

Applicant Number

**BOARD OF BAR EXAMINERS**  
**OF THE DELAWARE SUPREME COURT**

**2017 BAR EXAMINATION**

**Monday, July 24, 2017**

**9:30 a.m. – 12:30 p.m.**

**Questions 1-4**

## QUESTION #1

Avery resides in New Castle County, Delaware. She invented a popular high-tech device and, with the assistance of a lawyer, properly formed CalCorp to manufacture the device. CalCorp is a corporation organized under California law that does business only in California.

In 2017, CalCorp enters into an enforceable contract (the “Agreement”) with Plaintiff, a Delaware corporation, to deliver the devices to Plaintiff’s warehouse in California, in exchange for a payment of \$100,000.

After signing the Agreement, but before any deliveries are made, CalCorp informs Plaintiff that CalCorp is terminating the Agreement. Before any applicable statutes of limitations run, Plaintiff files a complaint (the “Complaint”) against CalCorp and Avery (together, “Defendants”) in the Delaware Superior Court (the “Court”), alleging three counts:

- (1) Damages of \$100,000 for breach of the Agreement, asserted against CalCorp;
- (2) Specific performance of the Agreement, asserted against CalCorp; and
- (3) Fraud, asserted against Avery.

Count 3 of the Complaint states, in its entirety:

The elements of fraud are: “(1) a false representation of material fact; (2) the knowledge or belief that the representation was false, or made with reckless indifference for the truth; (3) the intent to induce another party to act or refrain from acting; (4) the action or inaction taken was in justifiable reliance on the representation; and (5) damage to the other party as a result of the representation.” Avery committed fraud because she made a false statement regarding CalCorp’s intent to abide by its obligations under the Agreement.

Plaintiff makes no effort to serve Avery until, one-hundred fifty days after filing the Complaint, Plaintiff provides the Sheriff of New Castle County with a copy of the Complaint and directs him to serve it on Avery, which the Sheriff does by handing a copy of it to her at her house. The day after receiving the copy of the Complaint, Avery files a motion to dismiss the Complaint (the “Avery Motion to Dismiss”). The motion raises three grounds for dismissal: (i) insufficient process; (ii) service of process was untimely; and (iii) the Complaint fails to state a claim against Avery upon which relief can be granted. Plaintiff opposes the motion.

**1. How should the Court rule on all three parts of the Avery Motion to Dismiss, and why? With respect to part (iii) of the motion, your answer should include the standard of review that the Court would apply.**

\* \* \*

Plaintiff effects timely and proper service of process on CalCorp. CalCorp files a timely Answer to the Complaint (the “CalCorp Answer”), which contains one affirmative defense: the Court does not have *in personam* jurisdiction over CalCorp. Neither the Complaint nor CalCorp’s Answer contain a jury demand.

Twenty days after CalCorp’s Answer is filed, Plaintiff files a document entitled “Demand for Jury Trial” in which it demands a trial by jury as to any claims so triable. CalCorp promptly files a motion to strike the jury demand on the grounds that it is untimely (the “Motion to Strike”). Plaintiff opposes the Motion to Strike.

While the Motion to Strike remains pending, Plaintiff and CalCorp enter into an agreed scheduling order to govern the litigation, pursuant to which they will engage in discovery for twelve months. During the next twelve months, they engage in extensive discovery, including serving and responding to requests for production of documents, interrogatories, and requests for admissions. They each also take, and defend, several depositions.

Plaintiff’s requests for production of documents directed to CalCorp include the following:

Request No. 2: Produce all documents relating in any way to CalCorp’s business that were created, edited, or received since CalCorp was formed.

Plaintiff's requests for production do not contain any instructions or definitions. CalCorp timely objects on the grounds the information sought by Request No. 2 is irrelevant and it would be unduly burdensome on CalCorp to provide all of the information requested. Plaintiff refuses to limit the scope of the request. CalCorp moves for a protective order (the "Motion for Protective Order"), to which it attaches an affidavit from its director of information technology, which accurately states that CalCorp has hundreds of thousands of documents that would be responsive to the request, and it would cost over \$500,000 to gather and produce them. Plaintiff opposes the Motion for Protective Order.

After the close of discovery, but before the deadline under the scheduling order for filing dispositive motions, CalCorp files a motion for summary judgment (the "CalCorp Motion for Summary Judgment"), which contains two parts: (i) the Complaint should be dismissed in its entirety because the Court does not have personal jurisdiction over CalCorp due to the lack of minimum contacts between CalCorp and Delaware sufficient to satisfy due process; and (ii) Count 2 of the Complaint should be dismissed because the Court does not have subject matter jurisdiction over a claim for specific performance, which is equitable relief. Plaintiff's opposition to the CalCorp Motion for Summary Judgment admits the absence of minimum contacts and that Count 2 seeks equitable relief. Instead, Plaintiff argues that: (a) the subject matter jurisdiction defense is waived because it

was not pled in the Answer; and (b) both jurisdiction defenses are waived because CalCorp did not raise them by motion in a timely fashion.

The Court schedules oral argument on the Motion to Strike, the Motion for Protective Order, and the CalCorp Motion for Summary Judgment.

**Your answers to the following questions should assume that the Court's ruling on each motion is not dependent on the rulings on any of the other motions.**

- 2. How should the Court rule on the Motion to Strike, and why?**
- 3. How should the Court rule on the Motion for a Protective Order, and why? Include in your answer a discussion of the relevant discovery standard.**
- 4. How should the Court rule on both parts of the CalCorp Motion for Summary Judgment, and why?**
- 5. Without counsel present, would Avery be permitted to represent CalCorp at the hearing on the Motion to Strike, the Motion for Protective Order, and the CalCorp Motion for Summary Judgment? Why or why not?**

\* \* \*

## **QUESTION #2**

PubCo is a Delaware corporation. It has only one class of capital stock, par value \$0.01 per share (the “Common Stock”). PubCo’s board of directors (the “Board”) regularly discussed the fact that PubCo would benefit from raising additional capital. So when a wealthy, unaffiliated investor (“Investor”) informed the Board that Investor would be willing to purchase 250,000 newly issued shares of Common Stock for \$5 million, the Board agreed. Specifically, at a duly called meeting of the Board at which all PubCo directors were in attendance, the Board adopted resolutions authorizing the issuance of 250,000 shares of Common Stock (the “New Shares”) to Investor in exchange for \$5 million (the “Purchase Price”). The Investor paid the Purchase Price to PubCo and PubCo delivered a properly executed stock certificate representing the New Shares to Investor.

Assume that the Board satisfied its fiduciary duties of care and loyalty in approving the issuance of the New Shares and that the Purchase Price reflects the fair value of the New Shares. At the time of the issuance of the New Shares, PubCo’s certificate of incorporation (the “Charter”) authorized PubCo to issue 1,000,000 shares of Common Stock and 900,000 shares of Common Stock already had been issued. In other words, by issuing 250,000 New Shares, PubCo has purported to issue 150,000 more shares of Common Stock than the Charter authorizes.

\* \* \*

1. **Did the issuance of the New Shares satisfy the requirements for the issuance of stock under the Delaware General Corporation Law (the “DGCL”) and are the New Shares valid?** Your answer should address only the legal requirements to authorize the issuance of the New Shares under the DGCL. Do **not** address any other issue of state law (such as fiduciary duties or the Uniform Commercial Code) or federal law (such as securities laws and regulations or listing rules of national securities exchanges).

2. **What procedure(s), if any, are available under the DGCL or the Delaware common law for PubCo to ratify or validate the issuance of New Shares? If one or more procedures are available, briefly describe the procedure(s). If no procedure is available, explain why not.** Your answer should address only the procedure(s) that might be available **under the common law or the DGCL** to ratify or validate the shares. Do **not** address any other issue of state law (such as the Uniform Commercial Code) or federal law (such as securities laws and regulations).

\* \* \*

PubCo owns 65% of the issued and outstanding capital stock of another Delaware corporation (“SubCo”), which was first incorporated in 2007. SubCo’s



issued and outstanding capital stock is listed on a national securities exchange and publicly traded.

The PubCo Board decides that it is in the best interest of PubCo and its stockholders to buy out the remaining 35% of SubCo's shares. PubCo sends a letter to SubCo offering to acquire 100% of SubCo at a premium to the trading price of SubCo's shares (the "Proposal"). In that letter, PubCo also conditions any transaction on the receipt of a non-waivable recommendation of an independent committee of the SubCo board of directors (the "Independent Committee") and the vote of a majority of the minority of SubCo stockholders. The letter also states, however, that PubCo is "a buyer not a seller" and will vote its 65% of SubCo shares against any alternative transaction submitted to SubCo's stockholders. PubCo publicly discloses the Proposal the same day.

SubCo's board of directors comprises six people, three of whom are PubCo employees and three of whom are "outside" directors who are not employed by PubCo or SubCo. The three SubCo directors who are also employees of PubCo are Ann (PubCo's President and Chief Executive Officer), Bart (PubCo's Chief Financial Officer), Carla (PubCo's Head of Human Resources). The other three "outside" SubCo directors are Dawn, Enrique and Faith. At the last SubCo board meeting, Bart and Dawn realized that they attended elementary school together 30 years ago and, after the board meeting, reminisced for 20 minutes about their favorite

teachers. Enrique's primary employment is as a director of a charitable foundation, which for the last three years has publicly disclosed that PubCo and Ann are two of the foundation's 10 largest donors. Faith has no personal or business relationships with any of PubCo, SubCo or the other SubCo directors other than her service as a member of SubCo's board of directors. Assume that the relationships just described in this paragraph are the only personal or business relationships among SubCo's directors.

**3. Which SubCo directors, if any, are likely to be deemed "independent" under Delaware law for purposes of serving on the Independent Committee to consider and negotiate PubCo's Proposal?** Your answer must assess the independence (or lack thereof) as to each of Ann, Bart, Carla, Dawn, Enrique, and Faith.

\* \* \*

Assume for the remainder of this Essay (without affecting your answer to Question 3) that SubCo forms an Independent Committee composed entirely of two or more directors who are "independent" for all purposes under Delaware law. Among other things, the Independent Committee is expressly authorized to consider alternatives to the Proposal, to say "no" to the Proposal, to engage its own legal and financial advisors at SubCo's expense and to exercise any and all authority of the SubCo board of directors that may be delegated to a committee in connection with

the consideration, negotiation and approval of the transactions contemplated by the Proposal or any alternatives thereto.

During the course of negotiations between PubCo and the Independent Committee, PubCo insists that any definitive agreement include a provision requiring SubCo to amend its bylaws to add a requirement that any claim for breach of fiduciary duty against any current or former director or stockholder of SubCo be brought exclusively in the Delaware Court of Chancery (the “Forum Selection Bylaw”). PubCo states that adoption of the Forum Selection Bylaw is an absolute deal breaker because PubCo expects minority stockholders to sue if SubCo accepts the Proposal and PubCo does not want it or SubCo incurring unnecessary costs to litigate related claims in multiple venues.

\* \* \*

**Question 4:**

**Part 1: Would the Forum Selection Bylaw, if duly adopted, be valid under the DGCL? Why or why not?** Your answer should address only the validity of the Forum Selection Bylaw, assuming it is duly adopted, under the DGCL. Do **not** address any other issue of state law (such as fiduciary duties or the steps for duly adopting a bylaw) or federal law (such as securities laws and regulations or listing rules of national securities exchanges).

**Part 2: Does the Independent Committee possess the unilateral authority under the DGCL to adopt the Forum Selection Bylaw? Why or why not?**

\* \* \*

Over the next six weeks, the Independent Committee meets 15 times with its outside legal and financial advisors. At the Independent Committee's direction, the financial advisors solicit a broad range of potential counterparties to alternative transactions, but none is interested in holding discussions with SubCo. With the assistance of its advisors, the Independent Committee also actively negotiates with PubCo, which agrees to increase its offer price on two separate occasions before ultimately making its "best and final offer" to acquire SubCo for \$15 per share in cash (the "Merger Consideration"), a 30% premium to SubCo's trading price on the day before the Proposal was publicly disclosed. Finally, the Independent Committee receives an opinion from its financial advisors, opining that the Merger Consideration is fair, from a financial point of view, to SubCo's minority stockholders. The financial advisors also present their analysis indicating that the Merger Consideration is superior to the alternative of remaining an independent public company.

Informed by the negotiating history with PubCo and the financial advisors' expert analysis and opinion, the Independent Committee determines to recommend that the full SubCo board of directors approve a definitive merger agreement (the "Merger Agreement") drafted by the Independent Committee's attorneys providing for PubCo to acquire 100% of SubCo for \$15 per share. Based on that recommendation, the SubCo full board of directors unanimously approves the Merger Agreement, PubCo and SubCo execute and deliver the Merger Agreement, and SubCo submits the Merger Agreement to its stockholders for their approval or rejection. At a duly called special meeting of SubCo's stockholders, over 70% of the shares not owned by PubCo or anyone affiliated or associated with PubCo, and over 90% of the total outstanding shares (i.e., counting the shares owned by PubCo and its affiliates and associates), vote in favor of the adoption of the Merger Agreement.

A SubCo stockholder sues all of the SubCo directors and PubCo in the Delaware Court of Chancery alleging breaches of fiduciary duty in connection with the negotiation and approval of the Merger Agreement. After a full trial on the merits, the Court of Chancery finds as fact that (a) the Independent Committee was comprised of only independent directors who complied with their duty of care and were fully empowered to hire their own advisors and to say "no" to the Proposal, and (b) the majority of the minority vote was fully informed and uncoerced.

**6. What standard of judicial review will the Delaware Court of Chancery apply to the breach of fiduciary duty claims? Explain your answer. Assume the Court of Chancery's factual findings are correct.**

\* \* \*

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### **QUESTION #3**

Oceanside University (“Oceanside”) is a publicly-funded, post-secondary institution located in Beachtown, Delaware (“Beachtown”). Oceanside grants official recognition to student groups through its Officially Recognized Student Organization (“ORSO”) program. ORSOs receive a number of benefits from Oceanside, including access to office and meeting space, free publicity in school publications, and the right to use Oceanside’s name and logo.

In order to qualify for official recognition as an ORSO, Oceanside requires applicants to agree that they will abide by the university’s Nondiscrimination Policy.

The Nondiscrimination Policy provides:

#### **Chapter 41, §14A. Student Organizations;**

##### **Nondiscrimination –**

Official Recognition will not be granted to any student organization that restricts membership on the basis of race, sex, color, age, religion, ancestry, national origin, marital status, sexual orientation, gender identity or disability.

The Interdenominational Fellowship of Religious Students (the “IFRS”) is a national student organization devoted to increasing religious participation rates among young adults and promoting religious tolerance among members of different faiths. The IFRS’ Charter provides that membership is limited to college students that actively practice a recognized world religion. The IFRS objects to Oceanside’s nondiscrimination policy, contending that it will force the IFRS to accept members

who do not share its goals or actively practice a religion. The IFRS applies to Oceanside for recognition as an ORSO. While its application is pending, IFRS files a legal action in federal court seeking declaratory and injunctive relief prohibiting Oceanside from denying IFRS' ORSO recognition on the basis that IFRS will not agree to abide by the Nondiscrimination Policy.

**1. Does the IFRS have standing to seek an injunction to prevent Oceanside from enforcing its requirement that IFRS abide by its Nondiscrimination Policy in order to receive recognition as an ORSO? Why or why not?**

**2. Under what federal constitutional law provisions will the IFRS bring its claims. What standard(s) will the court apply in evaluating the claims? How should the court rule on the claims? Explain your answers.**

\* \* \*

Assume that Oceanside denies the IFRS' application for official recognition as an ORSO.

Upset at the denial of its application to be an ORSO, the IFRS wants to hold a protest parade in Beachtown on the last Saturday in August. Beachtown, a popular summer tourist destination, has adopted an ordinance which requires parade



organizers to obtain a permit from the town, but which prohibits any parades on Saturdays during the months of June, July and August (the “parade ordinance”). The parade ordinance was adopted to “protect, preserve and promote the health, safety and welfare of Beachtown’s residents and visitors” by assuring that Beachtown’s police and public safety personnel are not required to provide security and crowd control for parades on the busiest tourism days of the summer. As an alternative, the parade ordinance allows groups to host events free of charge at its municipal bandstand. The parade ordinance also contains an exception authorizing the Town Manager to issue a parade permit to any “qualified veterans’ organization” seeking to host a parade during the summer. Pursuant to this exception, Beachtown’s Town Manager has always issued a parade permit to the local veteran’s organization that hosts Beachtown’s annual 4<sup>th</sup> of July parade and fireworks display the first Saturday in July.

The IFRS consults with you after receiving notice that its application for a parade permit is denied based on the parade ordinance. The notice advised, however, that the municipal bandstand is available for the IFRS’ use as an alternative.

**3. Does Beachtown’s parade ordinance violate the 1<sup>st</sup> amendment on its face? Why or why not? If the IFRS challenges the parade ordinance on 1<sup>st</sup> amendment grounds, what standard(s) will the court apply to evaluate the IFRS’ claim and how should the court rule? Explain.**

\* \* \*

Assume that the IFRS elects not to challenge the parade ordinance.

The IFRS decides to use Beachtown’s municipal bandstand to host a rally protesting Oceanside’s decision to deny the IFRS official recognition as an ORSO. At the event, Roger, the 21 year old president of the IFRS’ Oceanside chapter, gets into a heated argument with a passerby and is arrested for inciting a public riot, an offense classified as a violent offense.

The State of Delaware has recently adopted a statute (the “Registry statute”) creating a civil school violence registry (the “Registry”) to combat an “alarming increase in school and campus violence.” Among the findings expressed by the Legislature in the legislation creating the Registry is that males between the age of 16 and 25 have the highest rates of arrest for violent crime.

The Registry statute requires that any high school or public university male student between the ages of 16 and 25 arrested for a violent offense at a school extracurricular event be automatically placed on the Registry for a period of six

months. To be removed from the Registry, a person must complete an anger management course. In addition, placement on the Registry is permanently noted in the student's official academic transcript.

Roger was placed on the Registry as a result of his arrest and consults with you. Assume that the IFRS' rally qualifies as a school extracurricular event.

**4. Identify and explain what federal constitutional law challenges Roger can bring to contest his placement on the Registry? Identify and explain what standard the federal court will apply in analyzing Roger's claims and how the federal court should rule?**

\* \* \*

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#### **QUESTION #4**

Harry Husband and Wendy Wife are married on August 27, 1995. Two months later, they buy two lots next to each other on a street in a new subdivision in New Castle County, Delaware. Dan Developer transfers ownership of the two lots to Harry and Wendy via a single Deed. The Deed is silent as to the type of ownership between Harry and Wendy.

**1. What type of ownership do Harry and Wendy have? Why? What are the elements?**

\* \* \*

Harry and Wendy then contract with Bob Builder to construct a house on Lot A. Harry and Wendy plan to use Lot B as a play area for their future children. Wendy and Harry obtain a construction loan from First Bank for financing. During construction of the house, Harry and Wendy become aware that each lot is smaller than Dan Developer had listed in the contract to sell the lots. The smaller lot sizes reduce the available area for building structures because the setbacks required by the applicable zoning ordinance prohibit building within 5 feet of each side property line.

The construction contract calls for Bob Builder to be paid periodic draws based on completion of specified thresholds of the house's construction. In a hurry to be paid, even though he was aware of the problem with the setbacks, Bob

continues to build the house according to the original design. Bob builds the house into Lot A's 5-foot setback on the side lot line shared with Lot B. In fact, the 10-foot deck on that side of the house goes through Lot A's 5-yard setback and into Lot B by 5 yards.

Bob Builder completes the house's construction on November 18, 1995. Harry and Wendy refinance the construction loan from First Bank with a conventional loan from Second Bank on January 3, 1996. The mortgage to Second Bank encumbers both lots and is recorded on January 7, 1996. Second Bank requires a survey to be performed as part of the refinancing. From the survey, Wendy and Harry learn of the deck's encroachment into the 5-foot side-yard setback and then 5 feet into Lot B. In an attempt to correct the issue, Harry and Wendy download, draft, and sign a License Agreement in their capacities as the owners of both lots authorizing the encroachment into Lot B.

- 2. Should Second Bank accept the License Agreement as a permanent, complete solution to the deck's encroachment into the setback of Lot A and onto Lot B? Why or why not? Identify an alternative property interest mechanism to correct any problems and explain any advantages over the License Agreement.**

\* \* \*

Second Bank also requires Harry and Wendy to sign a certification that they have fully paid for all construction of the house. Contrary to that certification

though, Harry and Wendy refused to pay Bob Builder his final \$20,000 because Bob constructed the deck into the Lot A setback and onto Lot B.

Also, at the refinancing, Harry and Wendy do not disclose a home equity line of credit they had obtained from First Bank on October 1, 1995, that was secured by the two lots. The home equity line does not appear in the title search because First Bank forgot to record the paperwork at the Recorder of Deeds. First Bank realizes this oversight upon receiving payment in full on the construction loan's mortgage one week after the refinancing. First Bank then records the mortgage for the home equity line of credit the next day, January 11, 1996. On January 31, 1996, Bob Builder files a complaint seeking a lien on Lot A for the final \$20,000 under the construction contract.

**3. At that point, on February 1, 1996, what was the order of lien priority for Lot A? Why?**

\* \* \*

In 2014, Harry and Wendy decide to divorce. They agree to sell Lot A (with the house) and Lot B, use the proceeds to pay joint debts, and then divide any remaining proceeds. To hopefully expedite receipt of proceeds, Harry and Wendy agree to sell the lots separately or together. Family Court enters a Divorce Decree divorcing Harry and Wendy on February 13, 2015.

Three months earlier, Billy Buyer had made an offer on Lot B, on which Billy planned to build a house of his own design. Rather than Wendy and Harry both attending the closing on Billy's purchase and having to see each other, Wendy signs a quitclaim deed as grantor transferring her interest in Lot B to Harry as grantee, although the deed does not have an acknowledgement. Harry then signs a deed indicating that he, as grantor, "grants and conveys" Lot B to Billy. After the closing on December 24, 2014, the settlement attorney records Harry's deed to Billy and then Wendy's deed to Harry.

**4. Does Billy have clear title? Why or why not?**

**5. Describe the warranties, if any, provided by the two deeds.**

\* \* \*

A few months after the closing, while Billy is waiting to retire and start construction on his house on Lot B, children from the subdivision begin to use Lot B for games of stickball after school. One day, eleven-year-old Charlie Child trips over an exposed root in the outfield and breaks his leg. After Charlie's injury, the subdivision's homeowners' association established by the Declaration of Covenants sends Billy a demand letter requesting that he not allow the children to use Lot B for stickball. The demand letter indicates that the lots are intended to only be used for

residences, although the Declaration of Covenants does not have any express provision governing uses.

**6. Does Delaware law require Billy to comply with the demand letter? Why or why not?**

\* \* \*

Lot A (with the house) does not sell as quickly as Lot B and, in fact, sits on the market for a year without any offers. As a result, Wendy and Harry decide to rent the house on Lot A to Timmy Tenant from May 1 to September 15, 2015. There is no written lease.

Billy retires on July 1, 2015 and begins designing his retirement house on Lot B. He obtains a survey that shows the deck from Lot A encroaching the 5 feet into Billy's Lot B, so Billy sends a letter on July 15, 2015, to Wendy and Harry demanding that they remove the portion of the deck that encroaches on Lot B. Billy's letter arrives at the house on Lot A and Timmy Tenant opens it. Upon learning that he potentially does not have use of the full deck, Timmy sends separate letters to Harry and Wendy indicating that Timmy is leaving the house, terminating the oral lease, and not paying any more rent.

**7. Do Harry and Wendy have a viable claim against Timmy related to the lease? Why or why not?**



**8. Do Harry and Wendy have a viable claim against Billy for adverse possession of the portion of Lot B on which the deck from Lot A encroaches? Why or why not?**

\* \* \*

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## GENERAL INSTRUCTIONS

The Essay Section of the 2017 Delaware Bar Examination consists of eight questions. This booklet contains the four essay questions which must be answered during this morning session of the Examination. The time allotted for this session is three hours. Each of the four questions is of equal weight, although some questions may take more time to read and answer than others. Accordingly, your time should be budgeted carefully. In addition, the subparts in the questions are not necessarily equally weighted.

Answers to the essay questions are graded by the Examiners. Answers are graded in accordance with certain general standards, including the applicant's ability to (i) recognize the issues; (ii) analyze the issues accurately; (iii) reason logically; (iv) demonstrate a thorough knowledge of the fundamental principles of law and their application; and (v) express concisely and accurately an answer that is directly responsive to the question. A response that does not answer a question or gives no semblance of issue recognition, analysis or discussion relevant to subject matter of the question may receive a very low grade. No credit will be given for discussion of irrelevant issues or statements of general principles that are not responsive to the question.

Applicant Number

**BOARD OF BAR EXAMINERS**

**OF THE DELAWARE SUPREME COURT**

**2017 BAR EXAMINATION**

**Monday, July 24, 2017**

**2:00 p.m. – 5:00 p.m.**

**Questions 5-8**

## QUESTION #5

**Assume the Delaware Uniform Commercial Code applies in all scenarios.**

Rebecca Retailer owns a novelty / souvenir shop on Main Street in Newark, Delaware. On May 1, Retailer places an order for 100 baseball-shaped mugs bearing the logo of the Wilmington Blue Rocks, the local minor league baseball team, from Denise Distributor. Distributor is one of Retailer's usual suppliers and a low-volume merchant of novelty items. When the mugs arrive on May 15, Retailer signs for the delivery but is preoccupied getting the shop ready for the upcoming University of Delaware graduation. She asks her assistant Ernest Employee to put the mugs on a shelf with other Delaware-themed items, which he does.

In November, Retailer is reviewing inventory reports and notices that hardly any of the mugs have sold. She checks the stock and discovers that the mugs bear the name and logo of another baseball team instead of the Blue Rocks. Retailer calls Distributor and asks to exchange the mugs, but Distributor refuses, claiming that Retailer accepted the mugs.

- 1. Was Retailer's acceptance of the mugs valid? Explain why or why not.**

**Assume the Delaware Uniform Commercial Code applies.**

**2. If Retailer's acceptance was valid, can she revoke the acceptance?**

**Explain why or why not. Assume the Delaware Uniform Commercial Code applies.**

\* \* \*

On January 15, in anticipation of Presidents' Day, a highly celebrated holiday among Retailer's clientele, she orders five boxes of Abraham Lincoln-themed trinkets from Distributor at a cost of \$1,000 per box, to be delivered by Friday, January 31. On the afternoon of January 31, Distributor's employee Donny Driver arrives at Retailer's shop, but finds it closed and locked. A note on the door reads "Closed for Flu."

It is cold and late, and Driver does not want to drive all the way back to Distributor's warehouse, so he checks the back door to the shop's office. The door is open and Driver leaves the boxes inside. He closes and locks the door, but first leaves a voicemail on Retailer's mobile phone explaining that he left the boxes inside. Unbeknownst to Retailer, Distributor, or Driver, the trinkets inside the boxes are not Lincoln-themed, but James Buchanan-themed. Over the weekend, the shop is burglarized and the boxes are stolen. Retailer refuses to pay Distributor for the goods.

3. **Who bears the risk of loss of the boxes? Why? Assume the Delaware Uniform Commercial Code applies. Do not discuss any potentially tortious conduct.**

\* \* \*

Distributor sues Retailer for the cost of the stolen trinkets. Retailer does not want to spend a lot of time or money on litigation, so she unilaterally decides that she and Distributor should split the cost 50 / 50. She writes Distributor a check for \$2,500, and inscribes “**PAYMENT IN FULL FOR DISPUTED GOODS**” in bold, capital letters on the memo line. Distributor’s CFO processes all payments when they are received. She has also been the primary decision maker in the Retailer litigation. CFO receives the check, reviews it, and deposits it into Distributor’s account.

4. **Assuming Retailer is otherwise responsible for paying for the trinkets, is her obligation discharged? Explain why or why not. Assume the Delaware Uniform Commercial Code applies.**

\* \* \*

Six months later, Distributor learns about the check notation and still wants to pursue Retailer for the full \$5,000. Although the check has been cashed, Distributor

tenders the \$2,500 back to Retailer and informs Retailer that she remains responsible for the entire debt.

**5. Assuming Retailer is otherwise responsible for paying for the trinkets, does Distributor's return of her \$2,500 impact Retailer's obligation?**

**Explain why or why not. Assume the Delaware Uniform Commercial Code applies.**

\* \* \*

Retailer replaces Distributor with Winnie Wholesaler, a merchant of trinkets and other novelty items. To entice Retailer's business, on July 1, Wholesaler sends the following offer to Retailer:

Baseball is back! In support of our local team, we are pleased to supply you with all Blue Rocks novelty items. As a new customer, we are especially excited to offer you an unlimited supply of Blue Rocks mugs throughout this season for \$3.00 each, a 50% discount from our standard price!

This offer is irrevocable for the maximum time permitted by law.

Wholesaler signs and dates the letter. The Blue Rocks have a successful season, winning the league championship on September 28. Retailer's business booms.

In December, Retailer meets Curtis Customer, who wants to buy a large quantity of Blue Rocks mugs as gifts for his employees. Customer asks Retailer to quote him a price for 10,000 mugs. Retailer reviews her offer from Wholesaler and sees that it states that it is irrevocable. Retailer then offers to sell Customer the mugs for \$5.00 each. Customer accepts the offer and Retailer places an order with Wholesaler for the mugs.

Wholesaler delivers the mugs to Retailer on December 10, and Customer picks them up the same day, paying Retailer \$50,000. When Retailer examines Wholesaler's invoice for the mugs, she discovers that Wholesaler has charged her \$6.00 per mug. Retailer calls Wholesaler to complain, and Wholesaler explains that the offer has expired. Retailer pays only \$30,000 and refuses to pay more. Wholesaler sues Retailer for the unpaid \$30,000.

- 6. Will Wholesaler prevail on her claim against Retailer? Explain why or why not. Assume the Delaware Uniform Commercial Code applies.**

\* \* \*



Retailer and Wholesaler resolve the mug dispute and continue their business relationship. On December 1, Retailer sends Wholesaler a check for \$10,000 as payment in full for several open orders.

The next day, Retailer discovers that she wrote the check from her personal account – a joint account with her husband Ralph – rather than her business account. She calls Wholesaler to ask her to not cash the check, but Wholesaler’s voicemail states that she is out of town until December 20. The same afternoon, Retailer’s husband Ralph calls the bank, confirms that the check has not been paid, and instructs the manager to stop payment on the check.

7. **Is Ralph’s stop payment order valid? Explain why or why not. Assume the Delaware Uniform Commercial Code applies.**

\* \* \*

After Ralph speaks with the bank, Retailer drafts a letter to the manager confirming the stop payment instruction, but it falls under the seat of her car on the way to the bank and she forgets about it. Wholesaler returns from vacation and deposits Retailer’s check on December 20. The funds are paid to Wholesaler from Retailer’s personal account.

**8. Should the bank have paid Wholesaler? Explain why or why not.**

**Assume the Delaware Uniform Commercial Code applies.**

\* \* \*

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## QUESTION #6

Owen owns Supermarket as a sole proprietorship. One day, Ann is at Supermarket. While shopping in Aisle 5, she runs into her psychiatrist, Bob, with whom she treats for a borderline personality disorder. Ann was in between treatment sessions with Bob. At Supermarket, Ann tells Bob that she has been having strong and uncontrollable urges to break things. While talking to Bob, Ann picks up a jar of pickles and says she is going to smash the jar on the linoleum floor. Chris is shopping in the next aisle and overhears Ann's conversation with Bob.

Five minutes later, Paula is walking up Aisle 5. Paula wears reading glasses when she needs to read fine print. On this particular day, she is looking for an organic ketchup made with tomatoes only grown in the Ozarks. She thinks she finds the ketchup she desperately seeks, and she exclaims with joy. She walks up Aisle 5 while searching in her purse for her reading glasses, so she can check the label for Ozark tomatoes. She cannot find her reading glasses. She slips in a clear liquid and exclaims, "where did this pickle jar come from!?" Chris, who is still in the next aisle, hears Paula's statement, as well as her fall to the floor. When she falls, Paula cracks her skull on the linoleum floor. Paula never regains consciousness, and is in a permanent vegetative state.

Chris walks around the corner, and finds Paula laying in Aisle 5. Next to Paula is a broken pickle jar. Chris runs to Owen, who calls 911. Owen talks to Chris, and writes down Chris's statement of what he saw and heard on a sheet of notebook paper. Owen also writes down that the floor had recently been buffed but too much wax had been used during the cleaning. Owen then slips the sheet of paper with his notes into a folder where he keeps information regarding other incidents that have been reported at the Supermarket.

Owen also reviews Supermarket's video surveillance footage of Aisle 5. Mickey, the assistant manager of Supermarket, is in the room with Owen when he is watching the video surveillance. When Owen yells about what the video shows, it startles Mickey, who spills his coffee on the back of the computer Owen is using. The liquid shorts out the computer and electrocutes Owen. Owen dies instantaneously. The only copy of the video surveillance is destroyed beyond repair.

Later, Mickey calls Paula's husband, Edward. Mickey apologizes, and offers to pay for all of Paula's medical bills. He also tells Edward that Supermarket is going to only stock pickles in plastic jars moving forward, so this type of tragedy never happens again.

**ASSUME THAT THE DELAWARE RULES OF EVIDENCE APPLY TO THE QUESTIONS SET FORTH BELOW.**

Edward, as the next friend of Paula, files suit against Ann and Supermarket for Paula's injury. All parties are present for trial.

**1. Assume Chris is properly subpoenaed to testify at trial.**

- a. Chris is asked what he heard Ann say to Bob. May Chris testify? Why or why not?**
- b. Chris is asked what he saw and heard when Paula fell. May Chris testify? Why or why not?**

**2. Assume Chris cannot be located for trial. Mickey is called as a witness.**

- a. On direct examination, Mickey is asked about what the video surveillance showed. What, if any, objections are proper? Explain.**
- b. Mickey is asked to testify about the statements Owen wrote down on the notebook paper. What, if any, portions of Owen's notes are admissible? Explain.**
- c. Mickey is asked to testify about his statements to Edward. What statements, if any, are admissible? Explain.**

**3. Franny, Paula's best friend, is called to testify about Paula and her life before she fell in the Supermarket. Paula previously filed a personal injury lawsuit against another grocery store twelve years ago. Franny also testified in that lawsuit about how the incident affected Paula and her life. Paula lost that lawsuit because it was determined she was faking her injuries. Franny was convicted of misdemeanor perjury based upon her testimony at Paula's**

**previous trial that Paula was injured and the effects such injuries supposedly had on Paula's life. Franny did not go to prison.**

- a. Does Franny's prior perjury in Paula's other lawsuit prevent her from testifying in the instant case? Why or why not?**
- b. May Franny's prior conviction be used as impeachment evidence against her if she testifies? Why or why not?**

**4. Edward's best friend, Jerry, is called to testify. Jerry reluctantly testifies that Edward is untruthful.**

- a. Edward's attorney intends to cross-examine Jerry regarding an incident in which Edward found \$100 on the street and took it to the police department. Is such testimony admissible? Explain.**

- b. Edward's attorney intends to call the police chief to testify about Edward finding \$100 on the street and bringing it to the police department. Is such testimony admissible? Explain.**

**5. On re-direct examination, Edward seeks to testify for the first time about a conversation he had with Supermarket's insurance company in which the insurance company offered \$1,000,000 to settle the case. Is this testimony admissible? Explain.**

\* \* \*

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## QUESTION #7

Audrey owns K&B Designs, a business specializing in home kitchen and bath remodeling. K&B Designs assists clients with all phases of the remodeling process from the initial design and selection of materials to hiring the contractor to complete the project. K&B Designs has a showroom in Delaware where customers can view various types of cabinetry, tile, countertop materials, and kitchen and bath hardware. Audrey is the sole officer and director of K&B Designs.

Audrey hires Brad as a “Design Professional” to assist clients with designing, purchasing materials for, and hiring contractors for remodeling projects. Brad has no written employment contract with K&B Designs, and K&B Designs never discussed a covenant not to compete with him. Because Brad has no prior kitchen or bath remodeling experience, Audrey devotes significant time towards training Brad in the remodeling industry.

After several years of training and employment at K&B Designs, Brad grows into one of Audrey’s most valued and trusted employees. Audrey gives Brad the title of “Design Manager” and entrusts him to supervise the showroom staff and two Design Professionals. At the same time, Audrey begins asking for Brad’s input before displaying new product lines in the Delaware showroom or establishing relationships with new contractors. Brad’s expanded role and supervisory

responsibilities make him a key managerial employee of K&B Designs, but he does not become an officer or director of K&B Designs.

Following his promotion to Design Manager, Brad begins meeting clients of K&B Designs at a local restaurant (“Restaurant”) to discuss their projects and review bids. K&B Designs has an account with Restaurant, and Brad often charges client meals, including the cost of alcoholic beverages, to that account. Audrey also frequently meets with clients at Restaurant (sometimes with Brad in attendance) and also charges those meals and any beverages to the K&B Designs account. K&B Designs has always paid the monthly bills from Restaurant in a timely manner, and Audrey has never questioned any of Brad’s client meal or beverage charges.

Several years after his promotion to Design Manager, Brad decides to start his own home kitchen and bath design business. Brad’s new business will operate in the same geographical region as K&B Designs and will compete with K&B Designs in assisting customers with their home renovation projects, including the design stage, material selection, and hiring contractors. Brad spends the next six months forming his plans, which he does not reveal to Audrey or any employees of K&B Designs.

Brad has found the training and experience he received at K&B Designs to be invaluable in preparing to launch his new business. Brad leases office space for a showroom, purchases computer equipment and design software, and arranges for



materials produced by several manufacturers to be displayed in his business's new showroom. Although K&B Designs displays materials from some of those same manufacturers in its showroom, the contractual arrangements between K&B Designs and the manufacturers are not exclusive. While all of those manufacturers are well known in the industry, Brad first met many of the sales personnel representing those manufacturers through his position with K&B Designs. Brad also plans to use some of the same remodeling contractors that K&B Designs uses for its remodeling projects. Although none of those contractors works exclusively with K&B Designs, Brad met them through his employment with K&B Designs. Brad tries to avoid spending time on preparations for his new business during hours he is working for K&B Designs, but he does take a few short calls on his cell phone during business hours and those calls relate to plans for his new business.

When Brad is nearly ready to open his new business, he gives K&B Designs two-week's notice of his resignation, explaining that he will be starting his own new business and thanking Audrey for everything she taught him. Audrey feels betrayed. She fires Brad immediately and asks him to leave the premises. Brad leaves and drives to Restaurant. He is upset and angry that Audrey fired him. He tells a waiter at Restaurant that he has recently received a promotion and that, to celebrate, he would like to buy champagne for everyone in Restaurant and asks the waiter to charge 6 bottles of expensive champagne to the K&B Designs' account. The

champagne costs \$150 per bottle. The waiter has served Brad and his clients in the past and Brad had charged those past meals to the K&B Designs' account. When K&B Designs receives its monthly bill from Restaurant, Audrey refuses to pay for both the champagne and the client meals that Brad charged during his last month of employment with K&B Designs.

**1. Applying principles of agency law, discuss whether Restaurant has any recourse against K&B Designs for the cost of the client meals or the champagne that Brad charged to the K&B Designs' account. As part of your answer, discuss the legal and factual arguments Restaurant could make to support its contention that K&B Designs is liable for the cost of the client meals and the champagne and the legal and factual arguments, if any, K&B Designs could make to support its contention that it is not liable.**

**2. Discuss whether Brad breached any fiduciary duty to K&B Designs by planning and taking affirmative steps to organize a competing business while still employed by K&B Designs or by not disclosing to K&B Designs that he would soon be starting a competing business. As part of your answer, discuss the legal and factual arguments K&B Designs could make to support an argument that Brad breached a fiduciary duty and the legal and factual**

**arguments Brad could make to defend against an argument that he breach a fiduciary duty.**

\* \* \*

Dave is Audrey's administrative assistant and has been a full-time employee of K&B Designs for over 5 years. For several years, Audrey has tasked Dave with picking up her lunch on days when Audrey eats in the office. Audrey always orders the same type of sandwich from the local sandwich shop in the strip mall where K&B Designs' offices and showroom are located. The sandwich costs \$7 at that shop. Each day Audrey gives Dave \$10 and says "you can keep the \$3 change."

The sandwich shop is popular and often quite busy at lunch time, and Dave frequently has to wait in line for up to one-half hour. One day Dave decides that, to try to save time, he will drive to another, less crowded location of the same sandwich shop chain about 2 miles away. It turns out that going to the other location does not save time due to the need to drive there and back. Dave learns, however, that the same sandwich costs \$1.50 less at the other location.

For over a year, Dave drives to the chain's other location to pick up Audrey's sandwich on days she eats in the office. Each day, Audrey gives him \$10 and tells him to "keep the \$3 change." Dave keeps all the change, but unbeknownst to Audrey, the amount of change is now \$4.50 rather than \$3.

One day, while driving to the other sandwich shop location to pick up Audrey's lunch, Dave runs a red light and strikes a pedestrian. The pedestrian is severely injured.

When, as a result of the accident, Audrey learns that Dave has been driving to a different sandwich shop location to buy Audrey's sandwiches, she also learns that her sandwich of choice costs \$1.50 less at the other location and that Dave has kept additional change in a total amount over \$250.

**3. Assuming that Dave was at fault in the accident, does the injured pedestrian have any recourse against K&B Designs under principles of agency law for the pedestrian's injuries? Explain your answer and discuss the elements necessary to establish vicarious liability on the part of K&B Designs.**

**4. Did Dave breach any fiduciary duties in his capacity as an agent by not disclosing to Audrey that her sandwiches cost \$1.50 less at the other shop location and by keeping the additional change for himself? As part of your answer, discuss the legal and factual arguments Audrey could make to support her argument that Dave should be required to reimburse her for the extra change he kept for himself and the legal and factual arguments Dave could make to defend against Audrey's argument.**

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## QUESTION #8

On June 10<sup>th</sup>, high school football coach, Carl Carter, is at an ATM machine outside of Bank, in New Castle County. As Carter turns to leave the ATM, a silver handgun with a black handle is thrust into his face and a male voice says, “hand it over and no one gets hurt.” Carter has \$60 and his debit card in his hand, which the assailant takes. Carter is primarily focused on the handgun, but he notices the assailant has blond hair, is wearing a knit green Eagles hat and his face is concealed by large sunglasses. The police arrive, but given the limited descriptive information from Carter, they are unable to develop a suspect.

On August 10<sup>th</sup>, Pam Peterson is leaving the local grocery store. She is eight months pregnant. As she walks to her car, a figure appears, wearing a green baseball cap with an Eagles logo and black sunglasses. Peterson feels a hard object, which she believes to be a handgun, pressed against her upper arm. The assailant demands her purse, and a struggle ensues. Peterson never lets go of her purse, and during the struggle she breaks her arm. Unsuccessful in his attempt to take Pam’s purse, the assailant flees toward a black sedan. Peterson then repeatedly screams, “Help! He has a gun and tried to steal my purse!”

At the same time, Officer O’Connor is walking, in full uniform, down the street. O’Connor hears Peterson’s screams, and sees the suspect run up the block. O’Connor runs after the suspect and yells, “Stop! Police!” but the suspect keeps

running. O'Connor sees the suspect enter a black sedan, close the door and start the engine. Before the suspect can place the car in drive, O'Connor reaches the car, opens the driver's door and pulls out the sole occupant, Bob Smith. O'Connor brings Smith around to the hood area of the sedan, puts Smith's hands behind his back, and detains him, face-down, on the hood of the car. O'Connor then pats down Smith and recovers a silver handgun from Smith's jacket pocket. O'Connor puts out a call for police assistance, and as he waits for backup, O'Connor asks, "Did you really think you'd get away with this in broad daylight?" Smith responds, "I didn't mean to hurt her, but I really need the money."

As he is detaining Smith, O'Connor can see into the black sedan, and in the center console, he sees what appears to be a debit card. O'Connor then reaches into the vehicle and removes the debit card. O'Connor sees that the name on the debit card is Carl Carter. O'Connor takes possession of the card and later logs it into evidence. A registration check on the black sedan indicates that the car was reported stolen two days prior from a nearby residence. The police tow the car to the police station, and O'Connor obtains a search warrant for the vehicle. During the execution of the search warrant on the car, O'Connor observes and recovers a bag under the driver's seat that contains more than 100 grams of heroin, as well as Smith's library card.

The police complete their investigation. The prosecutor assigned to the case files a single indictment against Smith in New Castle County. The indictment includes both the June 10<sup>th</sup> and August 10<sup>th</sup> incidents. The consolidated case proceeds in New Castle County Superior Court.

- 1. Identify and discuss, by reference to the elements, each crime that Smith could be charged with. If a crime is divided into degrees, specify and discuss the appropriate degree.**
  
- 2. You have been appointed to represent Smith. Discuss any potential *Motions to Suppress* that could be filed by Smith, and discuss the likelihood of success of any such motions.**
  
- 3. You are the judge assigned to the trial. The defense has filed a *Motion for Relief from Prejudicial Joinder*.**
  - a. Identify the applicable Rule;**
  - b. What factors should the Court consider in assessing the merits of the Motion;**
  - c. How do those factors apply to this case?**

\* \* \*



## **GENERAL INSTRUCTIONS**

The Essay Section of the 2017 Delaware Bar Examination consists of eight questions. This booklet contains the four essay questions which must be answered during this afternoon session of the Examination. The time allotted for this session is three hours. Each of the four questions is of equal weight, although some questions may take more time to read and answer than others. Accordingly, your time should be budgeted carefully. In addition, the subparts in the questions are not necessarily equally weighted.

Answers to the essay questions are graded by the Examiners. Answers are graded in accordance with certain general standards, including the applicant's ability to (i) recognize the issues; (ii) analyze the issues accurately; (iii) reason logically; (iv) demonstrate a thorough knowledge of the fundamental principles of law and their application; and (v) express concisely and accurately an answer that is directly responsive to the question. A response that does not answer a question or gives no semblance of issue recognition, analysis or discussion relevant to subject matter of the question may receive a very low grade. No credit will be given for discussion of irrelevant issues or statements of general principles that are not responsive to the question.