## **BUSINESS ASSOCIATIONS**

## Berkeley Law School Fall 2012

Law 250 (Section 2, Professor Nicholas Calcina Howson)

## PRELIMINARY SYLLABUS (April 2012)

Wednesday and Thursday, 3:35 – 5:25 PM Classroom: Law School 105

| Pr                   | ofessor Nichola | s Calcina Howson            |
|----------------------|-----------------|-----------------------------|
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#### 1. Course Description and Objectives

"Business Associations" is an introductory corporate and partnership law course and is commonly a prerequisite for several advanced courses in corporate and securities law, corporate finance, mergers & acquisitions ("M&A"), etc. Accordingly, the course will focus on the formation of business organizations, corporate powers and liability, duties of the corporate board, shareholders' voting rights, and M&A (both private and public) transactions. In conformity with the broad title of the course, the class will dedicate some amount of time to studying business associations that are *not* traditional "corporations", such as partnerships, limited liability companies, etc.

### 2. Class Hours

The class will meet Wednesday and Thursday from 3:35 - 5:25 PM in the Law School Room 105.

#### 3. <u>Course Materials</u>

The basic materials for the course are: (1) Charles R.T. O'Kelley & Robert Thompson, Corporations and Other Business Associations: Cases and Materials (Aspen, 6<sup>th</sup> ed. 2010), and (2) The 2010 Statutory Supplement to the above (entitled Corporations and Other Business Associations: Selected Statutes, Rules and Forms, 2010).

Some materials (including (i) assigned readings like the Delaware Chancery Court's *In re The Walt Disney Co. Litigation* opinion (Items U & V), (ii) optional readings like the chapters from Micklethwait and Wooldridge's *The Company: A Short History of a* 

Revolutionary Idea (Items A & M), (iii) current news reports and articles regarding corporate and partnership law developments posted by Professor Howson, and (iv) casebook Problem solutions) will be placed on the bSpace site for the course. Sometimes these will be notified by e-mails sent via bSpace and "announcements" posted on the bSpace site.

Three books have been put on reserve in the Law Library for further reading:

First, as optional supplementary reading for those without any substantial business or financial background, the following is recommended: Robert W. Hamilton and Richard A. Booth, *Business Basics for Law Students* (Aspen Law and Business, 4<sup>th</sup> ed. 2006) ("H&B"). Students may want to review the following sections of H&B: Chapters 2 (Present Value), 6 (Accounting and Financial Reporting), 7 (Valuation of a Going Business), Section 8.16 (Federal Taxation – Corporations and Other Business Forms), 10 (Business Organizations), 11 (Corporations), Sections 12.1 – 12.5, 12.9, and 12.2 (Securities Regulation -- various), and 13 (Mergers and Acquisitions). Two copies of this book have been placed on reserve. Also placed on reserve (again, two copies) is a less accessible book on business law basics: William A. Klein, John C. Coffee, Jr. and Frank Partnoy, Business Organization and Finance: Legal and Economic Principles (Foundation Press, 11<sup>th</sup> ed. 2010). Third, those who are interested in a very readable and witty history of the corporate form specifically may wish to read through the entirety of the following: John Micklethwait and Adrian Wooldridge, The Company: A Short History of a Revolutionary Idea (Modern Library 2003) ("M&W"). Parts of the first half of M&W are noted as optional readings in the course.

## 4. Reading Assignments

Students are expected to do all of the assigned readings prior to class meetings. All reading assignments include all relevant parts of the Statutory Supplement noted in the assigned casebook readings, whether or not noted under "Reading Assignments" on this syllabus. In addition, the reading assignments require that students work through (and be prepared to respond on) the Problems contained in the textbook

Reading assignments are listed under the last section of this syllabus. The reading assignments for the first two classes on Wednesday, August 22, 2012 and Thursday, August 23, 2012 are Items A, B, C and D on this syllabus.

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When reviewing the statutory materials cross-referenced in the casebook, be aware that the course will emphasize: (i) for partnership law, the *Revised* Uniform Partnership Act (1997), and not the Uniform Partnership Act (1914) (what we will call the "UPA(1997)" and the "UPA (1914)" respectively), and (ii) in the area of corporate law, the corporate law of Delaware ("DGCL") and the Model Business Corporation Act ("MBCA").

## 5. <u>Class Participation/"Passes" on Calling</u>

Class participation is extremely important, both for the general edification of the instructor and students, but also to keep students engaged and well-prepared. Students are expected to volunteer to speak or respond to questions in the class meetings. However, Professor Howson will also call on students randomly. If students are not prepared to be called on during a specific class meeting, they are asked to submit a clearly-written note to Professor Howson at the podium *before* the start of the class stating "Not prepared today. Please do not call on me. [Name]. [Date]." Students may accumulate up to four (4) pre-notified passes before their final course grade will be negatively affected.

### 6. Communication/bSpace

Announcements regarding the course will be posted on bSpace (and, generally, notified to students by e-mail via the bSpace mechanism). Students are in any case responsible for checking the bSpace site for announcements that may not have been the subject of an e-mail.

## 7. Final Examination

It is Professor Howson's *preliminary* intention is to give a final exam comprising two parts: a Part 1, which will be entirely "closed book" and consist of short answer and/or "objective" (multiple choice) type questions, and a Part 2, given "open book" (casebook (including casebook supplement), Statutory Supplement, student's own notes, and student's self-prepared outline) essay question. Professor Howson's present intention is to provide for a weighting of 60/40% ratio between the objective (multiple choice)/essay sections.

### 8. Office Hours

| Professor How  | son's office | hours meeting | s for the course | , in twenty (20) | ) minute intervals |  |
|--|--------------|---------------|------------------|------------------|--------------------|--|
| will be  | _ mornings   | between       | _ while classes  | are in session.  | Students must      |  |
| sign up for offi   | ce hours bef | ore 4:00 PM o | n the immediat   | ely preceding _  | by e-              |  |
| mailing Profess  | sor Howson'  | s assistant,  | , at             | ·                | must, in a         |  |
| responsive e-mail, confirm students' appointments for office hours, and the agreed time, |              |               |                  |                  |                    |  |
| prior to the 4:0   | 0 PM         | deadline.     |                  |                  |                    |  |

#### 9. Additional Assignment – Problem 3-4

We will discuss students' written answers to Problem 3-4 appearing at pp. 164-166 in the casebook in class (see Item M on the Reading List of this syllabus). Students are asked to hand in to Professor Howson, *immediately before the start of the relevant class session*, a five (5) page response to Problem 3-4, comprising (i) one page responding to questions 2 and 3 of the Problem (recommendation of share allocations and memo describing matters to be addressed in By-Laws) and (ii) four pages of a pencil mark-up of a Xerox

copy of the "Articles of Incorporation of the Plasti-Sheen Corporation" appearing at pp. 515-518 of the Statutory Supplement.<sup>2</sup> This exercise will not be graded, but is designed to have students apply themselves to the basic mechanics of corporate structuring. Students who do not turn in an answer prior to the start of the designated class will be deemed to have used up two (2) of their permitted four (4) "passes" described in Section 5 above.

## 10. Enron Movie

Professor Howson intends to convene an optional showing of the 2005 Enron-related film "The Smartest Guys in the Room" for students in his Business Associations section. The time and date of the showing will be notified to students, but is likely to occur in [November], and on a Thursday evening after class.

To be very clear: this entails making a Xerox copy of pp. 515-518 of the Statutory Supplement, and then marking in pencil changes you would make to the Articles. For instance, you would cross out the words "The Plasti-Sheen Corporation" in the title, and indicate its replacement with the words "Hip-Hop.com", etc.

## Reading Assignments

All numbers in the "Reading" line below, unless prefaced with an abbreviation referring to another source or text, refer to pages in the O'Kelley & Thompson casebook. "Additional Reading" means additional <u>assigned</u> reading, e.g., the additional assignments at Items B and C (provisions of the Restatement of Agency (3rd)), and Items U & V (the Delaware Chancery Court opinion regarding the termination of Michael Ovitz's employment at The Walt Disney Company, which students will be expected to review in its entirety). "Optional Reading" is completely optional. The indication "(Supp.)" means the 2010 Statutory Supplement.

#### Item A -- Introduction

Topic: Introduction to the course and history of the business association; business

associations: economic and legal aspects

Reading: 1-20

Optional Reading: M&W, 3-54 ("Merchants and Monopolists"; "Imperialists and

Speculators"; and "A Prolonged and Painful Birth") [available on bSpace]

### Item B -- Agency

Topic: Agency: duties of agent and principal to each other

Reading: 20-39

Cases: Community Counseling Service, Hamburger, Foley

Additional Reading: Restatement of Agency (3rd), Sections 1.01, 1.02, 1.03 (Supp.)

## <u>Item C -- Agency</u>

Topic: Agency: authority in relation to third parties

Reading: 39-49

Cases: Blackburn, Sennott

Additional Reading: Restatement of Agency (3rd), Sections 2.01-2.06, 3.01, 3.03 (Supp.)

#### Item D -- Partnership

Topic: Partnership and other non-corporate forms; <sup>3</sup> characterizing the relationship;

(skim) sharing profits and losses Reading: 51-75 (skim 68-75)

Cases: Byker, Hyansky, (and skim both of) Kovacik, Shamloo

#### <u>Item E -- Partnership</u>

Topic: Partnerships: fiduciary duty: duty of loyalty; self-dealing

Reading: 75-87

Cases: Meinhard, Vigneau

Students are asked to read pp. 51-56 and the cross-referenced statutory material carefully. There will *not* be an extended discussion of the various non-corporate business associations in this class session but students will be expected to be familiar with and understand the differences described for later in the course.

#### Item F -- Partnership

Topic: Partnerships: fiduciary duty and management; contracting for absolute discretion

Reading: 87-95 Cases: *Covalt, Starr* 

## <u>Item G – Partnership</u>

Topic: Partnerships: duty of care

Reading: 95-98 Cases: *Ferguson* 

#### Item H -- Partnership

Topic: Partnerships: dissolution and dissociation: the basic framework; wrongful

dissociation Reading: 98-114

Cases: McCormick (start), Drashner, McCormick (conclusion)

## <u>Item I -- Partnership</u>

Topic: Partnerships: fiduciary limits on dissolution "at will" and expulsion of unwanted

partners

Reading: 115-126 Cases: *Page, Bohatch* 

#### Item J-- Partnership

Topic: Partnerships: contracting to prevent opportunistic withdrawal

Reading: 126-135 Cases: *Meehan* 

#### Item K – Partnership

Topic: Partnerships: allocating the risk of loss in transactions with third parties

Reading: 135-151

Cases: P.A. Properties, Haymond, Dow

#### Item L – Corporations

Topic: Introduction to the corporate form

Reading: 153-159 (and be sure to do Problems 3-1 and 3-2; for Problem 3-1, students

may use (*i.e.*, read through and consider ) the MCBA *only* if they wish)

#### Item M -- Corporations

Topic: Governance: articles of incorporation; issuance of stock

Reading: 159-166 (do Problems 3-3 and 3-4, with the answer to Problem 3-4 written and submitted before the start of class as directed above in Section 9 of this Syllabus

("Additional Assignment")).

Optional Reading: M&W, 55-78 ("The Rise of Big Business in the United States")

[available on bSpace]

## <u>Item N -- Corporations</u>

Topic: Voting rights

Reading: 166-170 (to the top of the page)<sup>4</sup>

Optional Reading: H&B, Chapter 11

## <u>Item O -- Corporations</u>

Topic: Shareholder action after director election and removing directors

Reading: 170-189

Cases: Hoschett, Adlerstein

#### Item P -- Corporations

Topic: Initial issuance of securities and introduction to securities regulation and

disclosure; non-public offerings

Reading: 196-208

Cases: Edwards, Ralston Purina

## <u>Item Q-- Corporations</u>

Topic: Governance at publicly-held corporations: the National Market System and the Efficient Market Hypothesis; institutional investors; proxy voting; registration of public companies

Reading: 208-220

#### Item R -- Corporations

Topic: Proxy solicitations; shareholder proposals; governance related proposals

(amending by-laws and majority voting)

Reading: 220-226 (skip Problems 3-11 and 3-12); 230-246; 246-251

Cases: CA, Inc. v. AFSCME, Kistefos AS

## <u>Item S – Corporations and Fiduciary Duty</u>

Topic: Directors' fiduciary duties generally; introduction to the Business Judgment Rule

Reading: 265-276 Cases: *Shlensky*, *Dodge* 

#### Item T – Corporations and Fiduciary Duty

Topic: Fiduciary duty of care: policy; in the decisional setting

Reading: 323-350 (focus overwhelmingly on *Van Gorkom*, and do not do Problem 4-7) Cases: *Joy* (excerpt), *Smith v. Van Gorkom* (widely known simply as "*Van Gorkom*")<sup>5</sup>

This assignment has only a few pages, but students should work carefully on Problems 3-5, 3-6 and 3-7 (which asks you to revisit Problem 3-4, the subject of your assignment) and take notes on your responses prior to the class.

This is one of the most important cases the class will cover; please read it carefully and try to become as familiar as possible with the rich facts.

## <u>Items U & V – Corporations and Fiduciary Duty</u>

Topic: Fiduciary duty of care: statutory exculpation; directors' duty to monitor and the uses and abuses of duty of "good faith"; "waste"; *Disney*; "good faith" and its relationship to duty of care/duty of loyalty; officer's oversight and reporting; and officer's fiduciary duties (and business judgment rule protection)

Reading: 350-357 (exculpation); 357-375 (oversight duty ("good faith")), duty of care, and duty of loyalty, note mention of *Stone* (good faith a part of duty of loyalty) at 358 and 371-2 (note 1); 428-32; 386-387 (introduction to *Disney*); 375-376 (introduction to "waste"); *Disney* [on bSpace]; <sup>6</sup> 392-393 (note 2 regarding *Lyondell*); and 393-398 (*Miller* and focus on note 2 regarding *Gantler*).

Cases: Malpiede, Caremark, Stone, In re The Walt Disney Co. Litigation, Lyondell, Miller, Gantler

Additional Reading: *Disney* [on bSpace]

Optional Reading: *Stone* [on bSpace]; *Lyondell* [on bSpace]; *Gantler* [on bSpace]; (Supp.) 506-8 (form of Ovitz Employment Contract)

## <u>Item W – Corporations and Fiduciary Duty</u>

Topic: Fiduciary duty of loyalty: introduction and corporate opportunity (ALI and

Delaware approaches) Reading: 277-300

Cases: Northeast Harbor Golf Club, Broz

#### Item X – Corporations and Fiduciary Duty

Topic: Fiduciary duty of loyalty: conflict of interest; transactions with controlling

shareholders Reading: 300-322

Cases: Globe Woolen, Sinclair, Shapiro

## <u>Item Y – Corporations and Fiduciary Duty -- Shareholders' Litigation</u>

Topic: Derivative suits: demand requirement

Reading: 398-411 Cases: *Aronson* 

Optional Reading: 376-386 (*Disney* derivative pleadings); Second Amended

Consolidated Derivative Complaint, In re The Walt Disney Co. Litigation, (Supp.) 483-

505

## <u>Item Z – Corporations and Fiduciary Duty – Shareholders' Litigation</u>

Topic: Derivative suits: *Aronson's* first prong; second prong; *Caremark* claims; dismissal

by independent committee

Reading: 411-438

Cases: In re The Limited, Ryan, Stone, Zapata

Try to read the entire Delaware Chancery Court opinion, but be sure to focus on "Legal Standards," "Analysis" and "Conclusion", even if you have to skim 6-93 ("Facts").

## <u>Item A1 – Close Corporations</u>

Topic: Close corporations: contracting around law: directors' decisions and shareholders'

decisions

Reading: 447-472 (skip Problem 5-1)

Cases: Zion, Blount, Ramos

#### Item B1 – Close Corporations

Topic: Close corporations: traditional deference to majority; partnership analogy;

enhanced duty

Reading: 473-504 (skim Heatherington & Dooley and Easterbrook & Fishel excerpts and

notes/questions following those excerpts (488-492))

Cases: Zidell, Donahue, Wilkes, Nixon

#### <u>Item C1 – Close Corporations</u>

Topic: Close corporations: modern approach to involuntary dissolution; buyouts

Reading: 504-519

Cases: In re Kemp & Bealtey, Gimpel

## <u>Item D1 – Close Corporations</u>

Topic: Close corporations: share repurchase agreements

Reading: 519-533

Cases: Concord Auto, Gallagher, Pedro

#### Item E1 – Close Corporations

Topic: Close corporations: LLCs Reading: 535-545; 556-571; 587-591

Cases: Elf Atochem, Bay Center Apartments, Kahn, VGS

Optional (re-) Reading: 51-56 (focusing on 54-56)

#### Item F1 – Risk Allocation

Topic: Outsiders: introduction; "equity cushion"; dividends and distributions

Reading: 593-608 (skip Problem 7-2)

Cases: Klang

#### <u>Item G1 – Risk Allocation</u>

Topic: Outsiders: piercing the veil to real persons in contract

Reading: 608-625

Cases: Consumer's Co-op, K.C. Roofing Center

## <u>Item H1 – Risk Allocation</u>

Topic: Outsiders: piercing the veil to real persons in tort; to incorporated shareholders

Reading: 625-651

Cases: Western Rock, Baatz, (skim) Craig, Bestfoods

#### Item I1 – M&A and Control Transactions

Topic: Mergers: introduction; mergers and dissenters' rights

Reading: 689-708

Cases: Hewlett-Packard

#### Item J1 – M&A and Control Transactions

Topic: Mergers: contracting around appraisal and voting rights

Reading: 708-720

Cases: Applestein, Hariton

#### Item K1 – M&A and Control Transactions

Topic: Mergers: intersection of appraisal rights and fiduciary duty review (cash out

mergers and "business purpose" test)

Reading: 720-728 Cases: *Coggins* 

## <u>Item L1 – M&A and Control Transactions</u>

Topic: Mergers: the Weinberger approach

Reading: 728-744 Cases: *Weinberger* 

## Item M1 – M&A and Control Transactions<sup>7</sup>

Topic: Mergers: after Weinberger: valuation in statutory appraisal; appraisal as an

exclusive remedy (Delaware and other jurisdictions)

Reading: 744-769 (skim exclusivity in "other jurisdictions" (762-769))

Cases: Cede, Glassman, Stringer

# Item N1 – M&A and Control Transactions<sup>8</sup>

Topic: Transfer of control (control block, office, negligent sale) for a premium

Reading: 801-812

Cases: Tryon, Essex Universal, Harris

#### Item O1 – M&A and Hostile Transactions

Topic: Hostile takeovers: introduction and traditional review

Reading: 827-845 (skim introductory materials (827-837) and focus on *Cheff*)

Cases: Cheff

## <u>Item P1 – M&A and Hostile Transactions</u>

Topic: Hostile takeovers: enhanced scrutiny under *Unocal*; "poison pill" defense

Reading: 845-860 Cases: *Unocal, Moran* 

If time permits, or as assigned reading only but not discussed in class.

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## <u>Item Q1 – M&A and Hostile Transactions</u>

Topic: Hostile takeovers: enhanced scrutiny revisited: the Revlon rule; refinement of

Unocal and Revlon Reading: 861-878

Cases: Revlon, Paramount Communications v. Time

## <u>Item R1 – M&A and Hostile Transactions</u>

Topic: Hostile takeovers: even more enhanced scrutiny: QVC

Reading: 878-894

Cases: Paramount Communications v. QVC

End of Syllabus for L250, Section 2 (Professor Nicholas Calcina Howson)