CORPORATIONS

I. CORPORATE FORMATION
   a. Pre-incorporation Ks – Promoters and Subscribers
      i. Promoters
         1. Promoters are persons acting on behalf of a corp not yet formed.
            a. The corp becomes liable on a promoter’s preincorporation K when the corp adopts the K by
               i. Express board of directors resolution;
               ii. Implied option through knowledge of the K and acceptance of its benefits.
            b. The promoter remains liable on preincorporation Ks until there has been a novation, i.e., an agreement between the promoter, the corp, and the other contracting party that the corp will replace the promoter under the K.
               i. If a promoter enters a K and the corp is never formed?
                  1. The promoter alone is liable on this K.
               ii. If the promoter enters a pre-incorp K, and the corp merely adopts the K?
                  1. Both the promoter and the corp are liable on this K.
                  2. Can sue either one; can only recover once.
            c. Promoters are fiduciaries of each other and the corp. Therefore, promoters cannot make a secret profit on their dealings with the corp.
               i. Sale to corp of property acquired by promoter before becoming a promoter: profit recoverable by corp only if sold for more than FMV.
               ii. Sale to corp of property acquired by promoter after becoming a promoter: any profit recoverable by the corp.
                  1. On Jan 10, Paula begins working as a promoter for the Vegan Deli. On March 10, Paula buys a ton of vegan corned beef for 10k. On April 3, Paula sells the vegan beef to the corp for 20k. May the corp sue Paula?
                     a. Yes. Paula sold her own property which she acquired after becoming a promoter for a profit. Corp may recover that profit on the resale even if the property was sold to the corp at its FMV.
      ii. Subscribers
         1. Persons or entities who make written offers to buy stock from a corp not yet formed.
            a. 1/10, S signs a preincorporation subscription agreement, offering to buy 100 shares of C corp, a corp not yet formed. One week later, S changes her mind. Can S revoke?
            b. No, such an offer is irrevocable for 6 months.
   b. Formation requirements – de jure corporate status
i. **Incorporators**

   1. *Incorporators merely sign and file the articles of incorp with the state.*
   2. The articles MUST include (**A PAIN**):
      1. **Authorized shares**
         a. This is the maximum number of shares the corp is authorized to issue.
         b. The corp may never issue or sell more than the authorized number of shares, not before amending the articles to increase the number of authorized shares.

ii. **Purpose**

   a. **General purpose and perpetual duration – presumed**
      i. Can the articles of Bubba’s Bountiful Biscuits, Inc. indicate that the corp’s purpose is to engage in all lawful activity in perpetuity?
      ii. Yes. *A general purpose and a perpetual duration are valid and will be presumed unless there is a specific purpose or limited duration stated.*

   b. **Specific statement of purpose and ultra vires rules**
      i. What if the articles of Bubba’s Biscuits indicate that the corp’s purpose is to sell Southern-style sausage biscuits and the corp later sells T-shirts as well as the biscuits? Selling T-shirts is an ultra vires activity.
      ii. **Ultra vires ➔ beyond the purpose/specific statement of purpose of the corp.**
         1. **2 consequences:**
            a. *The state can enjoin the ultra vires activity.*
            b. *The corp may sue its own directors and officers for losses caused by the ultra vires activity.*

iii. **Agent – and address of registered office**

   a. Registered agent is corp’s official legal representative

iv. **Incorporators**

v. **Name of corporation**

   a. Can I form a corp with the name Bubba’s Bountiful Biscuits?
      i. No, the name of a corp must contain some indicia of corp status.

   iii. **By-laws – the corp need not adopt by-laws. The board has the power to adopt by-laws. The board has the power to adopt and amend the by-laws unless the articles give the power to the SH.**

vi. **De facto corp doctrine**

   i. A business failing to achieve de jure corp status nevertheless is treated as a corp if the organizers have made a good faith colorable attempt to comply with corp formalities and have no knowledge of the lack of corp status.

vii. **Corporation by estoppel**

   i. Under the common law doctrine of corp by estoppel, persons who have dealt with the entity as if it were a corp will be estopped from denying the corp’s existence. The doctrine applies in K to prevent the corp entity, and parties who have dealt with the entity as if it were a corp, from backing out of their Ks. However, it does not apply to tort victims.

viii. **Legal significance of formation of corp**

   i. A corp is a separate legal person

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ii. Generally, SH are not personally liable for debts of corp. This is the principle of limited liability, which means that the SH is liable only for the price of her stock.

f. **Piercing the corp veil**
   i. **GR:** a SH is not liable for the debts of a corp
   ii. **Except:** piercing the corp veil to avoid fraud or unfairness
       1. *Alter-ego – failure to observe sufficient corp formalities, OR*
       2. *Undercapitalization – failure to maintain sufficient funds to cover foreseeable liabilities*
   iii. X is the SH and CEO of Glowco, Inc., a corp that hauls and disposes of nuclear waste. Glowco does not carry insurance. Glowco has an initial capitalization of 1k. X commingles personal and corp funds. V is injured when one of Glowco’s trucks melts down. Can V sue X?
       1. As a rule, SH are not liable for corp obligations. But courts will pierce the corp veil to avoid fraud or unfairness. In this case, X has failed to observe sufficient corp formalities by commingling funds. Moreover, Glowco is also undercapitalized because it operates in a dangerous business, has no insurance, and minimal capitalization of $1,000. Therefore, the ct will pierce the corp veil to render X liable to V.
   iv. Remember, courts are generally more willing to pierce corp veil for a tort victim than for a K victim.

g. **Shareholders’ liabilities**
   i. Generally, SH may act in their own personal interest and have no fiduciary duty to the corp or its SH.
   ii. **Controlling SH**
       1. Modern law imposes a duty on a controlling SH to refrain from using her control to obtain a special advantage or to cause the corp to take action that unfairly prejudices the minority SH.
       2. *Sale to looters*
          a. Controlling SH may be held liable for the sale of shares at a premium where the premium was really paid to sell a corp office for private gain.
          b. Controlling SH who sell the controlling interest to individuals who subsequently loot the company to the detriment of the minority SH will be liable for damages unless reasonable measures were taken to investigate the character and reputation of the buyer.
             i. The seller’s duty of investigation depends on whether she has notice of the possibility of looting by the purchasers.
       3. *Sale at a premium*
          a. Some cts have held that controlling SH are liable for the sale of their shares at a premium where the premium was really paid to illegally sell the corp assets for their own benefit.
          b. Ct have held that officers and directors are fiduciaries and may not sell their offices for private gain.

h. **Foreign corps**
   i. A corp incorp outside the state that wishes to engage in regular intrastate business must qualify by filing a certificate of authority with the secretary of state that includes all of the information required in the articles.

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II. ISSUANCE OF STOCK – WHEN A CORP SELLS ITS OWN STOCK  

a. Consideration – what must the corp receive when it issues stock?  
   i. Par value means minimum issuance price, which means it may NEVER receive less than par value. It can always receive more than par value.  
      1. C corp is selling 10,000 shares of $3 par stock. It must receive at least 30k.  
   ii. No par means no minimum issuance price  
      1. Any valid consideration can be received if it is deemed adequate by the board.  

iii. Treasury stock  
   1. Treasury stock is stock that was previously issued and had been reacquired by the corp. It can then be re-sold.  
   2. C corp is selling $3 par treasury stock. It must receive at least any valid consideration deemed adequate by the board (just like no par stock).  

iv. Acquiring property with par value stock  
   1. Can C corp issue 5,000 shares of $3 par stock to acquire Green Acres?  
      a. Yes, any valid consideration may be received if the board values the consideration in good faith to be worth at least par value.  

v. Consequences of issuing par stock for less than par value  
   1. C corp issues 10,000 shares of $3 par to X for 22k. Can C corp recover 8k from its directors?  
      a. Yes, directors are liable for authorizing a below par issuance. No authority to do this, so they become liable personally.  
   2. Can C corp recover 8k from X?  
      a. Yes, the SH is liable for one thing only → to pay full consideration for her shares.  
      b. Full consideration means at least par value.  
      c. Choice: corp can sue directors or SH. Cannot recover twice, but can elect to sue either its own directors or the buyers of those shares.  

b. Preemptive rights  
   i. Definition  
      1. Preemptive right is the right of an existing SH to maintain her percentage of ownership by buying stock whenever there is a new issuance of stock for cash.  
      2. S owns 1,000 shares of C corp. There are 5,000 shares outstanding. C corp is planning to issue an additional 3,000 shares for cash. If S has preemptive rights, then S has the right to maintain her existing 20% ownership interest by buying up to 20% of the newly issued 3,000 shares for cash.  
   ii. What if the articles of incorp are silent or the bar exam question does not indicate whether the articles of C corp provide for preemptive rights?  
      1. There are no preemptive rights unless expressly granted in the articles.  

c. Redemption of stock  
   i. A redemption occurs where the corp purchases outstanding shares pursuant to its articles.  
   ii. Repurchase of shares is not allowed if the corp is insolvent.  
   iii. Under traditional corp laws, the source of the repurchase may only come from earned surplus (retained earnings) or other sources of surplus income. However, these limitations no longer apply in most states.  
   iv. Although the corp may choose to repurchase shares from SH< a SH cannot force the corp to repurchase his shares.  

III. DIRECTORS AND OFFICERS
a. **Statutory requirements – directors**
   i. Corps must have a board with at least 1 member.
   ii. SH elect directors.
   iii. SH can remove a director before her term expires. On what basis?
      1. *With or without cause.*
   iv. **Valid meeting**
      1. Unless all directors consent in writing to act without a meeting, a meeting is required.
      2. Notice of directors’ meeting can be set in bylaws.
      3. Proxies are not allowed. Also, no voting agreements. But conference calls now generally valid.
      4. *Quorum* – must have a majority of all directors to take action (unless a different percentage is required in bylaws).
   v. **Vote**
      a. To pass a resolution, all you need is a majority of those present.
      b. So if there are 9 directors, at least 5 must attend the meeting to constitute a quorum. If 5 directors attend, at least 3 must vote for a resolution in order for it to pass.
   vi. Each director is presumed to have concurred in board action unless her dissent or abstention is recorded in writing (minutes or letter to corp secretary).

b. **Liability of directors to their own corp and SH**
   i. Directors have a duty to *manage* the corp. Directors may delegate management functions to a committee of one or more directors that recommends action to the Board.
   ii. In managing the corp, the directors are protected from liability by the **Business Judgment Rule**. The Business Judgment Rule is a presumption that the directors *manage the corp in good faith and in the best interests of the corp and its SH*. As such, directors will not be liable for innocent mistakes of business judgment.
   iii. Directors, however, are fiduciaries who owe the corp duties of care and loyalty.
   iv. **Duty of care**
      1. A director owes the corp a duty of care. She must act with the care that a prudent person would use with regard to her own business, unless the Articles have limited director liability for a breach of the duty of care.
      2. Heffner, a director of Hedonists’ Hot Tubs, Inc., after studying the issue thoroughly, votes to hire a religious singing ensemble to promote the company’s line of hot tubs with built-in wine coolers and video cameras. The idea is a disaster. Has Heffner breached his duty of care?
         a. Directors have a duty to manage. They are protected from liability by the Business Judgment Rule. But they are fiduciaries who owe duties of care and loyalty. Directors must act with the care that a prudent person would use in managing their own business unless the articles have limited liability for a breach of a duty of care. In this case, the director, after studying the matter thoroughly, made an innocent mistake of business judgment. Therefore, he will not be liable for a breach of the duty of care.
   v. **Duty of loyalty**
      1. A director owes the corp a duty of loyalty. A director may not receive an unfair benefit to the detriment of the corp or its SH, unless there has been material disclosure and independent ratification.
         a. Self-dealing
i. Director who receives an unfair benefit to herself or her relative, or another one of her businesses in a transaction with her own corp

b. Usurping corp opportunities
   i. Director receives an unfair benefit by usurping for herself an opportunity which the corp would have pursued

c. Ratification
   i. Directors may defend a claim by obtaining independent ratification through:
      1. A majority vote of independent directors
      2. Majority vote of a committee of at least 2 independent directors; or
      3. Majority vote of shares held by independent SH.

2. Alice, one of 10 directors of Diamond Merchants Inc, spots choice diamonds and buys them for herself for $1M. Alice then resells those diamonds to her corp for $2M. Alice, however, disclosed her conduct to the board, and at a board meeting attended by the other 9 board members, 5 of the members voted to ratify her transaction. What liabilities, if any, does Alice have?
   a. Directors have a duty to manage. They are protected by the Business Judgment Rule. But they are fiduciaries who owe duties of care and loyalty. Directors may not receive an unfair benefit to the detriment of their corp unless there is material disclosure and independent ratification. In this case, Alice did receive an unfair benefit by profiting in a transaction with her own corp. Moreover, Alice also usurped the corp’s opportunity to buy those choice diamonds. Therefore, Alice would be liable for a breach of the duty of loyalty and would have to disgorge her profits.
      i. Nonetheless, Alice will not be liable because she disclosed her conduct and received independent ratification through a majority vote of the independent directors. Therefore, there is no liability here.

c. Officers
   i. Owe the same duties of care and loyalty as directors
   ii. Are agents of the corp and bind the corp by their authorized activities
   iii. Corps must have a president, secretary, and treasurer
   iv. Directors have virtually unlimited power to select officers, and may remove them from office at any time – but the corp will be liable for breach of K damages

d. **Indemnification of directors and officers**
   i. Director or officer has incurred costs, attorney’s fees, fines, a judgment or settlement in the course of corp business; she seeks reimbursement from the corp.
      1. The corp may NEVER indemnify a director who is held liable to their own corp.
      2. The corp MUST ALWAYS indemnify if successful against any party, including your corp.
      3. The corp MAY indemnify if:
         a. Liability to 3rd parties or settlement with the corp
         b. Director or officer shows that she acted in good faith and that she believed her conduct was in the corp’s best interest
         c. Who may determine whether to grant permissive indemnity?
            i. A majority of independent directors; OR
            ii. A committee of at least 2 so-called independent directors; OR
iii. A majority of shares held by independent SH; OR
iv. A special legal counsel’s opinion could recommend it.

IV. RIGHTS OF SHAREHOLDERS

a. Shareholder derivative suits
   i. In a derivative suit, a SH is suing to enforce the corp’s cause of action.
      1. Always ask: could the corp have brought this suit? If so, it’s a derivative suit.
   ii. Requirements for bringing a SH derivative suit:
      1. Contemporaneous stock ownership
         a. You must own at least 1 share of stock when the claim arose and
            throughout the entire litigation.
      2. Must generally make demand on directors that they cause their own corp to
         bring suit
         a. Demand must be made and rejected by the board; OR
         b. At least 90 days have passed since demand was made.
      3. Note → in a derivative suit, any recovery of losses goes to the corp, except that
         the SH may recover reasonable expenses of litigation.

b. Voting
   i. Who has the right to vote at an upcoming meeting where voting occurs?
      1. ONLY the record date owner votes → owner on the record date, which is the
         voter eligibility cut-off date set by the board up to 70 days before the meeting
         date.
   ii. SH voting by proxies
      1. A proxy is a
         a. Writing
         b. Signed by record SH
         c. Directed to secretary of corp
         d. Authorizing another to vote the shares
         e. Valid for only 11 months.
      2. On June 2, S, who is the record owner on the record date, sends a signed letter to
         secretary of C corp authorizing Ari Gold to vote her shares. Can Ari vote S’s
         shares at the annual meeting in July?
         a. Yes, it’s valid because:
            i. It’s in writing
            ii. It’s signed by record owner
            iii. It is sent to the corp’s secretary
            iv. It authorizes another
            v. Within 11 months.
         b. What if, prior to the meeting, S writes to the secretary of C corp, that she
            now wants Turtle to vote her shares at that meeting? Turtle can vote.
            i. Proxies are freely revocable unless 2 things are both true:
               1. They must say on them irrevocable; AND
               2. Must be coupled with an interest.
      3. Can S revoke her proxy even though it states that it is irrevocable?
         a. Yes, this proxy is still revocable because it is not also coupled with an
            interest.
      4. S (the record owner) sells B her shares after the record date but before the annual
         meeting. S gives B an irrevocable proxy to vote the shares at the annual meeting.
         Can S revoke this proxy?
a. No. This proxy cannot be revoked because it says irrevocable on it and it is coupled with an interest (mainly in the shares themselves).

iii. Where do SH vote?
1. Properly noticed annual meeting
   a. Every corp must have an annual meeting at which at least 1 director slot is open for election. A properly noticed annual meeting requires the time and place for the meeting.
2. Specially noticed special meeting (called by the board, the president or the holders of 10% of voting shares)
   a. Special meetings are for voting on a proposal or a fundamental corp change.
   b. They require special notice, which must contain the meeting’s special purpose. Nothing other than that purpose can take place at that meeting or else it will be void.

iv. Quorum
1. There must be a quorum represented at the meeting. Determination of a quorum focuses on the number of shares represented, not the number of SH. A quorum requires a majority of outstanding shares when the meeting begins, unless otherwise provided in articles.
2. X corp has 120,000 shares outstanding. X corp has 700 SH. What or who constitutes a quorum?
   a. The quorum is a majority of all shares that must be represented at the beginning of a meeting – at least 60,001 shares must be represented in person or by proxy at the beginning of the meeting.

v. Vote
1. If a quorum is present, action is approved if the votes cast in favor of the proposal exceed the votes against the proposal.
2. X corp has 120,000 shares outstanding. 80,000 shares are represented at the meeting but only 50,000 shares vote on a particular proposal. How many shares must vote for the proposal in order for it to be accepted by the SH?
   a. At least 25,001 shares therefore must vote in favor of this for it to pass.

vi. Pooled for block voting methods
1. SH who own relatively few voting shares decide that they can increase their influence by agreeing to vote alike. How can they do so?
   a. Voting trusts – formal delegation of voting power to a voting trustee for 10 years.
      i. Written trust agreement
      ii. Typically filed with corp
      iii. Transfer shares to voting trustee
      iv. SH get trust certificates; and
      v. SH retain all other rights except for voting.
   b. SH voting agreement
      i. Agreement in writing to vote shares as required in that agreement; it is now binding and enforceable on all signers with no time limit and no filing required.

vii. Cumulative voting for directors
1. You own 1,000 shares of stock in C corp. C corp has 9 directorships open for election. You believe that Martha Stewart should be director of C corp. Under traditional, straight voting, how many votes can you cast for Martha?
   a. 1,000 shares. We have 9 separate elections.
2. Under cumulative voting, you may multiply the number of shares times the number of directors to be elected.
   a. 9,000 votes to cast behind Martha. We have just 1 big election.
3. The articles of C corp are silent as to whether SH can vote cumulatively. Can C’s SH still vote cumulatively?
   a. There is no right to cumulative voting UNLESS the right is granted in the articles.

c. Right of SH to examine the books and records of the corp
   i. Any SH shall have access upon notice and at proper times

d. Dividends
   i. To be declared in board’s discretion unless the corp is insolvent or would be rendered insolvent by the dividend.
   ii. Board members are liable personally for unlawful distributions, but have a defense of good faith reliance on financial officer’s representations regarding solvency.
   iii. Directors who authorize a dividend that will declare corp insolvent → unlawful, liable personally for unauthorized illegal dividends.
   iv. Priority of distribution
      1. The board of directors of C corp decides to declare dividends totaling 400k. Who receives dividends if the outstanding stock is:
         a. 100,000 shares of common stock
            i. Common stock means pay them last and pay them equally.
         b. 100,000 shares of common and 20,000 shares of preferred with $2 dividend preference
            i. Preferred stock means pay them first $2 each.
            ii. 400k – 40k (20,000 x 2) = 360k
         c. 100,000 shares of common and 20,000 shares of $2 preferred that are participating
            i. These shares effectively get paid twice → first as preferred and again as if they were also common shares.
            ii. Pay preferred stock first → 40,000 (400k – 40k = 360k)
            iii. 360,000/120,000 = $3.00 per share for common stock.
         d. 100,000 shares of common and 20,000 shares of $2 preferred that are cumulative (and no dividends in the 3 prior years)
            i. Cumulative means that these shares have the right to receive those 3 prior unpaid years plus the current year’s worth of dividends.
            ii. $2 x 20,000 x 4 years = 160k to the preferred SH
            iii. 240,000 left over/100,000 = $2.40 per common share

e. SH agreements to eliminate corporate formalities (closely-held corps)
   i. Unanimous SH election in the articles, the bylaws, or in a filed written agreement
   ii. There must be a reasonable share transfer restriction.
   iii. No piercing the corp veil even if you fail to maintain formalities.
   iv. Possible subchapter S corp status (therefore, treated as a partnership for tax purposes).
      1. S corp status if no more than 100 SH who are individuals and American residents and no more than 1 class of stock.

f. Professional corps
i. Licensed professionals (i.e., lawyers, accountants, medical professionals) may incorporate as Professional Corporation (PC)

ii. Requirements
   1. Organizers file articles with name designated Professional Corporation or PC.
   2. The SH must be licensed professionals
   3. The corp may practice only one designated profession.
   4. The professionals are liable personally for their own malpractice.
   5. But the professionals are NOT liable personally for each other’s malpractice or the obligations of the corp itself.

V. FUNDAMENTAL CORP CHANGES
   a. Recognized fundamental corp changes
      i. Merger (A becomes B);
      ii. Consolidation (A and B become C);
      iii. Dissolution (A dissolves);
      iv. Fundamental (not ministerial) amendment of the articles;
      v. Sale (not purchase) of substantially all of the corp’s assets.

   b. Procedural steps
      i. Resolution by board at a valid meeting
      ii. Notice of special meeting with SH
      iii. Approval by a majority of all shares entitled to vote and by a majority of each voting group adversely affected by the change.
         1. Except: no SH approval required for short-form merger where a parent corp that owns 90% or more of the stock in its subsidiary merges with the subsidiary.
      iv. Possibility of dissenting SH right of appraisal
         1. A SH who does not vote in favor of a fundamental change has the right to force the corp to buy her shares at fair value.
         2. Actions by SH to perfect the right:
            a. Before SH vote, file written notice of objection and intent to demand payment;
            b. Do not vote in favor of the proposed change;
            c. Make prompt written demand to be bought out.
      3. What happens if the SH and the corp cannot agree on fair value?
         a. Ct has the power to appoint an expert appraiser to value the shares and the appraisal will be binding on parties.

   v. File notice with the state (i.e., Articles of Merger)

VI. FEDERAL SECURITIES LAW CONSIDERATIONS
   a. Anti-fraud section 10(b) of the Securities Exchange Act of 1934
      i. Scintor – intent to deceive
      ii. Deception – material misrepresentation or misappropriation of material nonpublic info (i.e. trading on or tipping inside info)
      iii. In connection with the actual purchase or sale of securities
         1. Ronco Corp intentionally issues a misleading press release that Pickens has expressed an interest in acquiring a major block of its stock. The release fails to indicate that it is Slim Pickens and not Boone Pickens who is interested. Because of this press release, Conviser does not sell his Ronco stock. Does Conviser have a Section 10(b) cause of action?
a. No, although there is scienter, an intentional act and deception, a misleading press release. Nonetheless, there is no liability here because Conviser did not actually purchase or sell any securities.

iv. **Insider Trading**
   1. Rule 10b-5 also prohibits most instances of trading securities on the basis of inside info, info not disclosed to the public that an investor would think is important when deciding whether or not to invest in a security.
   2. A person violates rule 10b-5 if by trading he breaches a duty of trust and confidence owed to
      a. The issuer
      b. SH of the issuer, or
      c. In the case of misappropriators, another person who is the source of the material nonpublic info.
   3. Anyone who breaches a duty not to use inside info for personal benefit can be held liable under 10b-5 (directors, officers, controlling SH, employees of the issuer, and the issuer’s CPAs, attorneys, and bankers).
   4. **Tippers and tippees**
      a. If an insider gives a tip of inside info to someone else who trades on the basis of the inside info, the tipper can be liable under 10b-5 if the tip was made for any improper purpose (e.g., in exchange for money or a kickback, as a gift, for a reputational benefit, etc.). The tippee can be held liable only if the tipper breached a duty and the tippee knew that the tipper was breaching the duty.
   5. **Misappropriators**
      a. The gov’t can prosecute a person under 10b-5 for trading on market info in breach of a duty of trust and confidence owed to the source of the info; the duty need not be owed to the issuer or SH of the issuer.

b. **Section 16(b) – short-swing trading profits**
   i. **When does 16(b) apply?**
      1. Big corps: reporting corp – (1) listed on a national exchange OR (2) at least 500 SH and $10M in assets
      2. Big shot D – officer, director, more than 10% SH
         a. *To be liable, must have owned 10 percent of that company’s stock before both its purchase and sale.*
   3. **Type of transaction**
      a. *Buying and selling stock within a single six-month period* (short-swing trading) [Fraud is not required. No requirement of inside info].
   ii. **What happens when 16(b) applies?**
      1. All profits from such short-swing trading are recoverable by the corp. If, within 6 months before or after any sale, there was a purchase at a lower price than the sale price, there is a profit.

c. **Sarbanes-Oxley Act of 2002**
   i. Reporting corps
   ii. **CEO and CFO must certify that based on the officer’s knowledge, reports filed with the SEC:**
      1. *Do not contain material misrepresentations or omissions, and*
      2. *Fairly represent the financial position of the company.*
   iii. Willfully certifying a false report could bring $5M fine and 20 years
   iv. If false reports have to be restated, the corp (directly or derivatively) may recover officer’s profits made from trading the company’s stock within 12 months after the false
Bar Exam Doctor reports were filed, and may recover incentive-based compensation received during that period.

v. Corps (directly or derivatively) may also recover any profits made by officers from trading corp’s stock during black-out periods of at least 3 days when at least 50% of the employees are prohibited from trading in their retirement plan’s securities.

MINI REVIEW

I. FORMATION
   a. Promoters are liable until novation
   b. Subscribers are irrevocable for 6 months
   c. Articles = PAIN
      i. Authorized shares
      ii. Purpose
      iii. Agent
      iv. Incorporators
      v. Name
   d. SH not liable, unless pierce veil.

II. ISSUANCE
   a. Par of value = minimum issuance price
   b. Preemptive rights = maintain ownership percentage

III. DIR/OFF/LIABILITY
   a. Duty to manage
   b. Business judgment rule
   c. Fiduciaries → care (prudence, unless limited in articles) and loyalty (no unfair benefits unless disclosure plus independent ratification)

IV. SH RIGHTS
   a. Derivative suits
      i. Contemporaneous ownership
      ii. Demand
   b. Voting
      i. Only record date owner votes
   c. Proxies
      i. Proxies are revocable unless they say irrevocable plus coupled with an interest.
   d. Quorum
      i. Majority of all shares
   e. Vote
      i. Votes in favor exceed votes against
   f. Cumulative voting
      i. Shares x slots
   g. Dividends
      i. Discretionary unless insolvency
         1. Common pay last
         2. Preferred pay first
         3. Participant pay again
         4. Cumulative add up
   h. Eliminating formalities (closely-held)
      i. Unanimous election
      ii. Share transfer restriction = no piercing plus S corp status
   i. PC
i. Designated profession
ii. Limited liability

V. FUNDAMENTAL CHANGES
a. Board resolves
b. Special notice
c. Majority of all shares
d. Dissenters’ rights
e. Notice to stay

VI. FEDERAL SECURITIES LAWS
a. 10(b)
   i. Scienter
   ii. Deception
   iii. Actual purchase or sale
b. 16(b)
   i. No trading profits within 6 months.
c. SOA
   i. No knowingly false filings
   ii. No benefits during falsehood or black-out periods

AGENCY AND PARTNERSHIP

AGENCY

I. LIABILITY OF PRINCIPAL FOR TORTS OF AGENT – RESPONDEAT SUPERIOR OR VICARIOUS LIABILITY
a. Two-part test:
   i. Principal will be liable for torts committed by agent if:
      1. A principal-agent relationship exists, and
      2. The tort was committed by the agent within the scope of that relationship.
   ii. The principal-agent relationship requires:
      1. Assent
         a. An informal agreement between a principal and the agent.
      2. Benefit
         a. Agent’s conduct must be for the principal’s benefit.
      3. Control
         a. Principal must have the right to control the agent by having the power to supervise the manner of the agent’s performance.
         b. Sub-agents
            i. There can be no vicarious liability for a sub-agent’s torts unless there is assent, benefit and the right to control the sub-agent tortfeasor. You will never find assent or right to control here.
         c. Borrowed agents
            i. There can be no vicarious liability for a borrowed agent’s tort unless there is assent, benefit, and a right to control the borrowed agent tortfeasor. Assent and benefit will be there, but there won’t be any right to control the borrowed agent.
   4. Contrast agent with independent contractor
      a. There is no right to control an independent contractor because there is no power to supervise the manner of his performance.
      b. Rule
i. No vicarious liability for an independent contractor’s torts.

c. Exceptions
   i. Ultrahazardous activities → if your independent contractor
      commits a tort while engaged in ultrahazardous activities, there
      will be vicarious liability for that tort.
   ii. Estoppel → if you hold out your independent contractor with the
      appearance of agency, you will be estopped from denying
      vicarious liability for the independent contractor’s torts.

iii. Scope
   1. Factors:
      a. Was conduct of the kind agent was hired to perform?
         i. If so, likely to be inside scope.
      b. Did the tort occur on the job?
         i. Frolic = new and independent journey
         ii. Detour = mere departure from an assigned task
      c. Did the agent intend to benefit the principal?
         i. If agent, even in part, intended to benefit the principal, that’s
            enough.
      d. If tort occurs on the way back to work, that means employee was merely
         on a detour, so the tort was therefore within scope of agency and there will
         be vicarious liability.

iv. Intentional torts
   1. Rule
      a. Intentional torts are generally outside the scope of agency.
   2. Exceptions
      a. Intentional torts are within the scope if the conduct was:
         i. Intentional conduct within scope if conduct specifically authorized
            by principal
         ii. Natural from the nature of employment
         iii. Motivated by desire to serve the principal

II. LIABILITY OF PRINCIPAL FOR CONTRACTS ENTERED BY AGENTS

a. Principal is liable for Ks entered into by its agent if the principal authorized the agent to enter
   the K.

b. There are 4 types of authority:
   i. Actual express authority → principal used words to express authority to agent.
      1. Rule
         a. Oral, private, narrow
      2. Except
         a. Equal dignities doctrine: if K itself is in writing, the express authority
            must also be in writing.
      3. Express authority will be revoked by:
         a. Unilateral act of either party, or
         b. Death or incapacity of the principal.
         c. Except:
            i. Express authority cannot be revoked if the principal gives the agent
               a durable power of attorney.

ii. Actual implied authority
1. Authority which an agent reasonably believes the principal has given because:
   a. **Necessity**
      i. There is implied authority to do all tasks which are necessary to accomplish an expressly authorized task.
   b. **Custom**
      i. There is implied authority to do all tasks which are customarily performed by persons with the agent’s title or position.
   c. **Prior dealings between principal and agent**
      i. There is implied authority to do all tasks which the agent believes to have been authorized to do from prior acquiescence by the principal.

iii. **Apparent authority**
   1. **Two-part test:**
      a. *Principal cloaked agent with the appearance of authority; and*
      b. *Third-party reasonably relies on appearance of authority.*
   2. **Secret limiting instruction**
      a. Agent has actual authority, but principal has secretly limited that authority. Agent acts beyond the scope of the limitation.
         i. Charles owns an antique store. A shipment of antique clocks arrives from London. Charles tells his employee Doofus not to sell a special grandfather clock. Charles goes to lunch and D sells the clock. Is C bound by contract?
            1. Principal will be liable on its authorized Ks. In this case, there is no actual express or implied authority to sell the clock. Nonetheless, there was apparent authority because Charles did cloak Doofus with the appearance of authority and third party buyers may reasonably rely on the appearance of authority.
   3. **Lingering authority**
      a. Actual authority has been terminated. Afterwards, agent continues to act on principal’s behalf.
         i. For many years, Agnes has sold goods as Priscilla’s agent. Priscilla finds out, however, that Agnes has been stealing money from her. Priscilla terminates Agnes. Agnes continues selling to customers and runs away with the money. Is Priscilla bound?
            1. Principal will be liable on its authorized Ks. In this case, actual and implied authority has been terminated by the principal. Nonetheless, there was apparent authority because Priscilla has cloaked Agnes with the lingering appearance of authority and third party buyers may continue to rely reasonably on the appearance of authority until they receive notice of termination.

iv. **Ratification**
   1. Authority can be granted after the K has been entered if:
      a. Principal has knowledge of all material facts regarding the K, and
      b. Principal accepts its benefits.
   2. Except
      a. Ratification cannot alter the terms of the K.

c. **The rules of liability on the K**
   i. **General rules**
1. If no authority, principal is not liable on the K. If no authority, agent is liable on the K.
2. If authority, principal is liable on the K. if authority, agent is not liable on the K.

ii. Exception
1. If principal is partially disclosed (only identity of principal concealed) or undisclosed (fact of principal concealed), authorized agent may nonetheless be liable at the election of the third party.

III. DUTIES AGENT OWES TO PRINCIPAL
a. Duty to exercise reasonable care
b. Duty to obey reasonable instructions
c. Duty of loyalty
   i. Self-dealing – agent cannot receive a benefit to the detriment of the principal.
   ii. Usurping the principal’s opportunity, or
   iii. Secret profits
d. Priscilla authorizes Agnes to buy diamonds. Agnes spots choice diamonds and secretly buys them for herself for 1M. Agnes then resells the diamonds for 2M.
   i. What duties, if any, has Agnes breached?
      1. Agnes has breached the duty of loyalty by self-dealing and usurping principal’s chance to buy diamonds and by making 1M profit at principal’s expense.
   ii. What remedies, if any, does Priscilla have against Agnes?
      1. Principal may recover losses caused by the breach and also disgorge profits made by disloyal agent.

PARTNERSHIP

I. GENERAL PARTNERSHIP FORMATION
a. Formalities
   i. No formalities to becoming a general partnership
b. Definition
   i. A general partnership is an association of 2 or more persons who are carrying on as co-owners of a business for profit.
c. Sharing of the profits
   i. The contribution of money or services in return for a share of the profits creates a presumption that a general partnership exists.

II. LIABILITIES OF GENERAL PARTNERS TO THIRD PARTIES
a. Agency principles apply
   i. Partners are agents of the partnership for carrying on usual partnership business.
   ii. Partnership is bound by torts committed by partners in scope of partnership business.
   iii. Partnership is bound by Ks entered by partners with authority.
b. General partners are personally liable for debts of the partnership
   i. Generally, an incoming partner is not liable for prior debts. But any money paid in by that incoming partner to the partnership can be used to satisfy those prior debts.
   ii. A dissociating partner does retain liability on future debts until actual notice of dissociation is given to creditors OR until 90 days after filing notice of dissociation with the state.
c. General partnership liability by estoppel
   i. One who represents to a third party that a general partnership exists will be liable as if a general partnership exists.
ii. Paula convinced Peter to start a sailing school, and agreed to lend Peter money to purchase a boat for that purpose. At a party, Paula told a wealthy friend: my friend Peter and I are starting a sailing school and we need a boat. The wealthy friend offered to sell Paula and Peter a boat, and agreed to allow Peter to take it for a test ride the next day. Later that night, however, Peter and Paula fight and decide to drop the sailing school idea. The next day Peter takes the boat for a ride and destroys the boat. May wealthy friend sue Paula for the loss of the boat?

1. **As a rule, general partners are personally liable for all partnership obligations including co-partner’s torts.** In this case, however, Paula and Peter never formed a partnership because theirs was just a lending arrangement not based on sharing profits. Nonetheless, under partnership by estoppel, Paula will be liable because she has represented to that 3rd party that she is a partner of Peter’s and will be liable as if she were.

d. **Contrast formation and liability within other unincorporated business organizations**

   i. **Limited partnerships**
   
   1. **Definition**
      
   a. A partnership in which there is at least 1 general partner and at least 1 limited partner.

   2. **Formation**
      
   a. Must file a limited partnership certificate that includes the names of all general partners.

   3. **Liability and control**
      
   a. General partners are still liable personally for all limited partnership obligations.

   b. Limited partners are not liable for obligations of the limited partnership itself; limited liability AND limited control.

   ii. **Registered limited liability partnership**

   1. **Formation**
      
   a. Must register by filing a statement of qualification plus annual reports.

   2. **Liabilities**
      
   a. No partner is liable for the obligations of the partnership itself, not even generals.

   b. But you can always sue them individually for their own torts.

   iii. **Limited liability companies**

   1. **Original purpose**
      
   a. To give its owners (members) the same limited liability of shareholders in a corp and also the benefits of a partnership tax treatment.

   2. **Formation**
      
   a. File the articles of organization and an operating agreement.

   3. **Liabilities**
      
   a. The members are not liable for the debts and obligations of the company itself.

   4. **Partnership characteristics**
      
   a. Members control, but Articles may delegate control to managers.

   b. Limited liquidity – member interests are not freely transferable.

   c. Limited life – events of dissolution

   d. Therefore, LLC = limited liability + limited liquidity + limited life + limited tax.

III. **RIGHTS AND LIABILITIES BETWEEN PARTNERS**
a. General partners are fiduciaries of each other and the partnership
   i. Duty of loyalty
      1. Partners may not engage in self-dealing, usurp partnership opportunities, make a
         secret undisclosed profit at partnership’s expense.
   ii. Action for accounting
      1. Partnership may recover losses caused by the breach and may disgorge profits
         made by the breaching partner as well.

b. Partners’ rights in partnership property
   i. Specific partnership assets
      1. Land, leases, equipment owned only by the partnership as specific partnership
         assets
      2. No individual partner may transfer these assets without partnership authority.
   ii. Share of profits and surplus
      1. This is personal property owned by individual partners.
      2. Therefore, individual partners may transfer their share of profits and surplus to
         some third party.
   iii. Share in management
      1. Asset owned only by the partnership itself.
      2. Therefore, no individual partner may transfer their share in management to some
         third party.
   iv. Conflict between specific partnership assets and personal property
      1. Test: whose money was used to buy property?
      2. John buys a car in John’s own name with John’s money which John uses in
         partnership business. John dies. Does John’s spouse Yoko get the car or is it a
         specific asset of the partnership?
         a. In this case, because John bought car with his own money, it becomes
            John’s car. Therefore, he may freely leave that car to Yoko through
            inheritance.

c. Management
   i. Absent an agreement, each partner entitled to equal control (vote)
   ii. A, B, and C agree to contribute money and share profits 60-30-10. How do they vote/
      1. Absent an agreement, equal control is rule: 1 partner, 1 vote.

d. Salary
   i. Absent an agreement, partners get no salary
      1. Exception
         a. Partners receive compensation for helping to wind up partnership’s
            business.

e. Partner’s share of profits and losses
   i. Absent an agreement, profits shared equally
   ii. Absent an agreement, losses shared like profits
      1. If agreement profits shared 60/40, losses shared?
         a. Like profits: 60/40.
      2. If agreement losses shared 60/40, profits shared?
         a. Without agreement on profits, all shared equally no matter what the
            agreement is with respect to losses.

IV. DISSOLUTION
a. Dissolution
   i. First, in a partnership at will, where there is no agreement, dissolution occurs
      automatically upon notice of express will of any single general partner to dissociate.
ii. Secondly, in a partnership not at will, where there is an agreement, dissolution occurs upon the happening of an event specified in the agreement OR upon the majority vote of the partners to dissolve within 90 days of the dissociation of any single partner.

b. Termination
   i. Real end

c. Winding up
   i. Period between dissolution and termination, in which remaining partners must liquidate partnership’s assets to satisfy partnership’s creditors.

d. Compensation and liability for winding up
   i. Compensation for winding up
      1. They get this.
   ii. Partnership’s liability for winding up
      1. Old business?
         a. The partnership and its individual general partners retain liability on all transactions entered into to wind up all business with existing creditors.
      2. New business?
         a. The partnership and its individual general partners still retain liability on brand new transactions until actual notice of dissolution is given to creditors or until 90 days after filing a statement of dissolution with the state.

e. Priority of distribution
   i. Each level of priority must be fully satisfied before beginning the next level in this order:
      1. First, creditors must be paid.
         a. All outside non-partner classic trade creditors must be paid and inside partners who have loaned money to the partnership.
      2. Second, capital contributions by partners must be paid.
         a. Partnership is liable to repay its own partners for their capital contributions.
      3. Profits and surplus, if any
         a. Profits, if any, are shared equally without an agreement.
   ii. Rule: each partner must be repaid his or her loans and capital contributions, plus the partner’s share of the profits or minus that partner’s share of the losses.
   iii. A and B dissolve their partnership. In winding up, they liquidate the partnership assets and have a total of 1M to distribute. How should that amount be distributed if (1) the partnership owes 600k to trade creditors, (2) A loaned the partnership 100k, (3) B made capital contributions of 200k?
      1. First, all outside and inside creditors must be paid (700k).
      2. Secondly, partnership now must also repay B the 200k for its capital contribution.
      3. The remaining 100k: without an agreement, equal share of 50k to A and B.
   iv. Suppose now that the partnership only has 700k to distribute?
      1. First, partnership still owes 700k to all outside and inside creditors and they must be paid first.
      2. Secondly, the partnership is still liable to B for its 200k capital contribution. Missing amount = loss.
      3. Individual general partners are still liable.
      4. Without an agreement, A and B will share equally in the 200k loss.

MINI-REVIEW

Bar Exam Doctor
I.  AGENCY
   a. Principal’s liability for agent’s torts
      i. Assent, benefit, control and scope
      ii. No VL for independent contractor’s torts
      iii. Intentional torts generally outside the scope
   b. Principal’s liability for agent’s Ks
      i. Express authority \(\rightarrow\) oral, except for equal dignities, revocable unless durable power of attorney
      ii. Implied authority \(\rightarrow\) necessity, custom, or prior dealings
      iii. Apparent authority = principal cloaks, 3rd party relies
      iv. Ratification = knowledge + acceptance of benefits
      v. Authorized agents are not liable unless undisclosed principal
   c. Duties agent owes principal
      i. Duty of care
      ii. Obedience
      iii. Loyalty

II. PARTNERSHIP
   a. Formation
      i. No general partnership formalities
      ii. Association of 2 or more persons carrying on as co-owners of business for profit
   b. Liabilities to third parties
      i. General partners are liable for all partnership obligations
      ii. Estoppel \(\rightarrow\) representers are liable as if general partners
      iii. Limited partners + registered limited liability partners + LLC members have limited liability
   c. Relations between partners
      i. Fiduciaries \(\rightarrow\) accounting for profits
      ii. Only share of profits is liquid transferable personal property
      iii. Without an agreement, equal control, no salary, equal profits and losses like profits.
   d. Dissolution
      i. Definitions
         1. Without agreement, dissolution = notice of express will of any single partner to dissociate
      ii. Priority
         1. All outside and inside creditors
         2. All capital contributions
         3. Profits, if any, share equally without an agreement
      iii. Distribution rule
         1. Each partner must be repaid their loans and capital contributions plus their share of profits, but minus their share of losses.