University of Illinois College of Law
Examination Cover Sheet

Mergers & Acquisitions
Professor Amitai Aviram
Spring Semester 2025
Number of Pages: 4 (including this page)
Exam Date & Time: **Wednesday, May 7, 9am**.

Exam Instructions

1. **Accessing and submitting the exam**
   a. The exam form will be e-mailed to you by my administrative assistant, on the Exam Date & Time.
   b. Save your exam answer as a Word (.doc or .docx) file, with the file name being your 4-digit exam number.
   c. **Submit the exam within 6 hours of the Exam Time (i.e., before 3pm)**, by e-mailing it as an attachment to my administrative assistant Kelly Downs (kdwns@illinois.edu).
2. **Permissible material**: This is an open book exam. Subject to Instruction 3 (confidentiality), you may use any written materials you want, whether in hardcopy or electronic format.
3. **Confidentiality**: Once you receive this exam form, you are not allowed to discuss the exam with anyone until after the last day of the exam period. Students enrolled in this course are not allowed to solicit or receive information about the exam if the source of the information (directly or indirectly) is a person who has seen the exam.
4. **Anonymity**: The exams are graded anonymously. Do not put in your exam answer anything that may identify you, except for your 4-digit exam number.
5. **Length limit**: The total length of your answer may not exceed 1,000 words. For every 10 words in excess of the length limit (rounded up), 1 point will be taken off the exam's raw score.
6. **Answering the exam**: Cite relevant case and statutory authority that is part of the course material, but do not cite sources that are not part of the course material. Subject to the length limit, answer all relevant issues that arise from the fact pattern, even if your conclusion on one of the issues is dispositive to other issues.
7. **Assumptions**: Unless the exam question specifies otherwise, assume that -
   a. The relevant jurisdiction applies the Restatement (Third) on Agency, Delaware corporate law, UPA, and U.S. securities law.
   b. Each business entity's charter states that: the entity is a stock corporation, has limited liability and perpetual existence; the entity may conduct any lawful act or activity; director fiduciary duty is limited to & director/agent right to indemnification is extended to the maximum degree allowed under DGCL §102(b)(7); the board may amend the bylaws.
   c. Each business entity's bylaws state that: the chairperson of the board is authorized to call a board meeting; and the board is authorized to call both annual & special shareholder meetings.
8. **"Fact" patterns are fiction**: The "facts" presented in this exam are not necessarily true in real life.

Bite Inc. ("Bite") is a publicly-traded Delaware corporation that produces unusually flavored foods. This is a risky operation because many products flop, but the few that succeed tend to be very profitable. Chelsea is the CEO of Bite, and is one of its three directors. The other two directors are Daniel, a corporate lawyer, and Dave, a food engineer.

In recent years Bite faced a string of disappointments. A dozen different projects faltered and had to be discontinued. The company was still profitable thanks to significant but slowly declining revenues from past successes. However, the poor growth prospects depressed Bite's share price. In response, two years ago Bite's board decided to focus all of Bite's marketing and development resources on their most promising new product – Vampire's Nightmare ("VN"), a garlic-flavored ice cream. All other product development was discontinued to make resources available for VN.

VN turned out to be a nightmare, though not for vampires. After spending millions on promotion, sales were dismal. Bite hired a consulting firm to investigate why VN failed. After thorough investigation, the firm presented its report, in which it argued that the reason for VN's poor performance was that VN was launched just as several vampire books and movies became fashionable among teens and young adults. The report suggested that due to the growing popularity of vampires, teens and young adults did not like garlic-flavored ice-cream as much as Bite expected they would. The consultants developed a rigorous model that estimated that if public opinion became less favorable to Vampires and more favorable to garlic, VN sales would surge and make Bite worth about $1B (doubling the price its stock was trading at the moment).

* * *

VN's flop caused Bite to post a loss that year – its first loss ever. In the annual shareholder meeting, Chelsea explained the conclusions of the consultant's report, and said that Bite will not give up on VN, but rather will find a way to make VN succeed. Irene, a shareholder, spoke and argued that VN failed not because of people's sympathy for vampires, but because nobody likes garlic-flavored ice cream. She called on Bite's board to stop making VN, and instead acquire the rights to a product that Irene thought was promising – Hot Stuff ("HS"), Jalapeño-flavored jarred baby food. The rights to HS were owned by Sizzle Inc. ("Sizzle"), a Delaware corporation 100% owned by Irene.

Following the shareholder meeting, Irene asked to meet with the board to discuss her plans for Bite to acquire HS. Chelsea promptly arranged for the board to meet with Irene that same week. However, it became clear during the meeting that all three directors were uninterested in HS, and that the board would not spend time and money further exploring Irene's suggestion.

Irene decided to take matters into her own hands. Sizzle had one class of shares, with 10M authorized shares, of which 1M shares were outstanding and owned by Irene. Irene caused Sizzle to issue all remaining 9M shares and offer them to the public at $10/share. In the prospectus given to investors, Irene explained that after Sizzle raised money by selling shares, it would use the money (as well as borrowing additional money as needed) to acquire Bite. It would then make Bite discontinue VN and develop HS instead.

The public offering was successful and Sizzle raised $90M. Other than the money it raised and the rights to HS, Sizzle had no assets.

Sizzle wrote a letter to Bite's board, offering to buy the company for $650M, which was a 30% premium above the price of Bite shares that day. It also repeated its intention, once it acquired Bite, to discontinue VN and develop HS. Finally, the letter warned that if this offer was rejected, Sizzle would "take the battle to Bite's shareholders".

The letter caught Bite's board off guard. Daniel had to fly to an important series of meetings and Dave was leaving for a family vacation which, he promised his wife, would not be cancelled for any reason.

Nonetheless, the board met immediately that day to discuss the letter. Because Daniel and Dave were in a rush, the board only had 30 minutes to discuss the situation. The directors were unanimous that the price offered by Sizzle was far below Bite's true value, based on the consultant's assessment that once VN sales reached their potential, Bite would be worth about $1B. The directors also agreed that Sizzle's plan to discontinue VN clashed with Bite's pro-garlic and anti-vampire corporate culture. Daniel suggested that Bite could preempt Sizzle's offer by offering to buy Sizzle. Chelsea asked at what price, and Dave suggested that since Sizzle's offer was at a 30% premium to the price of Bite's shares, Bite's offer could be at a 30% premium to the price Sizzle's SHs paid at the IPO ($10).

Chelsea suggested that they also try to raise Bite's share price by addressing the problem the consultant identified; specifically, by producing a movie that turned public perceptions against vampires. Dave asked how much that would cost. Chelsea texted a friend who was a Hollywood producer, who immediately responded that a ballpark cost for a movie that would have national impact was about $170M. The board then unanimously authorized Chelsea to do the following things on behalf of Bite:

- Write back to Sizzle, rejecting their offer and stating that $650M was far below the value of the company, as will become evident once VN proves a success.

- Make a tender offer for Sizzle's shares, offering $13/share, a 30% premium on the price they paid for the shares in the IPO (cost: $130M).

- Produce a big-budget movie aimed at teens and young adults, which portrays vampires as evil and garlic-flavored ice cream as potent protection against vampires (cost: $170M).

Chelsea sent the letter to Sizzle, announced the tender offer, and began negotiations with a movie studio to produce the movie. Irene sued Bite's directors, asking the court to enjoin the tender offer and the production of the movie. Bite conceded that Irene had standing to sue.

* * *

News coverage of Irene's suit highlighted Bite's planned anti-vampire and pro-garlic movie. While garlic farmers strongly supported the movie, many vampire-lovers were outraged. One of these vampire-lovers, a lawyer named Nyx, purchased shares of Bite and immediately wrote to Bite's board requesting to add a shareholder proposal to the next shareholder meeting's agenda. The proposal stated: "The shareholders call on the board to cease any activities that disparage vampires, such as the movie that the company is rumored to be producing."

Bite responded that according to its bylaws, the time period in which it is permissible to submit requests for shareholder proposals will only start in two months, and therefore Nyx's request is rejected, though she is welcome to resubmit the request within the time period specified in the bylaws.

The same day that Nyx received the rejection letter, a news story came out that discussed Bite's fateful decision, two years ago, to focus all of Bite's marketing and development resources on VN and discontinue all other product development (the "Focus Decision"). The news story quoted an unnamed source who claimed that Bite's CPDO (chief product development officer) tried in vain to persuade the board not to make the Focus Decision. He told the board that taste tests his department conducted showed that people do not like garlic-flavored ice cream, contrary to the results from the marketing department's focus groups.

Nyx believed the news story provided a "red flag" that focusing on VN was a bad idea, and therefore believed there was a strong case against the board for making the Focus Decision. She wrote to the board again, informed them that she was preparing to sue the directors for the losses Bite suffered from their Focus Decision, and demanded, on the basis of her shareholder inspection rights, a transcript of the board meeting in which the Focus Decision was made. Her stated purpose for exercising inspection rights was to collect information for her suit. She provided proof of her share ownership.

The board wrote back, refusing to allow the requested inspection without providing reasons. Nyx petitioned the court to compel inspection (i.e., force Bite to provide the transcript of the board meeting).

Discuss: (1) Irene's suit; <u>and</u> (2) Nyx's petition to compel inspection.

Model answer for the Spring 2025 M&A exam

1. **Irene's suit**

(a) **Duty & SoR**: Defendants owe FD as directors. The directors aren't self-dealing: They believe VN will succeed, but don't have a personal interest in VN different from SHs' interest, so Entire Fairness doesn't apply. Bite's actions do not embark on a CoC in Bite (they "just say no" to Sizzle, and embark on CoC in Sizzle), so no Enhanced Scrutiny under *Revlon*. Movie production doesn't prevent willing SHs from selling (or exercising any other right), so no Enhanced Scrutiny under *Unocal* regarding the movie. BJR applies to the movie production.

However, the tender offer combines Pacman defense (X buying Y) and Greenmail (bribing Y_S with a 30% premium to abandon acquiring X). This action uses corporate powers & resources to eliminate Sizzle's offer, which prevents Bite SHs from selling their shares to Sizzle, so the tender offer is subject to Enhanced Scrutiny under *Unocal*.[1]

(b) **Application: Movie (BJR)**:

- Self-dealing: no (see 1(a)).
- Bad faith: no. No illegality. No corporate waste, since reasonable people may find Bite's sales could benefit from the movie pro-garlic cultural influence.
- Reasonable investigation: No. Negligence is not exculpated under DGCL §102(b)(7), because the remedy requested is an injunction, not monetary damages. The decision is significant ($170M expenditure; 34% of Bite's market capitalization) and there's no objective urgency. The board decides after a 30-minute discussion with no preparatory work evaluating the expected benefits. The consultant report can be relied on as expert advice (DGCL §141(e)), but only identifies the problem, and doesn't suggest that a movie is a solution. The cost estimate is based on a hasty text exchange with no detailed analysis. The hastiness & lack of analysis for an expense of this magnitude is a red flag that makes the board reckless as to their insufficient information, and therefore grossly negligent. FD breached.

(c) **Application: Tender offer (Enhanced Scrutiny)**:

(i) Did BoD act in good faith & after a reasonable investigation?

- Legitimate threat: Yes. Board sees Sizzle's offer as a threat to Bite's future profits from VN (legitimate to prevent opportunity loss in *Airgas* terminology) & Bite's pro-garlic, anti-vampire corporate culture (legitimate under *Paramount*).

[1] Some students classified the movie and the tender offer as "takeover defenses" and therefore applied *Unocal*. This is incorrect because *Unocal* (and Enhanced Scrutiny generally) only applies to corporate actions that infringe on the exercise of SH rights, rather than any corporate actions aimed at reducing the chance of a takeover. On the opposite end of the spectrum of arguments, some students found the tender offer did not trigger *Unocal* because it did not prevent SHs from selling to Sizzle; it simply attempted to eliminate Sizzle's offer (by buying Sizzle/bribing Sizzle's SHs). Such reasoning is wrong, because it would likely find that poison pills also don't prevent SHs from selling, but rather deter the buyer and therefore eliminate the buyer's offer. Greenmail and Pac Man defense achieve with carrots the same result that a poison pill achieves with sticks – getting the buyer to withdraw their offer. *Unocal* found this to be an infringement on the SHs' right to sell, and other Delaware caselaw likewise applied Enhanced Scrutiny to greenmail.

- Good faith: Yes. No self-dealing (see 1(a)).
- Reasonable investigation: Maybe. The decision is significant ($130M; 26% of Bite's market capitalization) and only 30 minutes were spent considering it. Directors are familiar with the company strategy so they can evaluate the threat posed by Sizzle (of discontinuing VN) and whether stopping the threat is worth $130M. But directors lacked expertise to determine the appropriate premium and arbitrarily offered a 30% premium.

(ii) Reasonable response proportionate to threat posed? Under *Unitrin*: Not coercive – Bite SHs not forced to vote in support. Not preclusive – other bidders for Bite may appear even if Sizzle is acquired by Bite (indeed, greenmail encourages them to appear), and Irene can make another bid for Bite (no standstill agreement). Is it otherwise unreasonable to pay $130M for $90M in cash & HS rights that the board deems useless (so cost of about $40M) proportionate to the threat Sizzle poses to Bite's long-term plans & corporate culture (considering there's no standstill agreement so Irene can launch a new bid)? Probably unreasonable.[2]

Conclusion: Movie enjoyed for lack of reasonable investigation. Tender offer probably enjoined for possible failure of both prongs of *Unocal* (reasonable investigation and reasonable response).[3]

2. **Nyx's suit**[4]

(a) Nyx has standing because her suit to compel inspection is direct. Under *Tooley*, she (not Bite) suffered the harm of being denied information, and she would benefit from the remedy (of compelling production of the information).

Nyx made a written demand to exercise shareholder inspection rights under DGCL §220, and she is a shareholder. The requested information is necessary & essential for her stated purpose: to collect information to sue the board. She also has credible basis for her

[2] Some students wrongly argued, either in analyzing the reasonableness prong of Enhanced Scrutiny or in analyzing whether the board conducted a reasonable investigation, that the process was flawed because there was no reliance on an independent committee (or independent advisors). Whom should those directors/advisors be independent from? There are no facts suggesting that the directors or a controller has interests that differ from those of the SHs with regard to the challenged decision.

[3] Irene's suit only challenged the tender offer and the movie production, not the rejection of Sizzle's offer. The analysis of some students wrongly considered facts or considerations that were only relevant to the refusal of Sizzle's offer (e.g., noting, in the analysis of reasonable investigation, that the board did not consider the ability of Sizzle to finance its proposed acquisition of Bite). Citing facts that were not relevant to the two challenged board actions (but instead addressed the board's rejection of Sizzle's offer) resulted in a penalty to the score.

[4] This answer applied Section 220 as it was before the 2025 DGCL amendments. If such a question came up under the post-2025 amendment version of Section 220, the overall answer would be the same because Nyx lacked a proper purpose, as explained in section 2(b) of the answer. However, the analysis in section 2(a) would be somewhat different. A board meeting transcript isn't within the definition of "books and records" in Section 220(a)(1) (though minutes of board meetings are within the definition). Therefore, under Section 220(e), a transcript of a board meeting isn't the subject of inspection rights unless Nyx complied with the requirements of Section 220(g), including showing a "compelling need" for inspecting such a record.

stated purpose: the news story suggests the board ignored the CPDO's warning, which could substantiate Nyx's planned suit against the board. However, it isn't clear whether Bite has a transcript of the board meeting, and Section 220 can only require inspecting records the corporation has, not the creation of new records.

(b) In any case, Nyx lacks proper purpose because she has no standing to make the suit she is contemplating.[5] Under *Tooley*, the suit is derivative: Bite (not Nyx) lost money due to the Focus Decision, and if Nyx is successful, damages would be paid to Bite (not to Nyx). Because the suit is derivative, Nyx must comply with the contemporaneous ownership requirement, which requires owning shares at the time of the alleged wrong and maintain ownership throughout litigation. The alleged wrong – the Focus Decision, took place two years ago, and Nyx only bought her shares recently, so she has no standing, and thus no proper purpose for inspection. The court will deny her petition.

[5] Some students argued that Nyx's true purpose was not her stated purpose (challenging the Focus Decision) but rather protecting vampires (based on her requested SH proposal). The latter purpose would only be improper if it were not connected to Nyx's position as a SH; that is, if she did not believe that protecting vampires would result in Bite improving its profits in the long-run. For this reason, I did not include this in the model answer. However, a well-reasoned argument (explaining that Nyx's true purpose, as learned from her SH proposal, was to protect vampires at the expense of Bite's profits, and was therefore an improper purpose that was not connected to her role as a SH) received credit.