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## CORPORATIONS SYLLABUS

Fall Semester, 2006

Jay Brown

### REQUIRED READING:

Material as noted. There is no textbook. Materials will be provided electronically, by cd or by links to the Internet.<sup>1</sup> Problems will be periodically distributed via the Internet. You will need to read the Wall Street Journal. A three-month subscription is recommended.

### GRADING:

The grade will consist of a final examination. I reserve the right to alter the grade by as much as one half grade based upon class participation (or lack thereof).

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<sup>1</sup> Copies of the relevant statutes can also be found at the Colorado Legislature web site at <http://198.187.128.12/colorado/lpext.dll?f=templates&fn=fs-main.htm&2.0>.

- I. Week 1 & 2: Choice of Entity
  - A. Background: Enron
    - 1. Enron, Disney, and Corporate Governance
  - B. Alternative Entities
    - 1. Text, pp. 1-4
    - 2. General partnerships:
      - a. Defined: C.R.S. 7-60-106(1)
      - b. Liability: C.R.S. 7-60-115 (1); 7-60-116
      - c. Rights and duties: C.R.S. 7-60-118(a), (e), (g) & (h)
      - d. Agent status: C.R.S. 7-60-109
    - 3. Limited partnerships (LP):
      - a. Defined: CRS 7-62-101(7)
      - b. Formation: C.R.S. 7-62-201
      - c. Liability: C.R.S. 7-62-303
      - d. *Fox v. I-10, Ltd.*, 957 P.2d 1018 (Colo. 1998)
    - 4. Limited liability partnerships (LLP): C.R.S. 7-60-115(2)
    - 5. Limited liability limited partnership (LLLLP): C.R.S. 7-62-403
  - C. LLCs
    - 1. Text, pp. 6-8
    - 2. Colorado Limited Liability Company Act:
      - a. Limited liability: C.R.S. 7-80-705
      - b. Articles of organization: C.R.S. 7-80-204
      - c. Management: C.R.S. 7-80-401 - 403
      - d. Standards for management: C.R.S. 7-80-404
      - e. Non-waivable provisions: C.R.S. 7-80-108
    - 3. Delaware Limited Liability Company Act
      - a. Fiduciary duties, 6 Del. Code 18-1101
    - 4. Cases
      - a. *Haley v. Talcott*, 864 A.2d 86 (Del. 2004)
  - D. Subchapter S Corporations; Text, pp. 4-6
  - E. Problem #1: Kingdom Films

- II. Week 3: Sources and Development of Corporate Law
  - A. Sources of corporate law
    - 1. State (corporate code)
      - a. CRS 7-106-102: Committees
    - 2. Self-regulatory organizations (NYSE)
      - a. <http://www.nyse.com/regulation/listed/1101074746736.htm> (Section 303A, Corporate Governance Standards, #4 & #5)
    - 3. Federal (federal securities laws)
      - a. Item 7(d), Schedule 14A, 17 CFR 240.14d-101
  - B. Overview: The Race to the Bottom
    - 1. *Liggett Co. v. Lee*, 288 U.S. 517 (1933)(Brandeis, J., dissenting)
    - 2. Text, pp. 9-14
    - 3. Internal affairs of a partnership; see 7-60-154(b)
    - 4. Blank check preferred stock: CRS 7-106-102
      - a. See [www.disney.com](http://www.disney.com), find the link for Disney Inside and the link for corporate information (Disney Web Page), then find the link for corporate governance. Find the articles of incorporation (“Disney Articles”). Look at p. 22 and read the section on preferred stock.
  - C. Problem #2: Reliance v. Disney

### III. Week 4 & 5: Circumventing Limited Liability

#### A. Formation & defective formation

1. Text, pp. 15-16
2. Formation
  - a. Articles of incorporation: CRS 7-102-101; CRS 7-102-102
  - b. Bylaws: CRS 7-102-106; 7-110-201; Disney Articles, Article X, p. 26
  - c. Organizational formalities: CRS 7-102-105
3. Defective Incorporation
  - a. CRS 7-102-103; 7-102-104
  - b. *Pharmaceutical Sales and Consulting Corp. v. J.W.S. Delavau Co.*, 59 F.Supp. 2d 398 (N.J. 1999)

#### B. Piercing the Veil

1. *Yoder v. Honeywell, Inc.*, 104 F.3d 1215 (10<sup>th</sup> Cir. 1997)(relying on Colorado Law)
2. Piercing the veil of an LLC: CRS 7-80-107

#### C. Successor Liability

1. *Berg Chilling Systems, Inc. v. Hull Corp.*, 435 F.3d 455 (3<sup>rd</sup> Cir. 2006)

#### D. Problem #3: The Anaheim Angels

IV. Week 6 – 10: Management of the Corporation: Disney Case Study

A. Who runs the corporation?

B. Board Structure

1. Directors:

- a. Text, pp. 17
- b. Number of directors: CRS 7-108-103
- c. Staggered boards: CRS 7-108-106
- d. Vacancies: CRS 7-108-110
- e. Meetings: CRS 7-108-201 – 205
- f. Disney
  - i. Disney Articles, Article V, pp. 23-24
  - ii. Disney Proxy Statement, read pp. 2-4 (chairman and committees); 5-7 (director selection); 7 (board compensation)

2. Independent directors

- a. Why are they important?
- b. Text, pp. 18-26
- c. The problem of definition
  - i. State law definition
    1. Disney I: *In re Disney*, 731 A.2d 342; 1998 (Del. Ch. 1998)
    2. *Beam v. Martha Stewart*, 845 A.2d 1040 (Del. 2004)
  - ii. Self Regulatory Organizations:  
<http://www.nyse.com/regulation/listed/1101074746736.html> (Section 303A, Corporate Governance Standards, #4 & #5)
  - iii. SEC and Sarbanes-Oxley: Section 301 of Sarbanes-Oxley; Rule 10A-3, 17 CFR 240.10A-3; Exchange Act Release No. 47654 (April 9, 2003)
- d. Disney Proxy Statement, pp. 4-5 (director independence)

C. Management's authority and fiduciary obligations

- a. Overview: Text, pp. 27-36
- b. Duty of care
  - i. CRS 7-108-401; Text, pp. 27-30

- ii. Business judgment rule: *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985)
  - iii. Setting aside the presumption: *Brehm v. Eisner*, 2006 Del. Lexis 307 (Del. June 8, 2006)
- c. Duty of loyalty
- i. Conflicts of interest; Text, pp. 27-30
  - ii. What is a conflict of interest?
    - 1. See *In re Disney*, 2004 Del. Ch. LEXIS 132 (Del. Ch. Sept. 10, 2004)
    - 2. General: See Disney Proxy Statement, pp. 8-9 (related party transactions)
    - 3. Salaries: See Disney Proxy Statement, pp. 10-18
  - iii. Duty of loyalty and the importance of independent directors (review relevant sections of Text).
  - iv. An alternative approach: Categorical prohibitions. See Section 402 of Sarbanes Oxley; Section 13(k), 15 USC 78m(k).
- d. Good faith
- i. *Brehm v. Eisner*, 2006 Del. Lexis 307 (Del. June 8, 2006)
- e. Duty to monitor
- i. *In re Caremark*, 698 A.2d 959 (Del. Ch. 1996)
  - ii. Is *Caremark* outdated? See Section 404 of Sarbanes-Oxley; Item 308 of Regulation S-K, 17 CFR 229.308; Exchange Act Release No. 53385 (Feb. 28, 2006).
- f. Waiver of liability:
- i. CRS 7-108-402
  - ii. Disney Articles, Article IX (2. Limitation of Liability), p. 25
  - iii. *Brehm v. Eisner*, 2006 Del. Lexis 307 (Del. June 8, 2006)
- g. Problem #4: Disney and Corporate Governance

V. Week 11 - 14: Shareholders

A. Shareholder Action: Voting and the Proxy Rules

1. Text, pp. 37-41
2. Procedures
  - a. Shareholder meetings:
    - i. Meetings: 7-107-101; 7-107-102
    - ii. Notice of meeting: 7-107-105; 7-107-106
    - iii. Virtual meetings: Del. Code 211(a)<sup>2</sup>
    - iv. Disney Bylaws, Article II, Meeting of Stockholders ([www.disney.com](http://www.disney.com)).
    - v. Notice of Meeting, pp. 1-2, Pixar-Disney Merger Proxy/Registration Statement.
  - b. Voting
    - i. Record date: 7-107-107
    - ii. Cumulative voting: CRS 7-107-209
    - iii. Internet voting: Del. Code 212(c)(2)
    - iv. Voting non-voting shares: CRS 7-110-104
    - v. Disney Proxy Statement, at pp. 27-32 (voting and ownership)
    - vi. *Mm Cos. v. Liquid Audio*, 813 A.2d 1118 (Del. 2003)
3. Matters to be approved
  - a. Amendments to the articles: CRS 7-110-103
    - i. Disney Articles, Article VIII, p. 24
  - b. Sale of assets: CRS 7-112-102
  - c. Dissolution: CRS 7-114-102; 7-114-301
  - d. Mergers:
    - i. Why merge? Skim the risk factors in the Pixar-Disney Merger Proxy/Registration Statement, pp. 7-46
    - ii. The legal requirements: Triangular merger: CRS 7-111-103; Short form merger: CRS 7-111-104
    - iii. The terms
      - a. Pixar-Disney Merger Proxy/Registration Statement, pp. 8-14; 29-33

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<sup>2</sup> Delaware's corporate laws can be found at <http://www.state.de.us/corp/default.shtml>, using the link for corporate laws.

- b. Walk away (termination) fees: *Brazen v. Bell Atlantic Corp.*, 695 A.2d 43 (Del. 1997)
      - iv. Problem #5: Pixar/Disney Merger
    - e. Dissenter (appraisal) rights:
      - i. CRS 7-113-102; 7-113-301
      - ii. Pixar-Disney Merger Proxy/Registration Statement, p 3; pp. 23-28
      - iii. *Paskill v. Alcoma*, 747 A.2d 549 (Del. 2000)
5. Disclosure Obligations
- a. State law:
    - i. Statutes: 7-107-203 (proxies); 7-136-102 (inspection rights)
    - ii. *Disney v. Walt Disney Co.*, 2005 Del. Ch. LEXIS 94 (Del. Ch. June 20, 2005)
  - b. Federal law: The proxy rules
    - i. What companies are subject to the rules? Section 12(g) of the Securities Exchange Act of 1934, 15 USC 78l(g) and Rule 12g-1, 17 CFR 240.12g-1.<sup>3</sup>
    - ii. What do the proxy rules require?
      - a. Rule 14a-3, 17 CFR 240.14a-3: Requirement of distribution of proxy
      - b. Rule 14a-9, 17 C.F.R. 240.14a-9: Antifraud provisions
      - c. Schedule 14A, Items 1, 3, 7, 8, 14, 15, 21
      - d. Disney
        - (1) Disney Proxy Statement, at pp. 10-18 (executive compensation); 19-21 (directors); 22-26 (shareholder proposals)
        - (2) Pixar-Disney Merger Proxy/Registration Statement, pp. 35-37
  - e. Case law:

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<sup>3</sup> To find rules: go to [www.sec.gov](http://www.sec.gov); click laws & regulations; click Securities Exchange Act of 1934; click link within discussion of Act; click link: General rules and regulations promulgated under the Securities Exchange Act of 1934; Find applicable provisions.

- a. *In re Disney Co.*, Exchange Act Release No. 50882 (admin proc Dec. 20, 2004)
- b. *In re General Electric Co.*, Exchange Act Release No. 50426 (admin proc Sept. 23, 2004)

B. Problem #6: The Pixar-Disney Merger

VI: Review-Catch up