Student BAGS Number ______

Florida State University College of Law
Examination Cover Sheet

Business Associations
Professor Aviram
Spring Semester 2006: April 27, 2006
Number of Pages: 8 (including this page)
Time Allotted: 4 hours

<u>Exam Instructions</u>

1. **Permissible material**: This is an open book exam. You may use any material that is in hardcopy format, but you may not use any material that is in electronic format. You may not communicate with anyone about the exam until it is over, and you may not access the internet while taking the exam.
2. **Anonymity**: The exams are graded anonymously. Do not put your name or anything else that may identify you (except for your student number) on the exam.
3. **Legibility**: If you handwrite your exam, please write legibly. I will do my best to read your handwriting, but will have to disregard (and not give you points for) writing that is too small to read or otherwise illegible.
4. **Confidentiality**
   a. Once you receive this exam form, you are not allowed to discuss the exam with anyone until after the final day of the exam period for this semester (which may be later than the day of the exam).
   b. Students who are enrolled in this course are not allowed to solicit or receive information on the exam if the source of this information (directly or indirectly) is a person who has seen the exam form.
   c. Violating this section is considered a violation of the honor code.
   d. After the last day of the exam period for this semester, you are allowed to freely discuss the contents of the exam.
5. **Writing the exam**
   a. Cite relevant case and statutory authority.
   b. Length limit permitting, answer all relevant issues that arise from the fact pattern, even if your conclusion on one of the issues is dispositive to other issues.
   c. If you think a question cannot be answered without additional facts, state clearly what facts you believe to be necessary to answer the question.
6. **Applicable law**
   a. If a question specifies the applicable law, then assume that the relevant jurisdiction applies that law.
   b. If a fact pattern specifies the applicable law (and the specific question does not specify applicable law), then assume that the relevant jurisdiction applies that law.
   c. If neither the question nor the fact pattern specified the applicable law, then apply the law we addressed in the course. If the issue was addressed differently in different jurisdictions, then state the rule, application and result in each jurisdiction we addressed.

7. **Length limit**: The total length of your answers is limited as follows:
   a. If you type the exam on a computer, it should not exceed 1,600 words. If you handwrite your exam, it should not exceed 160 lines. These limits are for the entire exam, not for each question.
   b. **For every 10 words (typed exams) / 1 line (handwritten exams) in excess of the length limit (rounded up), one point will be taken off the exam's raw score**.
   c. If you type your exam, please write at the end of it the word count (e.g., "Word Count: 1,519 words"). If you handwrite your exam, please do a similar line count. The words/line used in reporting the word/line count are not calculated in the word/line count itself. **Failure to follow this sub-section will result in a reduction of one point from the raw score**.
8. **Choice**: The exam contains three questions. Answer any two of them. I will grade only the two questions you answered first.
9. **"Fact" patterns are fiction**: The "facts" presented in the exam were constructed for an educational purpose, and were not intended to refer to or inform about any real person or event.

Good Luck!

Essay Fact pattern (answer TWO of the three questions):

Brian, Isabelle and Zeke are partners in “Brian, Isabelle & Zeke” (“BIZ”), a general partnership governed by RUPA.

Scandal at Lake Wobegon: One day, BIZ was contacted by Lake Wobegon Properties, Inc. (“LWP”), a publicly-held Delaware corporation that invests in above-average real-estate. LWP has one class of shares, and has 100,000 authorized shares, all of them outstanding. LWP’s board of directors (“BoD”) has three directors.

Shortly before BIZ was contacted by LWP, the Wobegon Snoop (a local newspaper) discovered that LWP’s properties were not at all above-average. The Snoop revealed that LWP’s CEO masterminded a decade-long cover-up to hide from the BoD and the public the poor investments that LWP made. The BoD launched a full investigation, which revealed that LWP’s properties were worth only half of their purported value. LWP’s share price plummeted, its directors were voted out and replaced, and the new directors replaced the CEO.

Reforming LWP, With No Apparent Effect: LWP’s new directors decided that in order to turn the company around they needed to hire an adviser that would continuously monitor the market, find attractive investments and bring them to the BoD for approval. They contacted two dozen firms, including BIZ, and solicited offers to act as advisers. BIZ made the most attractive offer: In consideration for advising LWP, BIZ asked for a fee of 20% of LWP’s profits, plus $250,000/year. Though the BoD viewed these terms as extremely generous, they were the most modest of the offers LWP received.

At BIZ’s insistence, LWP added a section to its bylaws addressing the role of the “Investment Officer”, as the position was called. One clause stated that the Investment Officer was to advise the BoD about investment opportunities, and was not allowed to bind LWP in any transaction with third parties. Another clause clarified that the Investment Officer does not have to be a natural person, but can be a business entity. Yet another clause stated that an Investment Officer can only be appointed or terminated by the affirmative vote of shareholders owning at least two-thirds of LWP’s outstanding shares. These bylaw amendments were approved by the shareholders and took effect immediately. At the same shareholder meeting, the shareholders also appointed BIZ as the Investment Officer.

Despite the actions of the new BoD, several LWP shareholders (owning in total 15,000 LWP shares) were disillusioned with LWP and decided to sell their LWP shares. BIZ bought their shares, stating that “BIZ puts its money where its mouth is”.

After acquiring these shares, BIZ owned 15,000 LWP’s shares, making them the third largest shareholder. The largest LWP shareholder was local businessman M. Burns, who owned 45,000 LWP shares. The second largest shareholder, with 20,000 shares, was Burns’ right-hand man, W. Smithers. The remaining 20,000 LWP shares were held by over 600 investors, each of whom owned less than 100 shares.

In the following months, BIZ made tremendous efforts to find promising investments. The BoD, after due investigation, followed many of these recommendations. LWP's share prices, however, did not recover. The BoD became increasingly restless about the share prices.

The BIZ report: BIZ recognized the BoD's concerns and understood that LWP's share prices may reflect negatively on BIZ. Taking the initiative, they launched an investigation into the reasons for the LWP stock's poor performance and wrote a report to the BoD with their findings and recommendations.

According to this report, LWP share price was negatively impacted by the fact that most of the shareholders owned less than 100 shares. Brokers charge a lower fee when shares are bought or sold in blocks of 100 shares (known as 'full lots'). On the other hand, brokers charge a higher fee for trades in blocks of less than 100 shares (known as 'odd lots'). Currently only three shareholders - Burns, Smithers and BIZ - own full lots of shares. The other shareholders (and would be buyers) know they face higher fees for trading in odd lots, so they discount the extra fees from the price of LWP shares, depressing share price. According to the BIZ report, this was not a problem prior to the scandal, because at the time there were a number of minority shareholders who owned full lots. These were the shareholders who sold their shares to BIZ.

To solve this problem, BIZ recommended that odd lot holders be "bailed-out" by a tender offer to purchase their shares at 15% above the current market price. Such a tender offer would cost a lot of money. LWP had plenty of cash and could afford the tender offer, but BIZ was of the opinion that LWP should use its funds to make more investments, not waste them on purchasing its own shares. Therefore, BIZ volunteered to execute the tender offer itself, using its own funds to buy the shares of shareholders who own odd lots. To allow this tender offer to succeed, BIZ only asked that the BoD would announce that LWP would not buy back any of its own shares in the coming year. Without that promise, said BIZ, minority shareholders would hold out on BIZ's tender offer in the hope that the tender offer would fail, the odd lot problem would persist, and LWP would have to launch another tender offer at a higher price. BIZ explained that it is willing to risk its own money because in ensuring that LWP succeeds, BIZ will build a reputation as an effective and devoted Investment Officer.

Prof. Knowitall's Advice, Ignored: The BoD seemed grateful for BIZ's offer, but explained that it cannot accept it without thorough consideration. It then hired Professor John Knowitall, a finance expert at a reputed business school, to review the BIZ report and assess whether the report correctly identified LWP's problem and offered a reasonable solution. Prof. Knowitall spent several weeks investigating the proposal and LWP's trading patterns, and then presented the BoD with his analysis. According to Prof. Knowitall, the large number of odd lots did indeed depress LWP's share price, and consolidating the odd lots would likely increase the share price.

Prof. Knowitall said that a tender offer of odd lots (as BIZ suggested) is one way to solve the problem. Another solution would be a stock split, in which LWP would issue to its shareholders (at no cost) 99 new shares for each existing share of LWP. As a result, each shareholder would own 100 times the number of LWP shares she did before the stock split, ensuring that she would have full lots. Professor Knowitall said that the advantage of the stock split over the tender offer is that the former does not require spending any money.

The BoD listened intently to Prof. Knowitall and asked him what would happen to share prices under the stock split plan. He answered that, because the number of shares will be multiplied by a factor of 100, each of these shares would be worth 1% of the previous share price. This would reduce the price of LWP stock, currently trading at $95, to 95 cents, but since each shareholder would own 100 times the number of shares, the value of the shares would remain the same.

The BoD did not like the idea of LWP stock trading at such a low price, because they knew from their experience that many potential investors were irrational and may think that a low share price suggests that the LWP is doing poorly. Prof. Knowitall acknowledged that some investors may think poorly of a company with stock that was priced low, but he was adamant that the stock split plan was superior to the tender offer plan, because in his opinion saving the expense of the tender offer more than outweighs any irrational psychological effects that a low stock price would cause.

Despite Prof. Knowitall's recommendation, the BoD decided to reject the stock split plan and announced that LWP would not buy its own shares in the coming year. The vote on this decision was unanimous, 3-0. BIZ then launched its tender offer, with great success – all 20,000 shares that were in odd lots were tendered. BIZ paid the shareholders and received the shares. LWP was de-listed from the stock exchange and no longer traded there.

Burns and Smithers Sue: A few days later, Burns and Smithers sued LWP derivatively, claiming that the directors (whom they, as the majority shareholders, nominated and voted into office) breached their fiduciary duties by endorsing BIZ's tender offer. According to the complaint, the tender offer increased BIZ's stake in LWP to 35%, so that it was impossible to remove it from its position as Investment Officer. In addition, the complaint stated that the tender offer was unnecessary since a stock split would have solved the odd lot problem without allowing BIZ to increase its stake in LWP. The complaint alleges that the BoD was grossly negligent in ignoring Prof. Knowitall's advice, which favored the stock split over the tender offer. It also alleged that one of LWP's directors, Bright, was a professor at Yelp University, and that all three of BIZ's partners graduated from Yelp. Another director, Dim (who is a judge) went to law school with Zeke and the two remain friends, and go on hikes together a few times each year. Neither Bright nor Dim specifically disclosed any of this information to the other directors. The complaint did not allege any connection between LWP's third director and BIZ.

I. ***Analyze Burns' & Smithers' suit***. For exam purposes, disregard the issue of whether the suit should be direct or derivative. Also disregard any Federal securities law issues.

Paradise Falls, Delayed: While the suit was pending, Isabelle continued to look for investment opportunities for LWP. Zeke brought to her attention Paradise Falls, a property that was located in the State of Nirvana, about 300 miles from Lake Wobegon. All of LWP's investments were in the Lake Wobegon area, so Isabelle decided not to present this opportunity to the BoD. However, Paradise Falls looked promising as an investment, so Isabelle looked further into it. Some of the research on Paradise Falls was done from the Investment Officer's office at LWP, using LWP's computer, internet connection and phone.

Isabelle decided that Paradise Falls was a good investment and BIZ may want to purchase it. She decided to drive to Paradise Falls (a 5 hour drive) to look at the property. At the outskirts of Lake Wobegon on the road to Paradise Falls, just 10 minutes into the trip, Isabelle received a phone call from LWP's CEO. He told Isabelle that he just learned of a promising real-estate investment, and would appreciate if Isabelle could take a look at it (LWP's CEO occasionally contacted BIZ partners and asked them to look into certain business opportunities that he learned about; this was one such instance). The property was only 5 minutes away, so Isabelle took the nearest exit off of the highway and drove to the property, which was a run-down industrial building.

Flying Monkeys: Arriving at the property, which seemed abandoned, Isabelle saw that someone hung above the door a banner of the Wobegon State Golden Turkeys, the local university's basketball team. Isabelle, who used to play for the Turkeys' arch-rival, the University of Nirvana Flying Monkeys, jumped up and grabbed the banner, tearing it off of the wall. She landed on Earl, the 70-year-old father of the lot's owner, who was just coming out of the door. The frail Earl suffered serious injuries. He sued Isabelle, BIZ and LWP to recover damages for his injuries.

II. Assume that Isabelle is personally liable to Earl for his injuries. ***Analyze Earl's suit against BIZ and LWP***.

Suit settled, Agreement signed: The Burns/Smithers suit was settled out of court by agreeing to abolish the position of Investment Officer (and delete the portions of the bylaws that address the Investment Officer position). Smithers, who was unhappy with this settlement, was persuaded to sell his shares to Burns. BIZ also sold some of its shares to Burns. After the settlement, Burns owned 90,000 shares and BIZ owned the remaining 10,000 shares.

Burns and BIZ signed an agreement stating that both parties will vote their shares to appoint a slate of directors consisting of two directors nominated by Burns and one director nominated by BIZ. The agreement further stated that both Burns and BIZ shall vote their shares in favor of any merger approved by the BoD. LWP's bylaws were amended to state that any act of the BoD requires the consent of a majority of the directors, not unanimity.

Burns nominated himself and Benedict, a well-known banker experienced in real-estate financing. BIZ nominated Brian. Both Burns and BIZ voted all of their shares to elect Burns, Benedict and Brian as directors. The BoD then appointed Burns as the CEO.

Burns at the Helm: Under Burns' management, LWP launched environmentally-unfriendly operations on the lands it owned – nuclear power plants, quarries, coal and gold mines. Burns made sure to comply with all of the laws governing such activities, but his handling of public relations was atrocious. He repeatedly made smug, heartless remarks about the environment, and twice released his hounds to chase away reporters. Burns' bizarre behavior became a media attraction. Burns, and incidentally LWP, frequently made headlines – always portrayed negatively.

Media relations reached a new low when, in response to a reporter asking whether LWP should forego some profits to preserve the environment, Burns responded: "So Mother Nature needs a favor?! Well maybe she should have thought of that when she was besetting us with droughts and floods and poison monkeys! Nature started the fight for survival, and now she wants to quit because she's losing. Well, I say – hard cheese."

Brian's Plan: Brian lost his patience. He secretly met with Benedict and persuaded him that Burns was a liability for LWP because his poor public relations. They could have the BoD vote to fire Burns from the CEO position, but then Burns would replace Benedict with a more loyal director and have himself reappointed. Instead, Brian came up with another plan: BIZ would form a new corporation, NewCo, and fund it with $10 million, which was equal to the fair value of LWP. LWP will then sign an agreement to merge with NewCo. Since both corporations have an identical value, NewCo's shareholder (BIZ) will receive 50% of the merged company's shares, while the other 50% of the shares would be divided pro-rata between LWP's shareholders (90% Burns, 10% BIZ). As a result of this merger, the merged company (which would keep the name LWP) will be owned 45% by Burns and 55% by BIZ. Brian made no promises to Benedict regarding retaining him as a director after the merger, and did not offer Benedict any shares in the merged company.

Benedict met with Isabelle and negotiated with her the details of the merger. He hired an independent consultant to assess LWP's value, and the consultant confirmed that LWP was worth $10 million, and therefore a 50/50 merger with NewCo would be fairly priced for both parties to the merger.

Approving the Merger: LWP's bylaws state that a merger to which it is a party must be approved by both the BoD and the shareholders. Instead of holding a BoD meeting to approve the merger (which would, of course, make Burns aware of the merger), Benedict prepared a written consent that declares that the BoD, by a majority of its directors, approves the merger of LWP with NewCo and authorizes Benedict to sign the merger agreement on behalf of LWP. Benedict and Brian signed the written consent.

Benedict then signed the merger agreement, and convened a shareholder meeting to approve the merger. At this point, the agreement was fully disclosed to Burns and Benedict told him why he thought Burns had to lose control of LWP for the company to prosper. Burns was outraged at what he called "hijacking my company". Brian reminded Burns that according to their agreement Burns must vote in favor of the merger because it was approved by the board. Burns replied "I am the board!" and voted his 90,000 shares against the merger. BIZ voted its 10,000 shares in favor of the merger. Benedict, who chaired the shareholder meeting, announced that Burns is bound by the agreement and therefore counted his votes as if they were voted in accordance with the agreement, in favor of the merger. Benedict announced that all 100,000 shares are considered to be voted in favor of the merger, and therefore the shareholders have approved the merger.

III. Burns sued Benedict, Brian and LWP for an injunction to block the merger, claiming that it was not properly approved by the BoD and the shareholders. ***Analyze Burns' suit***. For exam purposes, disregard the issue of whether the suit should be direct or derivative.

Business Associations – Spring 2006
Memo on the Final Exam

Grades:

	Average	Median	Lowest	Highest
Entire Exam	42.83	44	21	65
Question 1	23.17	24	8	33
Question 2	19.67	18	9	33
Question 3*	N/A	N/A	N/A	N/A

* None of the exams answered question 3.

Below is an example of what would constitute an excellent exam. This is only an example, not the example; i.e., some students received credit for very different, but well explained and correct responses.

I. **Burns' & Smithers' Suit**

1. Challenged decisions: (i) Failing to implement the stock split plan; (ii) If BoD insists on a tender offer plan – allowing BIZ to conduct the tender offer (resulting in BIZ's entrenchment as Investment Officer).

2. BJR: Absent fraud, illegality or conflict of interest, BoD's business judgment is not second guessed by the court (*Kamin*, *Brehm*). There is no fraud or illegality in either decision.

3. Business judgment? Requires sufficient investigation & deliberation. Adequate amount depends on the magnitude of the decision (*Van Gorkom*, *Brehm*).
   (a) Declining the stock split – Moderate magnitude (prevents solving the odd lot problem, but does not entrench BIZ).
   (b) Allowing BIZ tender offer – Major magnitude (allows entrenching of BIZ as Investment Officer).
   (c) BoD made sufficient deliberation and investigation (hiring Knowitall as expert). They accepted Knowitall's conclusion that low price was due to odd lots. This requires knowledge in finance that BoD may not possess. BIZ does possess such knowledge, but lacks objectivity, so BoD cannot rely on BIZ report. BoD can rely on Knowitall's report under DGCL §141(e).
   (d) BoD rejected Knowitall's recommendation to prefer stock split over tender offer. This is a value judgment – psychological impact of low price vs. cost of tender offer and BIZ's entrenchment. Knowitall can clarify impact of each alternative, but it is up to the BoD to decide between the values, so rejecting his preference is appropriate.
   (e) This is true even if BoD makes a stupid choice (*Kamin*), as long as the decision is not irrational (*Brehm*). No irrationality here – concern for low price of shares is reasonable.

(f) No evidence that BoD considered BIZ's entrenchment. Failing to address an issue that is so significant and costly to LWP may violate the duty of care under *Caremark*, even if BoD had no notice of BIZ's intent to entrench itself.
(g) Conclusion: BoD reached a business decision, except perhaps violating a *Caremark* duty by failing to consider the tender offer's effect of entrenching BIZ.

4. Conflict of Interest?
(a) No CoI regarding decision not to split stock – In itself, refusing to split the stock does not entrench or otherwise help BIZ.
(b) Decision not to conduct a tender offer allows BIZ to conduct its own tender offer and entrench itself as Investment Officer. This would create a conflict of interest if directors have an interest in BIZ's success.
(c) Prof. Bright – Bright is a professor at Yelp, while all three partners at BIZ graduated from Yelp. In *Oracle*, a professor had CoI when the affected parties were major donors to his university, or another professor from his university. Merely graduating from the same university is a weak connection. Under *Stewart*, we balance the bond with the affected party with the harm to the director from tarnished reputation. A professor may be significantly affected by a tarnished reputation. Combined with the weak ties to people who merely graduated from his school, it is likely not enough to create a conflict of interest.
(d) Judge Dim – Under *Stewart*, we balance director's harm from offending the affected party with harm from tarnished reputation. Tarnished reputation particularly affects judges. On the other hand, Zeke seems like a friend whom Dim may be reluctant to offend. Closer call than with Bright, but I think mere friendship is insufficient to create a conflict of interest in this case (similar to analysis in *Stewart*).

5. Effect if directors are conflicted:
(a) If majority of directors have CoI, BJR is rebutted. Under *Cinerama*, when at least one director but less that a majority are conflicted, BJR is rebutted only if plaintiff proves that either: (i) interested directors dominated/controlled the board as a whole; or (ii) interested directors failed to disclose material information on their interest.
(b) In this case, no evidence of domination, but no disclosure. Therefore, BJR rebutted if either Bright or Dim has CoI.
(c) Under analysis above, it is likely that neither is conflicted, so BJR applies.

6. Fairness – Under *Bayer*, even if BJR is rebutted, decision does not violate BJR if it is fair. There is insufficient information to know if a 15% premium above market price is fair to the odd lot shareholders.

II. **<u>Earl's Suit</u>**

1. Suit against LWP
(a) Isabelle is LWP's sub-agent (BIZ is the agent), because through BIZ: (1) she acts on behalf of LWP to identify attractive investments; (2) she is subject to LWP's control, since LWP directs the ends of her activity (identifying investments); (3) she consented to the above. [Restatement §1]

(b) Is Isabelle/BIZ a servant? According to Restatement §220(1), a servant is subject to the principal's control as to the physical conduct. LWP generally does not tell BIZ/Isabelle how to assess the viability of possible investments. However, the CEO occasionally asks LWP to look into specific investments. This may be enough to make BIZ & Isabelle servants.

(c) Liability if Isabelle is an independent contractor: A principal is generally not liable for an independent contractor's tort, except when the principal retained control of the activity in which the tort occurs, principal employed an incompetent independent contractor, task is inherently dangerous or duty is non-delegable. In this case, the first exception applies: LWP's CEO directed Isabelle to inspect the property where the tort occurred. Therefore, the analysis continues as if Isabelle was LWP's servant.

(d) Was the tort committed within the scope of Isabelle's employment? Test in Restatement §228(1):

(i) It is of the kind she is employed to perform – Isabelle is employed to inspect properties in order to assess their attractiveness. However, she is not employed to remove banners (this was clearly done for personal reasons). Close call, but I think the former would control, satisfying this prong.
(ii) It occurs substantially within authorized time/space limits – Yes. Isabelle's job requires her to inspect properties, and the tort occurred when & where she did so.
(iii) It is actuated, at least in part, by a purpose to serve the master – No. Removing the banner was clearly an expression of her personal feelings towards the Golden Turkeys, and not intended to serve LWP.
(iv) This prong is irrelevant, because force was not intentionally used against Earl.

(e) Under the alternative Forseeability test (*Bushey*), element (iii) is replaced with a rule that, if some harm is foreseeable, the principal is liable (even if the particular harm was unforeseeable). The agent's conduct, however, must relate to the employment. In this case, the conduct (removing the banner) was not related to Isabelle's inspection of the property for LWP.

(f) Therefore, under either Restatement §228(1) or the foreseeability test, the tort was not within the scope of employment. Under Restatement §219(2), LWP is not liable for torts of its servant that are not within the scope of employment, unless LWP intended the conduct or consequences, LWP was negligent or reckless, the duty was non-delegable, or the servant purported to speak for the master and there was reliance upon apparent authority. None of the exceptions apply, so LWP is not liable to Earl.

(2) Suit against BIZ

(a) RUPA §305(a) states that a partnership is liable for loss or injury caused by a partner acting in the ordinary course of business of the partnership or with authority of the partnership.

(b) In inspecting the property for LWP, Isabelle acted in the ordinary course of BIZ's business of acting as LWP's Investment Officer.

(c) In addition, Isabelle acted in the ordinary course of BIZ's business in traveling to Paradise Falls to inspect property BIZ was considering purchasing for itself. Was the stop at the other property a "frolic & detour" that prevents the tort from taking place as part of the travel to Paradise Falls? Analogizing to *Clover*, probably not: the detour was short (5 minute drive) and Isabelle was to resume her travel after inspecting the property for LWP.

(i) Do Isabelle's personal motivations for removing the banner take her actions outside the ordinary course of business? Possibly, harmonizing the outcomes under agency and partnership law.

III. **<u>Burns' Suit</u>**

1. Did the BoD approve the merger?

(a) Bylaws state that BoD decision requires majority, not unanimity. This is similar to the default rule.

(b) DGCL §141(f) allows acts of the BoD without a meeting, by written consent of all directors, "unless otherwise restricted" by AoI or bylaws. It is not clear whether the bylaw amendment can be interpreted to apply not only to BoD meeting but to BoD written consents. Also, it is not clear if "unless otherwise restricted" allows to reduce the degree of restriction by allowing non-unanimous consent actions. If the answer to either is no, then the consent action is invalid since Burns did not sign it. In that case, there is no BoD approval of the merger.

(c) If the bylaw amendment allows a non-unanimous written consent, the consent may still be invalid if it violates fiduciary duties owed by Benedict or Brian. Unlike Massachusetts, Delaware does not have special rules for fiduciary duties in close corporations (*Nixon*). Do Benedict and Brian benefit from the BJR? They have reached a business decision, and Benedict has no CoI, but Brian does because the merger increases his partnership's ownership interest in LWP from 10% to 55%. With half of the directors involved in the decision having CoI, the BJR will not apply. The decision may still be valid if it is fair (*Bayer*), but acting behind the back of a fellow director and majority shareholder in order to take over his company seems patently unfair.

(d) It is possible that even Benedict violated fiduciary duties – his actions were intended to take control of the company away from Burns. This may amount to determining the corporation's ends, not just its means – which is outside the domain of a director's discretion (*Dodge v. FMC*).

(e) Conclusion: The BoD did not approve the merger, either because a consent is not effective unless it is unanimous or, even if a non-unanimous consent is valid under

LWP's bylaw amendment, this consent violated Brian's fiduciary duties and is therefore invalid.

2. Did the Shareholders approve the merger?

   (a) Is the shareholder agreement valid? DGCL §218(c) permits agreements that obligate a shareholder to vote in a certain way, and if the shareholder refuses to do so, the court will enforce the agreement or provide another remedy (*Ringling Bros*.). However, a court will not always enforce an agreement that restricts the discretion of a director (*McQuade*). A court will enforce an agreement if all shareholders are party to it (*Clark*), as is the case here. However, *Clark* is unnecessary here because the agreement restricts Burns and BIZ as shareholders (in how they vote their shares), not as directors. Therefore, the agreement is enforceable.

   (b) Did Benedict improperly interfere with the shareholder meeting by counting Burns' vote as if he voted in favor of the merger? Under *SWIB*, which follows the *Blasius* test, Benedict's decision is protected by the BJR unless Burns proves that Benedict acted for the primary purpose of interfering with the free exercise of Burns' franchise. This was the case here – Benedict intended to ignore Burns' vote against the merger. Therefore, the second part of the *Blasius* test applies, under which BoD must demonstrate that there was a compelling justification for its actions. In this case, there was – enforcing the shareholder agreement between Burns and BIZ (as mentioned in III.2(a), this agreement is enforceable). However, as explained in III.2(c), the agreement did not apply to this situation, so enforcing it does not justify ignoring Burns' vote.

   (c) However, enforcing the agreement does not allow overturning Burns' vote, because the agreement, while valid, does not apply – Burns is obligated to "vote [his] shares in favor of any merger approved by the BoD". As analyzed in III.1, the BoD did not approve the merger, so the agreement does not limit Burns right to vote his shares.

   (d) Conclusion: The BoD did not validly approve the merger. Therefore, the shareholder agreement does not restrict Burns' actions, and his vote against the merger should result in a shareholder rejection of the merger. Without both approvals, the merger was not approved and the court may enjoin it.