse, if any, does Dan have against Susie and Tom?**

**8. What recourse, if any, do Susie and Tom have against Dan?**

**\* \* \* \* \***