

Part Four, Chapters 13-22

The Transactional Lawyer

Part IV covered a number of corporate law subjects of interest to transactional lawyers. These include corporate formation, corporate finance, corporate governance, transactions with fiduciaries, and agreements relating to exculpation and indemnification of corporate decision makers. This means that there are a lot of possibilities for transaction-based assignments; at the moment, we are providing only two. The first calls on you to draft the articles of incorporation for a start-up business. The second involves something that is a corporate attorney's bread and butter: opining on a corporate transaction.

Scenario One

If you were assigned the Transactional Lawyer exercises at the end of Part III, you were introduced to John Faile and Deborah Seldin and were asked to evaluate a partnership agreement that they had drafted and then to convert it to an operating agreement for a limited liability company. Their general objectives are reiterated below. In the current scenario, however, John and Deborah have decided to form a corporation and your task is to draft a set of articles of incorporation consistent with their goals. You should also make a list of the other documents, if any, that might be needed or advisable.

John and Deborah's corporation will invest in real property. More specifically, their goals are as follow. They do not care what the par value of their shares may be or how many shares are issued. They do each contemplate investing \$220,000.00. (Once again you may assume that any conflict-of-interest in representing both parties has been resolved appropriately.)

Goal One To borrow the money needed to construct a hotel and commence its operation as a Hilton Inn franchise.

Goal Two To protect the corporation's assets and business operation from the claims of a shareholder's creditors, in bankruptcy or otherwise.

Goal Three To make sure that (the anticipated) appreciation of value in the corporation's property and/or business is fairly divided between the shareholders.

Goal Four To make sure that the corporation cannot be dissolved by the decision of one of the shareholders to quit the business.

[Your teacher may ask you to complete this assignment in writing or to prepare it for class discussion. You may be asked to apply the law of a specific state or to assume the applicability of the Model Business Corporations Act (2016).]

Scenario Two

The following letter is the opinion to be delivered by the law firm of Willis & Boyd LLP in connection with the issuance of preferred stock by Discus Manufacturing, Inc. An opinion such as this is circulated to the issuer (Discus), to the purchasers of the stock, to lawyers for the purchasers, and to any underwriters for the transaction. The language of the opinion is negotiated in advance of the closing for the transaction. Assume you are the responsible attorney with Willis & Boyd. You will sign the letter. As you read the opinion, consider the following:

1. What documents and other evidence would you want to inspect (or have your subordinates inspect) before you gave this opinion?
2. Is there any legal research you would want to have completed?
3. Are there any particular paragraphs of the opinion that would cause you concern?
4. Who is your client in preparing this opinion letter? Who is not your client? Would you be subject to potential malpractice liability to, say, the purchasers of the stock if your opinion is incorrect?

Do not, however, concern yourself with the paragraph numbered 7, which relates to compliance with the federal securities laws, or the reference to the federal securities laws in the paragraph numbered 14. We have included them, as they are standard features of opinions of this sort, but you do not yet have enough background for them to be meaningful. We shall return to these provisions in Part VII.

APPENDIX B-1 to the
PREFERRED STOCK PURCHASE AGREEMENT

[Form of Opinion of Willis & Boyd, General Counsel to Discus Manufacturing, Inc.]

April __, 20__

To each of the Purchasers listed on Schedule I hereto:

You have requested our opinion with respect to certain matters relating to the \$12.50 Cumulative Preferred Stock, Series M (hereinafter the “Shares”), of Discus Manufacturing, Inc., a ___ corporation (hereinafter the “Company”), which are to be purchased by you on this date pursuant to the Preferred Stock Purchase Agreements dated as of April __, 20__ (hereinafter the “Purchase Agreements”), executed by and between each of you and the Company. The capitalized terms used herein are used as defined in the Purchase Agreements unless such terms are otherwise defined herein.

In this connection, we have examined certificates of the Transfer Agent and of public officials, certificates of officers of the Company, and copies, certified to our satisfaction, of corporate documents and records of the Company and of public officials, and of such other papers as we have deemed relevant and necessary as a basis for our opinions set forth herein. We have relied upon such certificates of the Transfer Agent and of public officials and of officers of the Company, copies of which have been furnished to you, and upon representations of the Company contained in the Purchase “Agreements with respect to the accuracy of material factual matters contained therein which were not independently established.

Based upon the foregoing, it is our opinion that:

1. The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of _____ [the State of incorporation] and has all requisite corporate power and authority to authorize, issue and sell the Shares.
2. The Articles of Incorporation of the Company as in effect on the date hereof (the “Articles”) and all amendments thereto prior to the date hereof have been properly consented to or approved by the Company’s shareholders or, in the case of amendments thereto consisting of certificates containing or reflecting resolutions of the Board of Directors establishing and designating series of shares and prescribing the relative rights and preferences thereof, by the Company’s Board of Directors, in each case as required by law. The provisions contained in the Articles establishing and authorizing the issuance by the Company of Preferred Stock and prescribing the relative rights and preferences thereof to the extent provided in the Articles and authorizing the Board of Directors to establish and designate series of Preferred Stock and prescribe the relative rights and preferences thereof in such respects are not contained in the Articles are authorized by the laws of the State of _____ [the State of incorporation]. The provisions of the Resolution adopted by the Board of Directors of the Company establishing and designating the Shares and prescribing the relative rights and preference4s thereof to the extent provided in the Resolution are properly authorized by the laws of the State of _____ [the State of incorporation] and the provisions of the Articles and are valid and binding in accordance with their terms.
3. The Purchase Agreements have been duly authorized, executed and delivered by the Company. No consent, authorization or approval of the shareholders of the Company is required by law or by the Articles or Bylaws of the Company (hereinafter the “Bylaws”) for the execution and delivery of the Purchase Agreements. The Purchase Agreements are valid and binding agreements of the Company, enforceable against the Company in accordance with their terms, except as limited by applicable bankruptcy, insolvency, moratorium or other similar laws of general application at the time in effect and except that enforceability may be limited by general powers of equity.
4. Each certificate evidencing Shares being purchased by each of you has been duly executed and delivered by the Company, and the Shares have been duly authorized by the Company and are validly issued and outstanding. No consent, authorizatio9n or approval of the shareholders of the Company for such authorization or issuance is required by law or by the Articles or Bylaws. The Shares are fully paid and non-assessable. The Shares are not subject to preemptive rights on the part of any shareholder of the Company.
5. The Board of Directors of the Company has duly adopted the Resolution. The Certificate has been properly authorized and executed by the Company and has been properly filed in the office of the _____ [appropriate authority of the State of incorporation] and is effective.
6. The Shares have the relative rights and preferences set forth in the Articles, the Resolution and the Certificate. The Shares rank equally with other series of Preferred Stock of the Company now outstanding with respect to the payment of dividends and all other distributions, except only as to the rates of dividends payable thereon, the premiums payable on liquidation or dissolution of the Company, if any, the redemption prices thereof, if any, the provisions of the sinking fund, if any, and other provisions not inconsistent with the Articles.

7. Based upon the representations set forth in Paragraph __ and Paragraph __ of the Purchase Agreement, and the letter of CSFB Corporation [the underwriters of the issuance] with respect to the offering of the Shares, the sale and delivery of the Shares, in the manner contemplated by the Purchase Agreements, constitute an exempted transaction under the provisions of the Securities Act of 1933, as amended, and registration thereunder of the Shares is not required. Under the circumstances contemplated by the Purchase Agreements, the issuance and sale of the Shares to you do not require the registration of the Shares as a separate class under the Securities Exchange Act of 1934, as amended.
8. No documentary stamp or other taxes are payable in connection with the issue, sale, registration and delivery of the Shares as contemplated by the Purchase Agreements.
9. The Company has the corporate power and authority to own its properties and to carry on its business as currently being conducted.
10. The Company is properly qualified as a foreign corporation to transact business and is in good standing in each jurisdiction where the nature of the business transacted by it or the character of the properties owned or leased by it makes such qualification necessary and where the failure so to qualify would have a materially adverse effect on the business, operations or financial condition of the Company.
11. The certificates evidencing the Shares being purchased by each of you are in proper form
12. The execution and delivery of the Purchase Agreements and compliance with the terms and provisions thereof will not conflict with the Articles or Bylaws, and will not conflict with or result in the breach of or constitute a default under or result in the creation or imposition of any lien, charge or encumbrance upon any of the properties or assets of the Company pursuant to the terms of any indenture, mortgage or other agreement or instrument binding upon the Company or to which any of its properties is subject and which is known to us, or any plan, order, judgment, writ, injunction or decree applicable to the Company or any statute, law, rule or regulation.
13. The representations and warranties of the Company set forth in Paragraphs __, __, __ and __ of the Purchase Agreements are accurate and, to the best of our knowledge, the representations and warranties of the Company set forth in Paragraph __, __, __ and __ of the Purchase Agreements also are accurate. The representations and warranties of the Company set forth in Paragraph __ of the Purchase Agreements are accurate except that the Resolution has been adopted and the Certificate has been filed and except that our opinion as to the accuracy thereof is based, in the case of mortgages, agreements and other similar instruments, upon mortgages, agreements and other similar instruments that are known to us.
14. No consent, authorization or approval by, or notice to, or registration with, or the taking of any other action in respect of, any governmental authority, agency, commission or other body or officer, federal, state or municipal, including, without limitation, the _____ [appropriate authority of the State of incorporation], is needed under existing laws in connection with the issuance and sale of the Shares of the Company or the execution, delivery and performance by the Company of the Purchase Agreements or any of the terms, conditions or covenants of the Shares as set forth in the Articles, the Resolution and the Certificate, except the filing of the Certificate as set forth in paragraph 5 above and except for filings of applicable reports pursuant to Section 13 of the Securities Exchange Act of 1934. The filing of the Certificate has been properly made.

15. For federal income tax purposes the Shares constitute stock rather than debt. The dividends paid by the Company on the Shares will be distributions made by a corporation to a shareholder with respect to its stock within the meaning of Section 301(a) of the Code.

In giving this opinion, we have relied entirely upon the opinion to you, dated today, of Logan & Brown LLP as to all matters involving the law of the State of _____ [the state of the closing if it is not the State of incorporation].

Very truly yours,

[Your Name]

[Your teacher may ask you to complete this assignment in writing or to prepare it for class discussion. You may be asked to apply the law of a specific state or to assume the applicability of the Model Business Corporations Act (2016).]