

Final Examination
Mergers & Acquisitions Law
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1. You have three (3) hours to complete this exam.

2. This is an open book exam.

3. This exam consists of one (1) part.

There are four (4) essay questions. You must choose to write your response to any three (3) of the four (4) questions presented below. Please be sure to clearly designate the three (3) questions you choose to answer. Please do not answer more than three (3) questions since you will only receive credit for the first three responses presented in the order presented in your blue book.

There is no time limit on a particular question. All of the questions are equivalent in point score—namely, each of the three (3) questions you choose to answer is valued at thirty (30) points on a ninety point scale. Recall that 10% of your grade (10 points) is based on your course attendance and participation. Each question will be graded based on the quality of your overall response.

Please write your response in the blue books provided. Please write clearly. Write on every other line and every other page to permit instructor comments.

4. Write your exam number on your exam envelope. Put your correct class section and student exam # at the top of this page, each page of questions, and each blue book. **Do not** use your name, student ID number or Social Security Number on any exam materials.

5. At the conclusion of the exam, return all test materials, including blue books, scratch paper, and this exam packet to the envelope and submit it to the proctor. **DO NOT** seal the envelope. Students who do not return all exam materials at the end of the exam may not be graded.

GOOD LUCK!

Essay Questions

Use these facts for all four questions—Additional facts pertinent to answering numbered questions are provided in the questions.

As of Thursday, May 1, 2008 Arrive Acquisitions Corporation (AAcquirer@ or “A”) and Torrens Target Corporation (ATarget@ or “T”) are two calendar year, publicly traded corporations. Acquirer shares are comprised of one class of outstanding publicly traded common stock. Target shares include one class of non-traded privately-held convertible preferred stock and one class of common stock that is listed and traded on a public exchange. Acquirer shares are traded via the NASDAQ National Market System and Target common shares are listed and traded on the New York Stock Exchange.

Acquirer is a Delaware corporation and Target is a California corporation. Both A and T are engaged in business in all states. Acquirer is engaged in separate lines of business that are generally not competitive with or similar to the businesses engaged in by Target. However, Acquirer and Target do compete in one line of business where each possesses a 20% market share. This common business is not significant in contributing to either corporation’s overall profit.

You are T.J. Thomas, Esq., senior partner of the law firm Thomas & Thomas, LLP. You are a well-known M&A lawyer. Your law firm serves as Target’s “outside” general counsel.

On May 1, 2008 you received a call from Tonya Talbot, Esq. Ms. Talbot is a former Thomas & Thomas litigation partner, Ms. Talbot now serves as Target’s Director, Executive Vice President, General Counsel and Secretary. In the course of your conversation with Ms. Talbot a number of important threshold issues are presented for your consideration regarding a proposed unsolicited acquisition of Target initiated by Acquirer.

In the course of your conversation with Ms. Talbot she informed you that Acquirer sent a so-called “bear hug” letter to Target. Essentially the letter indicates that Acquirer seeks to enter into friendly discussions concerning its acquisition of Target via a number of alternative routes, as follows:

1. A direct acquisition of both classes of Target’s outstanding preferred and common shares via an exchange of Acquirer stock. Upon the effective date of the exchange Target shares would be cancelled and Target would merge into Acquirer; or
2. The same acquisition described in the first alternative except that Acquirer would form a new subsidiary (“Sub”) and Target would then, upon satisfaction of the events described above merge Target into the Sub and Target shareholders would receive Acquirer shares; or
3. Acquirer would agree to acquire substantially all of the assets of Target in exchange for either Acquirer shares or, at the option of Target, cash. In this event Target would be free to determine whether it wanted to liquidate or continue its business; or
4. In the event Target does not favorably reply to Acquirer in 15 days from the date of the letter, Target will mount a hostile tender offer.

As noted by Acquirer in the letter and to the knowledge of Ms. Talbot no person or agency, including SEC has been made aware of the solicitation or the existence of the letter.

Subsequent questions arise as time passes and the proposed transaction further unfolds. Specific questions follow.

Remember to choose to answer only 3 of the following 4 questions. Each numbered question contains a few sub-questions. Please answer all questions.

Question 1 appears on the next page.

QUESTION 1. BEAR HUGS: UNSOLICITED OFFER RESPONSES AND THIRD PARTY DISCLOSURES

Ms. Talbot has requested that you spell out your initial views concerning the following matters in a succinct and well-reasoned memorandum directed to her.

(a) Bear hug. What is a “bear-hug letter and what purpose does it serve the Acquirer?

(b) Express Duty to Disclose? As a calendar year public corporation registered under the Securities and Exchange Act of 1934, as amended, do you believe it likely Target has an express duty to disclose to SEC and the public the Acquirer offers or the fact that the letter exists?

(c) Assume no express duty. Assuming your answer to the previous question is that no express duty attaches, do you recommend that Target voluntarily disclose the offer to SEC and the public?

(1) Would your answer to the previous question be impacted if you learn that the Target CEO will be appearing on a nationally-aired television program in a few days to discuss market rumors concerning potential acquisitions of Target?

(2) Assume Target determines it is appropriate to disclose the offer to the public. In what manner should it inform the public and what should it say?

(d) In the absence of extraordinary transactions offer a couple of examples of common situations where a public corporation has a “duty to speak” to the public.

End of Question 1. Question 2 appears on the next page.

QUESTION 2. TARGET BOARD FIDUCIARY RESPONSIBILITIES, DOCUMENTATION AND DEFENSIVE RESPONSES TO HOSTILE OFFERS

On Saturday May 10, 2008 Ms. Talbot and others met at the Target's San Francisco offices in a Special Meeting of the Board to consider the Acquirer's letter. From the outset of the board's discussions, it was clear the Target board did not believe a merger or asset sale was in the best interest of Target or Target shareholders. You have been invited to appear and offer your well-reasoned views in the course of board discussions. Here are a few of the key questions that you have been asked.

(a) Fiduciary duties. What fiduciary duties, if any, do Target board members have as regards consideration of an unsolicited offer? Do extraordinary fiduciary duties apply to a board's role in extraordinary transactions?

(b) Form of Board Resolutions. Should the Target board memorialize its discussions and resolutions in "long-form" or "short-form" corporate resolutions? Discuss.

(c) Classified Board and Class Voting. Assume the Board is a "classified board" and shareholders are entitled to class voting. Assume further the preferred shareholders include only Target insiders—directors and senior officers. How does this impact the ability of the Target or Target shareholders to reject a hostile Acquirer bid?

(d) Crown Jewels, etc. Noting that valuable patent rights are the "crown jewel" of Target, one of the directors has raised the possibility of using various shark repellants to deter the unwanted advances of Acquirer. Among them he suggests the board consider seeking a "white knight" letter of intent wherein crown jewel "lock-up" options, termination fees and no-talk provisions may apply. What is the director referring to when he uses the terms shark repellant, white knight, crown jewel "lock-up" option, termination fee and no-talk provisions? Why might these arrangements deter an unwanted acquisition?

End of Question 2. Question 3 appears on the next page.

QUESTION 3. TARGET SHAREHOLDER VOTING REQUIREMENTS, SHAREHOLDER RIGHTS BOARD RESPONSIBILITIES AND DEFENSIVE RESPONSES TO HOSTILE OFFERS

Assume the Target board believes a merger of Target into Acquirer is in the best interests of Target shareholders. Ms. Talbot has asked you to write her a memo in reply to the following questions:

(a) Antitrust. Given the fact Acquirer and Target compete in one line of business where each possesses a 20% horizontal market share (although the common business is not significant in contributing to either corporation's overall profit), will the merger encounter problems from an antitrust standpoint? Briefly discuss antitrust oversight by FTC and DOJ and what initial requirements apply to the Target. What factors are considered in the determination of whether a transaction may be blocked for antitrust purposes? When should Target notify antitrust regulators of the proposed merger?

(b) Voting. The Target board has decided to recommend Acquirer's proposal to issue Acquirer shares in exchange for all of the preferred and common shares of Target shareholders. In light of the fact Target is a California corporation, what requirements under California law apply to shareholder voting on the proposed merger? Is it likely that additional voting rules may apply under federal law?

(1) A number of minority shareholders have indicated they object to the proposed merger. Briefly, what rights if any do minority shareholders have?

(2) Are Target bondholders or other non-shareholders generally entitled to vote? Are there any circumstances where bondholders might be given a vote? What rights do bondholders often have in regards to extraordinary transactions?

(c) Abandonment. If after favorable recommendation of the Target board Target shareholders approve the transaction and Target enters into a definitive merger agreement, may the Target abandon the merger and effectively disregard the vote? In this

regard, how would a “fiduciary-out” clause assist the Target board in abandoning the merger?

End of Question 3. Question 4 appears on the next page.

QUESTION 4. EXPERTS, LETTERS OF INTENT, MERGER AGREEMENTS, TENDER OFFERS AND PROXY BATTLES

Ms. Talbot has asked you to write her a memo in reply to the following questions:

(a) Experts. What experts are generally engaged by a target corporation in a friendly merger transaction? What roles do the experts play?

(b) “Hidden” Parties. Although merger contracts may refer to the Target and Acquirer as “parties” discuss some of the so-called “hidden” parties and the roles they play.

(c) LOI. What is a letter of intent and how does it differ from a merger agreement?

(d) Confidential Information. Discuss ways of protecting the Target’s confidential information in light of the Acquirer’s need to examine such information to assess valuation of the Target and to perform “due diligence.”

(e) Stalking Horse. What is a “stalking horse” and what benefit might it provide to a target interested in achieving a maximum price for its shareholders?

(f) Tender Offer vs. Proxy Battle. What is a tender offer and how does it differ from a proxy battle? Why would a hostile acquirer use one approach versus another?

(g) Tax comfort. What is “tax comfort” and what devices are used by a target or acquiring corporation to provide such comfort to one another?

END OF EXAMINATION