

MERGERS & ACQUISITIONS

Professor John Orcutt

Spring Semester 2017

FINAL EXAMINATION**Instructions:**

1. This is a closed-book examination. You may not bring any materials to the examination with the exception of ESL students who are allowed to bring and use a Home Language/English dictionary.
2. This is a 3-hour examination and is worth 338 points (or 75% of your final grade). The examination consists of seven essay questions:

Q1 = 56 points	Q2 = 56 points	Q3 = 56 points	Q4 = 45 points
Q5 = 35 points	Q6 = 45 points	Q7 = 45 points	

I have written this exam to be a 2 hour and 30 minute exam (150 minutes). ***It is your responsibility to apportion your time appropriately amongst the questions.*** If you base your time on the possible points per question, the time apportionment should be:

Q1 = 25 minutes	Q2 = 25 minutes	Q3 = 25 minutes	Q4 = 20 minutes
Q5 = 15 minutes	Q6 = 20 minutes	Q7 = 20 minutes	

To provide some cushion in your taking of the exam, I am giving you an extra 30 minutes. Therefore, you will actually have 3 hours for the exam.

3. The grading of examinations is anonymous. So, you must write your examination number on the examination and your blue book. **YOU MAY NOT WRITE YOUR NAME ON ANYTHING – YOU MAY ONLY USE YOUR EXAM NUMBER.**
4. For those of you who are handwriting your exams, please write your answers in a blue book. The only answers that will be graded are the answers written into a blue book. While you are free to use scratch paper, answers written on scratch paper, or anything else other than a blue book, will not be read and will not be counted for any credit. Please write only on the front side of the pages in the blue book.
5. For those of you who are taking this exam on a laptop computer, you will be subject to the laptop exam rules that are provided to you by the Registrar. The above scratch paper rules also apply to laptop exams. I do not grade scratch paper.
6. Please remember that organization, persuasiveness, neatness, and legibility all count in determining your grade on the essay answers. To improve the organization of an answer, you may wish to quickly outline the answer on a separate sheet of paper prior to writing your full answer in the blue book or on your laptop.
7. I have tried my best to write and proofread the exam so there are no distracting typos or other errors—but I may not have been totally successful. If you believe there is a typo or other error that makes it difficult to answer a particular question, please point out the error in your answer and explain any assumption you used to answer the question.

Good luck on the examination!

DO NOT TURN TO PAGE 2 UNTIL THE PROCTOR TELLS YOU TO BEGIN

Question 1 (56 points possible—25 minutes suggested)

Acme Corp. (“Acme”) is a Delaware corporation with two classes of stock: common stock and preferred stock. Acme’s capital structure can be summarized more specifically as follows:

Common stock

- Outstanding shares = 9 million
- Voting rights = 1 share is equal to 1 vote. Common stockholders do not have any class voting rights.
- Dividend rights = Common stockholders do not have any mandatory dividend rights.

Preferred stock

- Outstanding shares = 1 million.
- Voting rights = 1 share is equal to 1 vote. Preferred stockholders do not have any class voting rights.
- Dividend rights = Preferred stockholders are entitled to mandatory, cumulative dividends.

Acme’s board of directors would like to eliminate the preferred stockholders’ mandatory, cumulative dividend rights. In fact, the board would like to eliminate the preferred stock altogether and replace it with common stock. You are Acme’s attorney and the board has come to you for advice.

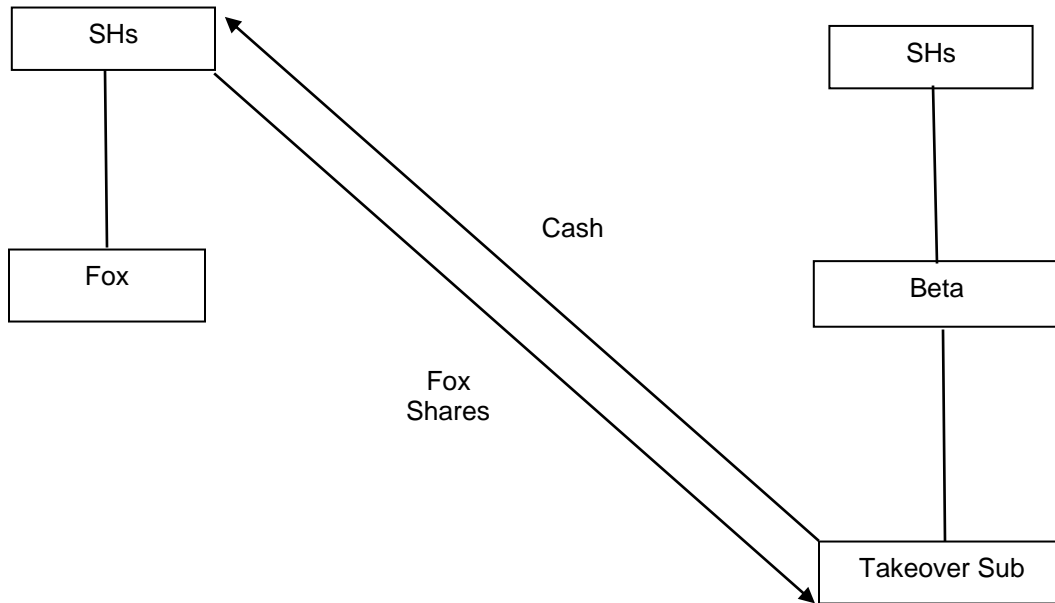
Your assignment:

- (a) Can Acme’s board amend Acme’s certificate of incorporation to eliminate the preferred stock and replace it with common stock? Please explain. In answering this question, please assume that the preferred stockholders will vote against any such amendment.
- (b) If Acme’s board cannot amend the certificate of incorporation, is there another strategy Acme could use to eliminate the preferred stock and replace it with common stock? Please explain. In giving your explanation, please mention whether the common or preferred stockholders will be entitled to appraisal rights,

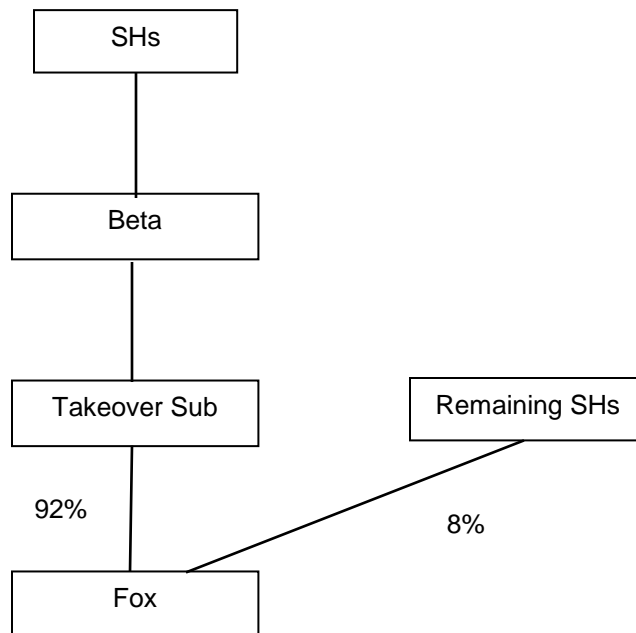
Question 2 (56 points possible—25 minutes suggested)

Beta Corp. (“Beta”), a Delaware corporation, acquired a 92% interest in Fox Corp. (“Fox”), which is also a Delaware corporation, pursuant to a tender offer (the “Tender Offer”). The Tender Offer looked like this:

TENDER OFFER



POST-TENDER OFFER



Following the Tender Offer, Beta decided to eliminate Fox's remaining 8% shareholders (the "8% SHs"). To do this, Beta decided to execute an upstream, section 253 cash merger (the "Squeeze-Out Merger") between Fox and Takeover Sub (which would be renamed Fox upon conclusion of the transaction)

Fox's success, pre- and post-tender offer was strikingly different.

- **Pre-Tender Offer:** Fox was struggling financially at the time of the Tender Offer. Fox was barely profitable and its forecasts called for decreasing profits for the foreseeable future.
- **Post-Tender Offer:** Following the Tender Offer, Acme installed a new management team for Fox, instituted a new business strategy, and provided Fox with significant resources. The results were immediate and positive. Fox's profits increased dramatically and its projections called for substantial profit increases for the foreseeable future.

Beta launched the Squeeze-Out Merger roughly nine months after completing the Tender Offer, by which time Fox was well on the way to its successful turnaround under new management. Takeover Sub's board of directors had to determine Fox's value in order to come up with the cash consideration amount for the Squeeze-Out Merger. In doing so, Takeover Sub's board used Fox's "Pre-Tender Offer" profit projections (the "Pre-Tender Offer Numbers").

At the time the Squeeze-Out Merger was announced, each of the 8% SHs requested appraisal rights. In addition, the 8% SHs challenged the valuation technique used by Takeover Sub's directors. The 8% SHs contend that for purposes of valuing their interest, Fox's improved "Post-Tender Offer" profit projections on the date of the merger should have been used (the "Merger-Date Numbers"). Takeover Sub's directors responded by arguing the value of the new management team does not belong to the dissenting shareholders (just as it did not belong to Fox's shareholders who tendered into the Tender Offer). Takeover Sub's directors argue that the 8% SHs should not get a better deal than the shareholders who tendered into the Tender Offer.

Your assignment:

- (a) Was Takeover Sub required to grant appraisal rights to the 8% SHs in the Squeeze-Out Merger?
- (b) Which side should prevail in the dispute about whether the Pre-Tender Offer Numbers or the Merger-Date Numbers should be used for valuing the 8% SHs' interest? Please explain your answers.
- (c) The 8% SHs are also considering filing a suit against Takeover Sub' directors alleging they breached their duties of care and loyalty when they devised the Squeeze-Out Merger and established the cash consideration amount. Please advise the 8% SHs on the potential merits of such a fiduciary duty lawsuit.

Question 3 (56 points possible—25 minutes suggested)

In class we considered Walgreen's proposed merger with Rite Aid and Microsoft's proposed merger with LinkedIn. Both deals are structured as reverse-triangular, cash mergers. Each of the corporations in the deals, including any mergers subs, are Delaware corporations.

Your assignment:

- (a) Please draw a diagram of a reverse-triangular, cash merger. In doing so, please label the diagram with the shareholder and board approvals required by Delaware law.
- (b) Most public company mergers are structured as reverse-triangular mergers. Why do you suppose most public company mergers use the triangular structure? In addition, why do you suppose most use a reverse structure, rather than a forward structure? Please explain.
- (c) What are the advantages for public company mergers of using cash as the merger consideration? Specifically, did using cash allow Walgreen (or Microsoft) to avoid giving Rite Aid's (or LinkedIn's) shareholders appraisal rights? What other possible advantages may Walgreen (or Microsoft) have received from using cash as the merger consideration? Please explain.

Question 4 (45 points possible—20 minutes suggested)

Buffalo Corp. ("Buffalo") is considering acquiring Turkey Corp. ("Turkey"). Turkey is an *old-fashioned* company, operating all of its business through a single-corporation structure. Turkey does not have any subsidiaries. Turkey has a number of successful divisions and some very interesting assets. However, Turkey also has serious financial concerns. There is a significant risk that Turkey will need to file bankruptcy within the next 12 months.

Buffalo would like to acquire Turkey's *interesting* assets and divisions without having to take on Turkey's substantial liabilities. Please advise Buffalo. In doing, please address successor liability risks that Buffalo faces by acquiring Turkey.

Question 5 (35 points possible—15 minutes suggested)

BlackBox Inc. (“BB”) manufactures and sells widgets. BB’s widgets employ patented technology that BB licenses from Tech Co. through a non-exclusive patent license (the “License”). The License does not include any language addressing BB’s ability to transfer the License to another party.

Pierce Co. (“Pierce”) recently acquired BB pursuant to a forward-triangular merger. BB merged into a merger sub established by Pierce. Upon completion of the merger, merger sub renamed itself BlackBox Inc. (“BB2”) and continued manufacturing and selling widgets using the patented technology covered by the License.

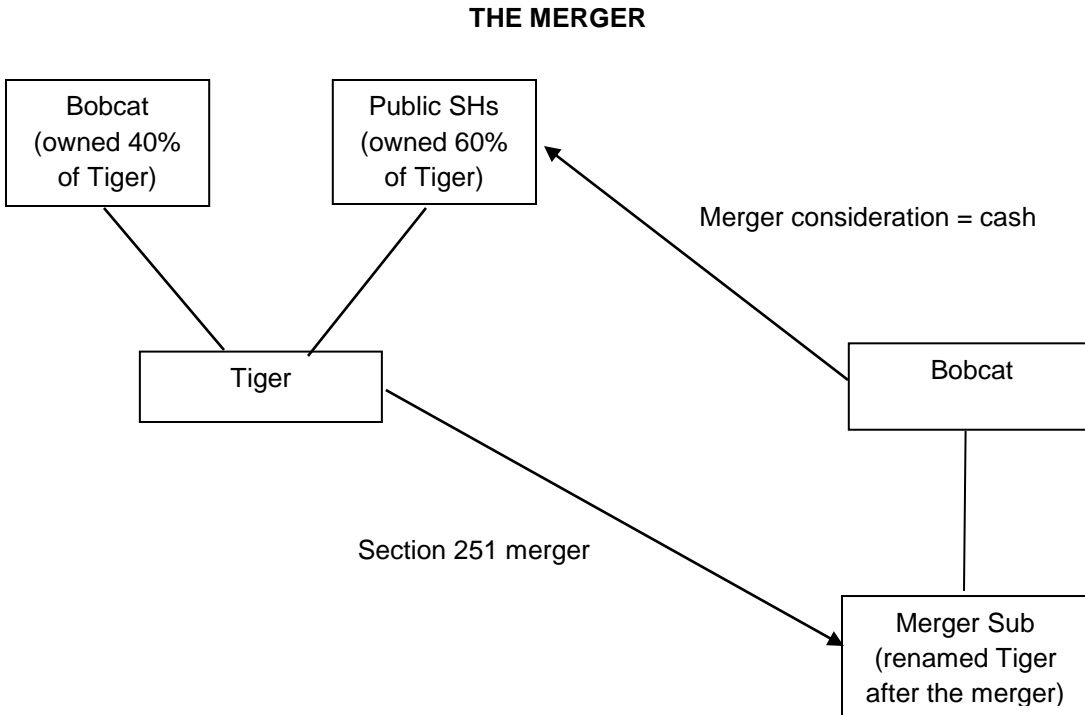
Shortly after the merger was consummated, Tech Co. sued BB2 for patent infringement. Tech Co. asserts BB2 is not entitled to the patent rights granted by the License. In short, Tech Co. asserts the License did not transfer to BB2 in the merger.

Your assignment:

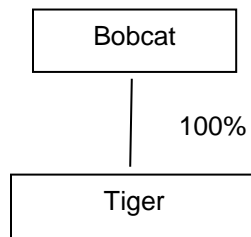
- (a) Please analyze Tech Co.’s claim that the License did not transfer to BB2 in the forward-triangular merger.
- (b) The License Agreement was granted to BB on very favorable terms. Pierce should have known that Tech Co. would not want BB2 to have those same favorable terms. Tech Co. wants to renegotiate the License. Knowing this, could BB and Pierce have structured their transaction differently to allow Pierce to acquire BB (and the License) without needing Tech Co.’s consent? Please explain.

Question 6 (45 points possible—20 minutes suggested)

Tiger Co. (“Tiger”), a Delaware corporation, was a publicly-traded company. Bobcat, Inc. (“Bobcat”), a Delaware corporation and a 40% shareholder in Tiger, acquired the remaining stock of Tiger in a cash merger (the “Merger”).



POST TRANSACTION



From the outset, Bobcat’s proposal to acquire the other 60% ownership of Tiger was contingent upon two stockholder-protective procedural conditions.

1. Bobcat required the Merger be negotiated and approved by a special committee of independent Tiger directors (the “Special Committee”); and
2. Bobcat required the Merger be approved by a majority of the disinterested, public shareholders (i.e., shareholders not affiliated with Bobcat).

Your assignment:

- (a) Why do you think Bobcat insisted on the two stockholder-protective procedural conditions? What benefit did they provide Bobcat? Please explain.
- (b) What if Bobcat's proposal to acquire the other 60% ownership of Tiger was contingent upon satisfying **either** of the two stockholder-protective procedural conditions (i.e., the Merger was (a) negotiated by the Special Committee **or** (b) approved by a majority of the disinterested, public shareholders)? What benefit would Bobcat have received in that case? Please explain.

Question 7 (45 points possible—20 minutes suggested)

Revlon duties apply to the actions of a corporation's directors when they have decided to sell the company (or a sale of the company is inevitable). When triggered, Revlon duties require the selling company's directors to change from protectors of the corporate entity (seeking to maximize the corporation's long-term value) to *auctioneers* whose duty is to get the best price for the shareholders at a sale of the company. In *Lyondell Chemical Co. v. Ryan*, Lyondell shareholders ("Plaintiffs") alleged that Lyondell's directors breached their fiduciary duties, including their Revlon obligations, when they approved Lyondell's sale to Basell. Among other things, Plaintiffs alleged the directors did not obtain the best available price in selling the company. And, the facts suggested that Lyondell's directors may not have perfectly complied with their Revlon duties. Yet, the Delaware Supreme Court held that Plaintiffs' Revlon claims against Lyondell's directors should have been dismissed by the Chancery Court at summary judgment. Please explain why? In giving your explanation, make sure to discuss Delaware General Corporation Law section 102(b)(7).

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END OF EXAM

FOR THE 3Ls AND GRADUATES STUDENTS: Enjoy wonderful careers and please keep in touch.

FOR THE 2Ls: I look forward to seeing you next year.