February 2010

New York State
Bar Examination

Essay Questions

QUESTION 1

Bob and Ann were married in 2000 in State X. In 2001, the couple moved to New York, and Bob started as an associate with Law Firm.

On May 30, 2008, Bob and Ann separated. Prior to separating, the couple executed a properly acknowledged separation agreement which stated that they would now live separate and apart. In June 2008, the agreement was duly filed in the county clerk's office of the county where they then resided. Bob has continued to live in New York, where they had lived for over seven years. In July 2008, Ann moved to State Y, where she continues to reside. One evening in January 2009, Bob and Ann happened to encounter one another and engaged in sexual relations. They have had no other contact since their separation.

In July 2009, Bob filed for divorce against Ann in New York. The summons and complaint pled the foregoing relevant facts and were duly personally served on Ann in State Y. In defending the action, Ann has (a) contested jurisdiction because of the residence of the parties and (b) claimed that Bob failed to comply with the parties' separation agreement, because he and Ann had sexual relations in January of that year.

Upon becoming a partner in Law Firm on January 1, 2010, Bob signed a partnership agreement which required him to pay a $30,000 capital contribution to the partnership to become a member of the firm. He subsequently learned that Creditor, a former client, had obtained a $500,000 final judgment against the firm in July 2009 on a malpractice claim with which Bob was not involved. Law Firm used Bob's partnership capital contribution money to help partially satisfy the judgment. Creditor now seeks to recover directly from Bob personally on the unsatisfied portion of the judgment.

After Ann moved out of the couple's New York home, Bob purchased a new bedroom set from Magic Circle Furniture Store. Pursuant to a retail credit installment agreement, Magic Circle extended Bob $6,000 in credit to enable him to purchase the bedroom set. Magic Circle did not file a financing statement. After paying $1,000 toward the furniture, Bob defaulted on his payments.

1. Will Bob be successful in his action for divorce?

2. (a) Did Law Firm properly use Bob's partnership capital contribution to partially satisfy the malpractice judgment against the firm?

   (b) Assuming the partnership agreement is silent on the issue, can Creditor recover from Bob individually for any unpaid portion of the malpractice judgment?

3. Does Magic Circle have an enforceable security interest in the bedroom set?

QUESTION 2

In January 2009, Tina retained Lawyer to draft a will. Tina was 90 years old, unmarried and had no children. Tina directed Lawyer to draft a will which named Fran as executor and included the following provisions:

> I, Tina, being of sound mind and memory, hereby bequeath:
>
> (1) Blackacre, my home in Broome County, to Fran;
> (2) $25,000 to my friend, Ana;
> (3) $100,000 to my beloved Niece, from the funds in my Brokerage account;
> (4) the rest and residue of my estate to my only sibling, Brother.

In March, Tina arrived at Lawyer's office to execute the will. Lawyer asked his secretary, Sara, and Jack, a plumber who was in the office fixing the sink, to act as witnesses. Under Lawyer's supervision, Tina read the will and told everyone it was exactly what she wanted. Tina signed the will, which was witnessed by Sara and Jack.

In April, Ana died, survived only by her daughter, Jen.

Blackacre was encumbered by a mortgage and note held by Lender. Tina contracted a serious illness, and as a result, fell behind in her mortgage payments. In June, Lender duly commenced a foreclosure action against Tina, and Lawyer timely served an answer on her behalf. In July, Lender served and filed a motion for summary judgment, but before the motion was heard, Tina died. On the return date of Lender's motion, Lawyer signed a stipulation of settlement prepared by Lender stating that Tina owed Lender $250,000 and would pay Lender that amount.

At the time of her death, Tina's estate consisted solely of Blackacre valued at $500,000, $75,000 in Tina's Brokerage account, and $50,000 in a bank account. Fran promptly offered Tina's will for probate, and Brother filed objections, claiming that Tina had lacked testamentary capacity when the will was executed, thus rendering the will inadmissible to probate.

At the probate proceeding, Jack the plumber testified that he was a subscribing witness and that he observed Tina before she signed her will. Fran's attorney asked Jack whether, in his opinion, Tina was mentally competent when she executed the will. Brother objected on the ground that Jack was not an expert qualified to give opinion testimony. The court overruled the objection and allowed Jack to testify that in his opinion Tina was mentally competent when she executed her will. At the conclusion of the proceeding, the court admitted the will to probate and issued letters testamentary to Fran as executor of Tina's estate.

1. Was the court's ruling permitting Jack to testify correct?

2. What effect, if any, did Tina's death have on Lender's foreclosure action including the stipulation?

3. What, if anything, will Jen, Niece, and Brother receive under Tina's will?

QUESTION 3

Dan bought a dog for his child, Son, age ten. The dog was a large pedigree, bred as a guard dog. The dog has always been docile and well-behaved at home, but has occasionally displayed defensive and aggressive behavior to strangers on the street. Every afternoon, Dan and Son walked the dog through their neighborhood streets. Thea, Dan's next door neighbor, often complained to Dan when Dan walked the dog because Dan let Son hold the leash, and at times the dog got away from Son who was not strong enough to hold the leash. Thea was afraid that the dog would injure her five year old niece, Child. Thea felt like a second mother to her niece for whom she baby sat in her home five days a week.

One year ago, while Dan and Son were walking the dog in front of Thea's house, the dog broke loose from Son and tried to bite Child. Dan was able to grab the leash and restrain the dog. After the incident, Dan apologized and assured Thea, "This will never happen again."

Six months ago, while Dan and Son were walking the dog in front of Thea's house, Son was holding the leash and was again unable to control the dog, which broke free. The dog ran towards Thea and Child who were walking hand in hand. The dog attacked Child and, despite Thea's best efforts to protect her niece, Child was seriously injured. The dog made no contact with Thea. Immediately after the attack, Thea sought psychiatric counseling for depression and anxiety due to witnessing the attack on Child, and she has been continuously treated and on medication since the attack on Child.

Thea duly commenced an action against Dan for negligent infliction of emotional distress seeking to recover for her emotional injuries. Dan has moved to dismiss Thea's complaint on the grounds that she did not sustain physical injuries and lacked standing to assert a claim.

Mom, Child's mother, duly commenced an action on Child's behalf against Dan seeking to recover for Child's personal injuries and to obtain a permanent injunction forbidding Dan from walking the dog in front of Thea's house without proper restraint.

The complaint sets forth the above pertinent facts and alleges that Dan is liable for Child's injuries on the ground of strict liability in tort.

During the past two weeks, Mom observed Dan walking the dog in front of Thea's house, with Son holding the leash. Yesterday, Mom moved on notice to Dan for a preliminary injunction. The motion asks the court to enjoin Dan from walking the dog in front of Thea's house without proper restraint.

(1) How should the court rule on Dan's motion to dismiss Thea's complaint?

(2) Can Dan be held liable in Mom's action on behalf of Child against Dan?

(3) What are the legal standards and issues that the court should consider in deciding Mom's motion for a preliminary injunction, and how should the court rule?

QUESTION 4

In 1990, the owner of a parcel of land in Albany County subdivided it into two residential lots, ServAcre, which had frontage on a pond, and DomAcre, which had no such frontage. Al purchased DomAcre, and Bob purchased ServAcre. Al's deed contained a grant of an easement over ServAcre for purposes of launching a boat on the pond, and Bob's deed was expressly subject to that easement. Both deeds were duly recorded. Al used the easement several times every summer.

In 1995, Al conveyed DomAcre to Cal, who also purchased ServAcre from Bob the next year. In 2001, Cal sold DomAcre to Dan. In 2002, Cal sold ServAcre to Ed. The deeds to Dan and Ed were duly recorded, and although both deeds contained the language, "Together with the appurtenances and all of the estate and right of the Grantor in and to said premises," neither contained any mention of the easement. Nevertheless, Dan crossed ServAcre to launch a boat several times each summer, without objection from Cal or Ed, until 2008 when Dan sold his boat.

Two months ago, Ed orally agreed to pay Broker, a real estate broker licensed in New York, a commission of 5% of the sale price if Broker located a purchaser for ServAcre. They did not discuss whether or not a closing was required for the commission to be earned.

Broker located Buyer, who entered into a written contract with Ed to purchase ServAcre. The contract contained all terms essential for a real property sales contract but was silent regarding the quality of title to be conveyed and did not state whether or not the conveyance would be subject to any easement or restrictions.

After the contract was signed, while Buyer was inspecting ServAcre, Dan approached Buyer, introduced himself, and informed Buyer that Dan had just purchased a boat and that, although for two summers he had not used the easement over ServAcre, he again planned to use it. When Buyer said he was unaware of any easement, Dan replied that both the language of his and the prior deeds, as well as his prior use, created his right which he would enforce in court if necessary.

Buyer then contacted Broker and Ed, advising them that he was cancelling the purchase contract based on the title being unmarketable because of Dan's claim of an easement.

1. If Dan attempts to enforce his claimed right to cross ServAcre, is he likely to be successful?

2. Without waiting for a court determination on Dan's claim, may Buyer now properly cancel the purchase contract on the ground that the title is unmarketable?

3. May Broker successfully enforce his oral agreement to be paid a commission by Ed, even if Buyer may properly cancel the contract on the ground that the title is unmarketable?

QUESTION 5

Smith owns 10% of the common shares of Omega, Inc., a closely held corporation. Baker and Jones each own 45% of Omega's common shares. Baker and Jones also serve on Omega's board of directors and are paid corporate officers.

Omega has not paid a dividend on its common shares for several years. Smith, who is not an officer of the corporation and has never received a salary from the corporation, is very unhappy that no dividends are being paid.

When Smith complained to Baker and Jones about nonpayment of dividends, they said that while Omega could legally pay dividends, it has not done so in order to retain the corporation's earnings for expansion of the business. They also pointed to data showing that Omega's business has expanded considerably in the past several years, financed entirely through undistributed earnings, and told Smith that he should "go away and let us run the show." Smith complained that "only you are enjoying the fruits of Omega's success." In response to an inquiry from Smith, Baker and Jones refused to reveal the amounts of their salaries, even though those salaries are within industry range.

Baker and Jones each offered to purchase all of Smith's shares for $35 per share. Smith suspects that the shares are worth more than $35 per share. Smith has asked to inspect Omega's corporate books and records in order to determine the value of his shares, but Jones and Baker have refused to give Smith access to any corporate records.

Smith has asked your law firm the following questions:

1. Does Smith have a right to inspect Omega's corporate books and records to determine whether $35 per share is a fair price for his shares? Explain.

2. If Smith brings a suit to compel the payment of a dividend, must Smith first make a demand on the corporation? Explain.

3. If Smith brings a suit to compel the payment of a dividend, is that suit likely to be successful? Explain.

QUESTION MPT

State of Franklin v. McLain

The client, Brian McLain, has been charged with violating various sections of the Franklin Criminal Code dealing with methamphetamine, a controlled substance. The charges are based on evidence seized from McLain after police stopped him for investigatory purposes, acting on an anonymous tip that an individual matching McLain's description had been seen purchasing items at a convenience store that, while entirely legal, are known ingredients of methamphetamine production. The officers searched his car, finding the goods described in the tip, together with a small plastic bag containing what appeared to be a marijuana cigarette. McLain was arrested and booked. After questioning, McLain directed the police to a "meth lab" where they found chemicals and equipment used to manufacture methamphetamine, as well as the drug itself. McLain was charged with possession of methamphetamine with intent to distribute, possession of laboratory equipment and supplies with the intent to manufacture methamphetamine, and manufacture of methamphetamine. He has moved to suppress all evidence seized by police on grounds that the officer lacked reasonable suspicion to stop him. He has also moved to dismiss the possession of equipment with the intent to manufacture methamphetamine charge on the ground that it is a lesser-included offense of manufacture of methamphetamine.

Applicants' task is to draft the arguments in support of both motions. The File consists of a memorandum from the supervising attorney describing the assignment, guidelines for drafting persuasive briefs, the criminal complaint, the motion to suppress evidence and to dismiss Count 2, the transcript of the anonymous call to the crime hotline, and an excerpt of the transcript of the evidentiary hearing. The Library contains the relevant Franklin statutes and three cases—two relating to investigatory stops, and one dealing with lesser-included offenses.

February 2010

New York State
Bar Examination

Sample Essay Answers

FEBRUARY 2010 NEW YORK STATE BAR EXAMINATION

SAMPLE CANDIDATE ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO QUESTION 1

1. The issue is whether the New York court has subject matter jurisdiction to hear a divorce action in this case and whether spouses who engage in one-time sexual relations during the pendency of their separation agreement may, nevertheless obtained a conversion divorce.

The Supreme Court of New York has exclusive subject matter jurisdiction over all actions affecting marital status. Pursuant to the Domestic Relations Law (DRL), an ex parte divorce--a divorce action where only one of the spouses is before the court--may be maintained in a New York court, without personal jurisdiction over the absentee spouse, if one of three durational residency requirements is satisfied. First, the plaintiff-spouse must be a New York domiciliary to commence an action for divorce in New York. The plaintiff-spouse's status as a New York domiciliary gives the Supreme Court subject matter jurisdiction over the marital *res*. Pursuant to the DRL, the plaintiff-spouse must establish that either (a) both spouses are New York residents at the time the action is commenced and the grounds for divorce arose in New York, (b) one spouse has been a New York resident for two years immediately preceding the action, or (c) one spouse has been a New York resident for one year immediately preceding the action and either (i) the marriage was entered into in New York, (ii) New York was the matrimonial domicile at some point, or (iii) the grounds for divorce arose in New York. Failure to establish one of the three durational residency requirements constitutes failure to state a cause of action.

Here, Bob is a New York domiciliary, as he has lived in New York since 2001. Bob resides in New York and intends to indefinitely remain. Accordingly, the Supreme Court has subject matter jurisdiction over the marriage and may issue is a divorce if Bob can establish one of the three durational residency requirements. Bob has lived in New York since 2001, wholly satisfying the option that one of the spouses be a New York resident for a period of two years immediately preceding the action. Accordingly, Bob has met the jurisdictional and procedural requirements to obtain a divorce from Ann in New York and the Supreme Court may entertain the divorce action.

New York remains the only state that does not provide for no-fault divorce. To obtain a divorce, the plaintiff-spouse must establish one of the five grounds for divorce, as provided in the DRL, only one of which is relevant here: conversion divorce. To obtain a conversion divorce, the spouses must have lived separate and apart pursuant to a valid separation agreement or divorce decree for a period of at least twelve months. When the action for conversion divorce is based upon a separation agreement, neither spouse must have committed a material breach thereof, or else the divorce will not be granted. To constitute a valid separation agreement, the agreement must be in writing, signed by both spouses, witnessed, and filed with the Supreme Court prior to the filing of the divorce action. The separation agreement, however, will be rescinded where the

spouses voluntarily resume cohabitation with intent to reconcile or where they engage in sexual relations with intent to reconcile. The courts have held, however, where separated spouses engage in sexual relations *without* intent to reconcile, the separation agreement will not be rescinded and a conversion divorce may still be maintained where they meet the durational requirement of time living apart.

Here, Bob and Ann entered into a valid separation agreement, as the facts indicate it was properly acknowledged and filed with the County Clerk. Bob and Ann lived apart pursuant to this agreement from June 2008 to July 2009. As this time period amounts to 13 months, Bob and Ann have met the requirement that they live separate and apart pursuant to a valid separation agreement for at least 12 months. Bob and Ann's one-time fling in January 2009 will not have the effect of rescinding their separation agreement or causing Bob or Ann to be in breach thereof, because Bob and Ann had no other contact since this sexual encounter. Thus, Bob and Ann did not engage in sexual relations in January 2009 *with intent to reconcile*. Accordingly, Bob will be successful in maintaining his action for conversion divorce because he and Ann lived apart pursuant to a valid separation decree for a period of more than twelve months, and neither he nor Ann materially breached any provisions of that agreement. The Supreme Court will grant Bob a conversion divorce from Ann.

2. The issue is whether an incoming partner is personally liable for debts and obligations incurred by the partnership prior to his entry into the partnership.

New York has adopted the Uniform Partnership Act (UPA) as the law governing partnerships. Under the UPA, a partnership is defined as any association of two or more persons carrying on as co-owners of a business for profit. Pursuant to the UPA, where a partner enters a partnership and pays capital contributions into that partnership, he will be liable on obligations incurred by the partnership prior to his entry only to the extent of his capital contributions. That is, the partnership may use any incoming partner's capital contributions to pay down debts or other obligations that the partnership has incurred, but the incoming partner may not be held personally liable for any debts or obligations that the partnership incurred prior to his entry. Thus, where a partnership incurs a judgment prior to a new partner's entry, the new partner is only liable on that judgment to the extent of the contributions he made into the partnership.

a. Here, Bob became a partner in Law Firm on January 1, 2010. As part of his entry into the Law Firm, Bob paid in capital contributions of $30,000 to the Firm. Creditor, however, obtained a judgment against the Law Firm in the amount of $500,000 in July 2009, many months before Bob became a partner in the Firm. Thus, Bob could only be held liable on Creditor's judgment against the Firm to the extent of his $30,000 contribution and no more than that. The Law Firm properly applied Bob's $30,000 contribution toward Creditor's judgment because a partnership may use its incoming

partner's capital contributions to pay off debts incurred by the partnership prior to the partner's entry.

b. However, Creditor may not enforce its claim against Bob personally on the unsatisfied portion of the debt, because Bob was not a partner of the Law Firm at the time Creditor obtained its $500,000 judgment. Thus, Creditor is limited to obtaining from Bob the $30,000 that Bob paid as capital contributions to the Law Firm and nothing more.

3. The issue is whether a creditor who provides value to a debtor to enable the debtor to acquire rights in the collateral has an enforceable security interest against the debtor despite failing to file a financing statement.

Article 9 of the Uniform Commercial Code (UCC) applies to consensual security interests such as consensual liens in consumer goods and business equipment. Pursuant to Article 9 of the UCC, a creditor's security interest in collateral becomes enforceable--that is, it attaches--when the creditor (a) furnishes value to the debtor, (b) the parties execute a security agreement, and (c) the debtor acquires rights in the collateral. As for the majority of Article 9 security interests, the security agreement is the most crucial method by which to attain attachment. Other security interests may perfect automatically, without the execution of a security agreement, if the creditor takes possession of the collateral. A security agreement must be authenticated by the debtor--that is, the debtor must sign the security agreement in either print or electronic form--and the agreement must reasonably identify the collateral. Where a creditor extends value to the debtor for the purpose of enabling the debtor to acquire rights in the collateral that is the subject of the security interest, however, a purchase money security interest (PMSI) arises. PMSIs in consumer goods enjoy automatic attachment under Article 9 of the UCC and the creditor need not execute a security agreement to attach his PMSI with respect to the debtor. The UCC gives special protection to PMSI holders in an effort to encourage lending to consumers.

Here, Magic Circle is an Article 9 creditor because it took a consensual security interest in Bob's bedroom set. Magic Circle's security interest attached automatically when it lent Bob $6,000 in credit to purchase the bedroom set because this loan enabled Bob to acquire rights in the bedroom set, which constitutes the collateral that Magic Circle has secured in consideration for its loan. Accordingly, Magic Circle is a PMSI holder in Bob's bedroom set and its security interest is attached and enforceable as against Bob. Additionally, Magic Circle's status as a PMSI holder also gives it automatic perfection and super-priority status over all other lien holders that may have a conflicting security interest in the bedroom set or Bob's household goods.

ANSWER TO QUESTION 1

1. a. The issue is whether New York has acquired proper jurisdiction over an out-of-state Defendant spouse in a divorce action and whether New York may properly adjudicate the divorce action based on the residency of the parties.

Under the CPLR, the New York Supreme Court has exclusive jurisdiction over any action that adjudicates the status of a marriage, including divorce, legal separation, annulments, and declarations of nullity. Marriages are considered property of the state, and therefore the New York Supreme Court has "rem" jurisdiction over the marriage. Accordingly, to have proper jurisdiction to issue a divorce decree, only the Plaintiff spouse must be domiciled in New York. The domicile of the Defendant spouse is irrelevant, and the New York Supreme Court need not find a basis of jurisdiction over the Defendant spouse to issue a divorce decree. Domicile is determined by (1) presence in the state and (2) an intent to remain in the state indefinitely. Once it is determined that the Plaintiff spouse is a domiciliary of New York, the Plaintiff spouse must properly serve process upon the Defendant spouse or her attorney via personal service or any other form of service authorized by the Court.

In this case, Bob, the Plaintiff spouse, is a domiciliary of New York. He has lived in New York for 8 years, and New York is his permanent residence. The facts indicate the Bob duly served Ann with process in State Y. Therefore, New York has proper jurisdiction to issue a divorce decree. It should be noted that if Bob asked the court to engage in equitable distribution, award maintenance or in any other way affect the property rights of Ann, the Court would have to assert a basis of jurisdiction over Ann via the matrimonial long-arm statute.

In addition to having proper jurisdiction, Bob must also allege in his divorce complaint that he has satisfied New York's Durational Residency Requirements. Under the CPLR, the Plaintiff spouse must substantively allege that the marriage has sufficient connections to New York state such that it is proper for New York to adjudicate the status of the marriage. Failure to properly satisfy the durational residency requirements may result in dismissal for failure to state a cause of action. The durational residency requirements are met in three ways: (1) where both parties are residents of New York at the time the action is commenced and the grounds for divorce arose in New York; (2) where one party has been a resident New York for one year prior to the action plus an additional factor connecting the marriage to New York, including either the marriage took place in New York, New York was the matrimonial domicile of the parties or the grounds for divorce arose in New York, or (3) where one party has been a resident of New York for two years prior to the action, no further showing is necessary.

In this case, Bob the Plaintiff spouse has been a continuous resident of New York for over two years. He alleged this fact in his complaint, and as a result, he satisfied the

durational residency requirements. Because Bob has met both jurisdictional requirements and the durational residency requirements, Ann will not be successful in contesting New York's jurisdiction over the divorce action.

b. The issue is whether the separation agreement duly executed by the parties is rescinded due to the fact that the parties engaged in sexual relations on one isolated occasion.

Under New York Domestic Relations Law, a divorce may be obtained either by successfully proving grounds for divorce, which includes abandonment, adultery, imprisonment for 3 consecutive years, or cruel and inhuman treatment. In the absence of grounds for divorce, a party may also obtain what is known as a conversion divorce. To procure a conversion divorce, a party must show that (1) the spouses are separated under either a decree of legal separation or under a validly executed separation agreement filed with the court, and (2) the parties have lived separate and apart for 1 year. However, a court will deem a separation agreement rescinded and will not grant a divorce based on that separation agreement where (1) the parties cohabit with the intent to reconcile after execution of the agreement or (2) where one party has materially breached the terms of the agreement. The restrictions do not apply where the parties are separated based on a decree of legal separation.

In this case, the facts indicate that in May 2008 Bob and Ann separated pursuant to a properly acknowledged and executed separation agreement, which they duly filed with the county clerk's office the following month. It should be noted that the separation clock begins to run when the parties actually separate and not when the agreement is filed. The agreement can be filed at any point prior to commencement of the divorce action. Bob filed for divorce in July 2009, and the parties have lived separate and apart since executing the separation agreement in May 2008. Therefore, the parties have satisfied the requirements for a conversion divorce. The fact that Bob and Ann engaged in sexual relations on an isolated occasion in January 2009 does not affect he separation agreement. In order for a separation agreement to be rescinded the parties must cohabitate with the intent to reconcile. Here the facts indicate that Bob and Ann had no intent to reconcile and have had no contact since that single encounter. Accordingly, because the separation agreement remains enforceable and the parties have lived separate and apart for at least 1 year, and Bob will be successful in his action for divorce.

2. a. The issue is whether a partnership may use an incoming partner's capital contributions to satisfy a pre-existing obligation.

Under the Uniform Partnership Act, which New York has adopted, a partnership may use an incoming partner's capital contribution to satisfy pre-existing obligations, but the incoming partner will not be personally liable for those obligations.

In this case, Law Firm used Bob's capital contribution to partially satisfy a judgment obtained by Creditor in July 2009. Law Firm was authorized to use the funds under the UPA, and thus its actions were proper.

b. The issue is whether an incoming partner is personally liable for the pre-existing debts of the partnership.

Under the Uniform Partnership Act, the general partners of a partnership are personally liable for the debts and obligations incurred by the partnership. However, the UPA places a limitation on the personal liability of incoming partners. An incoming partner is liable only to the extent of his capital contribution for prior debts of the partnership and cannot be held personally liable for any pre-existing obligations.

In this case, Bob joined the partnership in January 2010 and thereafter learned that in July 2009 Creditor had obtained a judgment against partnership for a malpractice claim. Because Creditor's malpractice judgment predated Bob's admittance as a partner to Law Firm, Bob will only be liable to the extent of his capital contribution. Creditor cannot hold Bob personally liable for the unsatisfied portion of the judgment.

3. The issue is whether Magic Circle properly attached and perfected its security interest in the bedroom set.

Under Article 9 of the UCC, a creditor may properly obtain a security interest in collateral as a means to secure a loan given to a debtor. To obtain a valid security interest in collateral, the creditor must attach the collateral and perfect its interest. Attachment secures the creditor's rights in the debtor's collateral while perfection gives notice of the creditor's rights in the collateral to other secured parties who may have claims to the same collateral.

Under Article 9 of the UCC, attachment requires (1) the creditor extending value to the debtor, (2) a record or security agreement memorializing the security interest, and (3) the debtor must have ownership rights in the collateral. The record or security agreement must be authenticated by the debtor and must reasonably identify the collateral (meaning a supergeneric description will not suffice).

In this case, Magic Circle has properly attached its security interest in Bob's furniture set by obtaining what is known as a purchase money security interest in consumer goods. Consumer goods refers to any collateral that will be used for family or home purposes. A purchase money security interest arises where the creditor assumes a security interest in collateral it actually sells the debtor or where the creditor obtains a security interest in the goods that debtor purchases with the loaned funds. Here, Magic Circle extended $6000 of credit to enable Bob to purchase the furniture set he now owns. Magic Circle reserved a security interest in the furniture as collateral for the debt. Thus,

Magic Circle has both extended value, and Bob has rights to the collateral. Moreover, Magic Circle and Bob entered into retail credit installment agreement, and assuming it was properly authenticated by Bob and identified the collateral, the agreement will be valid. As such, Magic Circle has properly attached the security interest in the furniture set.

However, Magic Circle must also perfect its security interest. Typically, perfection is obtained by the creditor filing a financing statement with the secretary of state that identifies the collateral and its security interest in it. Perfection may also be obtained by taking possession or control of the collateral providing the security interest. However, where a secured party has retained a purchase money security interest in consumer goods, perfection is automatic upon attachment and no further steps are necessary.

In this case, because Magic Circle has properly attached its security interest in the furniture set, perfection was automatic. Therefore, Magic Circle a perfected security interest in the furniture set and may initiate foreclosure proceedings on account of Bob's default if it so chooses.

ANSWER TO QUESTION 2

1. The Issue is whether a witness to a will is permitted to testify as to a Testator's testamentary capacity at the time she executed the will

Under New York's EPTL, in order for a will to be validly executed in New York the following requirements must be satisfied: (1) the will must be signed by adult testator; (2) the will must be in writing; (3) the testator's signature must appear at the end; (4) the testator must publish that the document is her will; and (5) two witnesses must sign the will within 30 days from each other, and sign in the testator's presence. If these formal procedures are not satisfied, then New York will deem the will invalid and any challenges to the will be rendered obsolete because the will is per se invalid.

Once a will is declared valid, it may be challenged on the following grounds:(1) the testator was unduly influenced by a beneficiary at the time she executed a will and (2) the testator lacked testamentary capacity at the time she executed the will. A challenge by a party that a testator lacked testamentary capacity requires the court to consider the testator's age and state of mind at the time she executed the will. Thus, the court must weigh whether the testator was of sound mind, so that without prompting, she fully recognized the extent of her estate and the objects of her bounty. In making this assessment, the Court will be permitted to consider the testimony of witnesses to a will, regardless of whether they possess expert knowledge on the subject matter. Thus, while the general rule under New York law is that a lay witness is not permitted to testify as to

facts, or to draw conclusions or give opinions based on her assessment of the facts, or to render her opinion in matters that are more appropriately reserved for expert testimony, these rules do not apply to a proceeding in the Surrogate's Court regarding the testamentary capacity of a testator, as given by a witness to the will who received nothing under it (that is, an uninterested witness). Here, the Surrogate will be permitted to consider the facts and circumstances surrounding the execution of the will, which includes the testimony of a disinterested witness who validly witnessed a will that is deemed by the court to be validly executed.

In the present case, Jack would be permitted to offer testimony as to the Testator Tina's mental capacity at the time she executed the will. The facts indicate that Tina read the will, published the will by "telling everyone that it was exactly what she wanted," signed the will, and then had both witnesses, Sara and Jack subscribe the will in her presence on the date it was executed. Therefore, the will was validly executed under New York law.

Here, the objections of Brother that Jack is not an expert witness, and thus unqualified to testify, will not succeed where the will has been deemed valid and Jack was not a beneficiary under the will.

Under New York law, a necessary witness is one who is required for proper execution of any will. Where a necessary witness is also a beneficiary under the will, that will still remains valid, but that bequest to the beneficiary will be rendered invalid unless there were at least two other witnesses to the will who received nothing under it (thus, New York requires at least 2 disinterested witnesses to any will). Here, Jack was a necessary witness who was not a beneficiary under the will. Accordingly, the will is valid and Jack will not be deemed an interested witness who may have any of his testimony challenged in the event a will beneficiary challenges the testator's capacity at the time she executed the will.

Furthermore, Jack would also not have been disqualified as an interested party from testifying under New York's dead man statute, because again, he was not an interested witness under the will. Under the Dead Man's Statute, an interested witness (that is, one who would seek to gain or lose something from the Court's ruling, or who would have any judgment later utilized against him in a proceeding by the deceased party's estate) would be prohibited to testify unless he satisfied an exception to that statute (such as where the decedent's death was by virtue of an accident involving a car, boat or plane, where the witness would be permitted to testify as to facts surrounding that incident; or where the estate opened the door by openly questioning the witness about any transactions or conversations had with the decedent; or where the estate fails to raise the Dead Man's Statute exception, and thereby waives it).

In the present matter, Court's ruling to permit Jack to testify was correctly made. Here, as a witness to a validly executed will, who also does not qualify as an interested witness, will be permitted by the Surrogate to testify as to his opinion regarding the testator's state of mind, and Brother will see his challenge fail.

2. The issue is whether Tina's death has an impact on the foreclosure proceeding commenced by Lender and whether Lawyer's execution of the Stipulation will be rendered invalid because Tina's death terminated the agency

Under New York law, the agency relationship arises where the principal permits another party (the agent) to bind the principal to contracts. An agent has 3 types of authority: (1) actual authority, which is either orally conferred or conferred in writing by the principal; (2) implied authority: which the law infers from the express authority given; and (3) apparent authority: where the principal, through words or conduct communicated to a 3rd party, creates the appearance of an agency relationship, and the 3rd party reasonably relies upon the agent's apparent authority.

Even with any of the authority above, however, an agency relationship will terminate upon the following events: (1) through an unilateral action by either the principal or agent terminating the agency (for instance, the agent resigning or the principal firing the agent); (2) bankruptcy of the principal, which terminates the agency by operation of law; (3) a mental infirmity or mental incapacity of the principal; and (4) death of either the agent or the principal. When any of these events occur, the agency relationship terminates by operation of law.

In the present case, Tina's interest in Blackacre was encumbered by a mortgage and note held by the Lender, and in June the Lender duly commenced a foreclosure proceeding against Tina by filing a motion for summary judgment (as a side note, under any CPLR 3212 motion, the Court must find that there are no material issues of fact to be litigated and that the Court can decide the motion as a matter of law; furthermore, any motion for summary judgment must be filed within 120 days following the filing of a note of issue, unless the Court decides to extend this period for "good cause shown."). When the Lender had duly filed and served the summary judgment motion in July, Tina had died. Accordingly, any agency relationship between the lawyer and Tina accordingly terminated on that date as well, because Tina's death served to end the agency relationship. Thus, Lawyer's action to enter into a stipulation upon the return date of the Lender's summary judgment motion is invalid, because he no longer had the authority to do so.

However, Tina's death does not mean that the foreclosure action is now terminated. Instead, only the stipulation entered into by the lawyer is invalid, and only the agreement to pay the stipulated 250,000 will be deemed unenforceable. Subsequently, the Lender is free to proceed with his foreclosure action against Tina's

estate, but the stipulated figure of 250,000 is unenforceable and will not be recognized by a Court.

3. a. The issue is whether Jen can benefit under the anti-lapse statute and receive the bequest made by Tina to her predeceased mother
As a general rule, when a beneficiary predeceases the testator, that beneficiary's bequest under the testator's will shall lapse back into the residuary. Where there is no residuary, or the residuary fails, then that bequest lapses. The exception to this rule under the New York EPTL is the anti-lapse statute. Here, any bequests by the testator to an issue or sibling will not lapse, but instead will be distributed to the issue of that predeceased beneficiary, if she had any. Friends of the testator who receive a bequest under the testator's will do not qualify under the anti-lapse statute.

In the present case, Ana was a named beneficiary under Tina's will, and was to receive a general bequest of 25,000. Ana predeceased Tina, and was survived by her issue, her only daughter Jen. Under the EPTL, however, Ana (and subsequently her daughter Jen) will not benefit under the anti-lapse rule, because she is a friend, and not an issue or sibling of Tina. Therefore, any bequest that was scheduled to go to Ana will not pass to her issue under the anti-lapse statute. Instead, that bequest will lapse back into Tina's estate, and go to the residuary legatee (here, Brother, who is discussed below).

b. The issue is whether Tina's Niece will still be able to receive her demonstrative bequest from the 100,000 proceeds in Tina's brokerage account, or whether that bequest adeemed with Tina's death

A specific bequest to a beneficiary under the testator's will is that of an identifiable specific item from the testator's estate (such as a rare painting or a Tiffany ring, for example). If, at the moment of the testator's death that bequest is lost, has been stolen, destroyed, or has been conveyed away, then that bequest will be found to have adeemed, and that beneficiary does not receive the bequest. The process of ademption only applies to specific bequests, however, and does not apply to general bequests (that is, bequests of a specified sum of money) or demonstrative bequests, which are bequests of money from an identified source). Instead, with the case of demonstrative bequests especially, if the beneficiary can successful trace the proceeds of these bequests from their identified source, then that beneficiary is entitled to receive that bequest.

In the present case, the 100,000 bequest from Tina to Niece is a demonstrative bequest. Here, it can be traced to a specified source, the brokerage account held in Tina's name. If those proceeds remain in the account at the time of the testator's death, and where the will was validly executed, then the beneficiary is entitled to take that bequest.

c. The issue is whether Brother can still take under Tina's will as a residuary beneficiary even though he challenged Jack's testimony as to whether Tina had testamentary capacity at the time she executed the will.

Under New York law, where the testator's will contains a no-contest clause, any beneficiary to that will who contests the will or any of its provisions will be deemed to forfeit her legacy under the will, and shall be judged to have immediately predeceased the testator. There are exceptions to this rule, such as where the challenging party was contesting the subject matter jurisdiction of the court or where the challenger was seeking a construction of the will or where the challenger was an infant or a surviving spouse. Where a will does not contain such a clause, however, a beneficiary under the will is free to challenge circumstances surrounding its execution, such as whether the testator lacked testamentary capacity, and will not result in losing his bequest under the will.

In the present case, the facts do not indicate that Tina's will contained a no-contest clause. Furthermore, Brother was permitted to challenge the testimony of Jack's opinion as to whether Tina possessed the requisite testamentary capacity at the time she entered the will, and without risk of forfeiting his bequest under the will. Accordingly, Brother will not be deemed to have invalidly challenged the will and thus forfeited his legacy because the will neither contains a no-contest clause nor is brother prohibited by law, as a beneficiary, from contesting the testator's mental capacity at the time she executed the will. Accordingly, Brother's challenge will have no bearing on his status as beneficiary and he can continue to take his residuary share.

ANSWER TO QUESTION 2

1. The issue is whether Jack a witness is competent to testify as to the fact that Tina, a testator, is mentally competent when she executed a will.

Generally, lay witnesses are not competent to give opinion testimony. Lay witnesses are not allowed to give opinions that require expert knowledge, or scientific expertise, or give legal conclusions. Several exceptions exist to admit lay witness testimony on opinions that reasonably arise from the events they observed, such as the general mental state of persons they personally saw and witnessed. In testamentary matters, a testator is only required to know generally the nature of their property, the purpose of the instrument, and the natural bounty, or offspring, a lower standard than mental competency. Witnesses to wills can testify as to the testator's mental state to establish testamentary capacity, though they cannot give conclusions as to the testator's legal mental competency.

Here, Fran's attorney asked Jack about her mental competency in executing the will. In this case, it in context, the lawyer would have been asking about Tina's competency in relation to the requirements of testamentary capacity which would be

within the exception for lay witness opinion testimony. The court was correct in permitting Jack to testify.

2. The issue is what effect Tina's death will have on the foreclosure action. Generally, specific devises in wills are devised subject to the liens attached to them. A general provision to pay debts does not direct the executor to satisfy liens on specifically devised property. The distributee takes subject to the mortgage and either the distributee or the estate must continue to make payments on the debt. If payments are not made, the debt will go into default as at any other time. The mortgagee and creditor for a debt secured by a mortgage to specifically devised property can initiate a foreclosure action on the property, even while held by the executor, if the payments go into default. During foreclosure, the debtor has the right of redemption up until the sale of the property. The death of a debtor testator during a foreclosure action will have no effect on the rights of the creditor / mortgagee, or the estate.

Here, Tina's Blackacre was specifically devised, to Fran, but encumbered by a mortgage and note held by Lender. The lender had commenced a foreclosure action against Tina, and filed a motion for summary judgment, after which Tina died. As the foreclosure sale had not occurred yet, Tina and now her estate holds the right of redemption against the mortgagee. The Lawyer's stipulation agreement, signed on behalf of Tina stating that Tina owed $250,000 will be binding on the estate if it was signed by Lawyer on Tina's behalf before her death. If it was signed and returned after her death, the stipulation agreement will not be valid, attorney's agency for Tina would have ended, and Tina's estate would have come into existence. Power to act for the estate would go to Fran, as executor to act on behalf of the estate in respect to the mortgage foreclosure action. However, stipulation agreement aside, the Lender can proceed in the foreclosure action against the estate if the right of redemption is not exercised and payments brought up to date before the sale of the property.

Tina's death will not stop or toll the foreclosure action, though if it preceded the stipulation agreement, the stipulation agreement is invalid.

3. The issue is whether the will was validly executed under testamentary formalities and what the parties below will take.

A will must be signed, subscribed, published, and witnessed by two witnesses, who must attest the will in thirty days. The publication required is that the testator must declare the will to be her will to the two witnesses.

Here the will was signed, subscribed, and witnessed by two witnesses. The will was also published, when Tina said that this was what she wanted. There may be an issue as to publication, but under the context, her statement would probably be enough to satisfy the requirement.

Jen will receive nothing under the will, or intestacy.

The issue is what happens to a gift devised to a friend when the friend predeceases the testator.

Generally, when a gift is devised to a distributee who dies before the testator, the gift lapses and is returned to the residuary of the estate. A statutory exception exists under the anti-lapse statute for gifts to descendants of the testator's parents: brothers and sisters and to the testator's issue. In these cases, the gift will then go to the devisee's issue.

Here, Tina devised a gift to Ana, who was only a friend. Ana predeceased Tina, so the gift lapsed and was not saved by the anti-lapse statute.

Niece will receive $100,000, first satisfied from the brokerage account, then other funds from the estate.

The issue is what happens when a demonstrative devise is to come from a fund that is insufficient. A demonstrative devise is a gift of a certain amount, which is to be first satisfied from the designated source, then made up from the rest of the estate. Here, Tina gave Niece, $100,000, from the funds of her brokerage account. The designation of the brokerage account designates this as a devise to be satisfied from the brokerage account first. This account will be exhausted after $75,000. Then the devise will be satisfied from the remaining funds in the bank account.

Under intestacy, Niece would receive nothing.

The brother will take the residue of the estate, which is what is left over after distributing all specific, general and demonstrative devises.

Here, Tina's estate consists of Blackacre, $75,000 in a brokerage account, and $50,000 in a bank account.

Tina has successfully devised Blackacre to Fran, who will take subject to the mortgage, and $100,000 to Niece ($75,000 from brokerage account and $25,000 from bank account). Brother will be left with the $25,000 left over in the bank account, left because the gift to Ana lapsed.

Under intestacy, Brother would have taken the full estate as heir - her closest relative under NY's intestacy statute.

ANSWER TO QUESTION 3

1. The issue is whether Thea has a valid claim for negligent infliction of emotional distress seeking to recover emotional injuries only.

In New York, in order to recover for negligent infliction of emotional distress the plaintiff needs to plead and prove the following:

a. The plaintiff has within the Paulsgraf zone of danger and the defendant owed a foreseeable duty of care to the plaintiff, because there has a foreseeable risk of harm or injury to the plaintiff by the defendant's negligent contact.

b. The plaintiff must suffer injuries. Physical injuries must be present. As far as any psychological injuries, there needs to be some manifestation of physical injuries. Or in the event there were no injuries, then the plaintiff must have been a close family member witnessing the injury caused to loved one.

Thea has within the Paulsgraf zone of danger. She ran physically next to her niece when her niece was being mauled by the dog and it is clearly foreseeable that the dog could have turned and attacked Thea. She was in close proximity to her niece throughout the attack.

Thea has sustained psychological injury and trauma. However, there is no physical injury and without the physical injury, the only other way in which she can put forward a valid claim is if she is construed in the eyes of the law as a close family member witnessing the scene to a loved one whilst simultaneously being in the zone of danger. New York law does not recognize an aunt-niece relationship as being one that would give rise to a claim for negligent infliction of emotional distress. In light of the above, Thea is not in a position to file this action and the court should dismiss Thea's claim.

2. The issue is whether Dan is liable under strict tort liability.

Strict tort liability arises in causes of actions involving injuries sustained by wild or domestic animals. A dog is considered a domestic animal. However, an owner will not be automatically responsible under strict tort liability for any injuries caused by a domestic animal if that animal has displayed no vicious propensities. This is usually referred to as the right to "one bite". Vicious propensities are the animal's inclinations and habitual tendency to act in a manner to endanger another person, or property. This is also where the dog is known to bite, gnarl or snap at people. Then an owner of such an animal will be liable under strict tort liability despite the dog never having bitten anyone before. The owner must be aware of the dog's vicious properties and inclinations in order to be liable for its actions. Here, Dan purchased the dog bred as a guard dog, which

alone would not be sufficient. However, Dan had himself on previous occasions witnessed the dog try and attack the niece in the past and was also aware that the dog was aggressive towards strangers and had on occasion with such force managed to run free.

It is likely that Dan was very definitely aware of his dog's vicious properties and had a duty of care to others. Accordingly, it is likely the courts will bid Dan strictly liable for the injuries sustained by the niece.

3. The issue is whether Mom is entitled to the provisional remedy of a preliminary injunction.

The courts have discretion when granting provisional remedies. There are four provisional remedies: 1) preliminary injunction, 2) attachment order, 3) receivership or 4) lis pendens.

The purpose of a provisional remedy is to maintain the status quo pending the outcome of a hearing. In order to obtain a preliminary injunction, the plaintiff must establish a) the likelihood of success of their claim based on the merits, b) irreparable injury will occur or is presently occurring, and c) that plaintiff is likely to suffer more harm if the preliminary injunction is not granted than if the dependant will suffer if the injunction is granted. This is known as the relative harm test where the court endeavors to balance the equities.

Irreparable injury is such injury that cannot be quantified through money damages or is too complex and difficult to ascertain what the monetary damages would be if the harm or act continues.

A preliminary injunction seeks to stop somebody from doing something that continues to cause the irreparable injury. The plaintiff needs to establish the likelihood of their success on the merits of their claim and before the court can consider ordering a preliminary injunction the courts needs to evaluate the likelihood of success on the underlying claim. A plaintiff can be required to post a bond to compensate against any damages in the event the preliminary injunction is wrongfully granted.

In this case, the courts will need to consider the potential non-quantifiable harm to niece if the injunction is not granted and weigh that against the harm to Dan and his dog if the injunction is granted. The injunction seeks to prevent Dan from continuing to walk his dog outside the home of niece. It is unlikely that Dan will suffer a great loss if he is forced to find a different route to walk his dog. The harm to niece could be substantial, evidently the dog is keen on attacking niece as he has attempted to attack her on two occasions. Further, niece may be suffering psychological harm as a result of the last attack and this harm is not repairable through damages. It is likely that when the court

balances the equities, the court is likely to consider the preliminary injunction while the pending case is finalized.

ANSWER TO QUESTION 3

1. The issue is whether Thea has stated a valid cause of action for negligent infliction of emotional distress

All people are under a duty not to cause emotional distress to foreseeable plaintiffs. Under New York Law, a valid claim of negligent infliction of emotional distress (NIED) may arise under two separate circumstances. The first is a breach of a duty of care which comes dangerously close to directly causing an injury to the plaintiff. Under that claim the plaintiff must show the defendant owed a duty, breached that duty there was actual and proximate causation and as a result, the plaintiff manifested a physical injury because of their emotional distress. Under such a claim the plaintiff must show that they themselves were the party almost injured by the negligent act.

Here, under the first form of NIED, the plaintiff, Thea, must show that Dan owed her a duty of care and that he breached that duty. This may be demonstrated because Dan owed all foreseeable plaintiffs a duty not to cause them emotional distress. Furthermore, Thea may show he breached this by allowing his dog to almost attack her. Additionally, Thea can show that this was the cause in fact of her injuries by showing, but for Dan walking his dog by her house, she would not have sustained any injury. Furthermore, she can show this was the proximate cause because his dog getting free from his son's hand was foreseeable. Thea's problem will be in showing the appropriate damages required for NIED. Under NIED, Thea must show that she suffered a serious physical manifestation of the injuries. Because Thea only suffered depression and anxiety as a result of the attack, she will not be able to show the physical manifestation required under the first form of NIED. Therefore, a claim arising for NIED alleged by Thea for her "near attack" will not be sustained.

However, New York does recognize a "bystander" claim of NIED. Under the bystander claim of NIED, the elements are the same as above, except it requires showing the plaintiff witnessed the attack upon a close family relative and suffered severe emotional distress as a result. Under the common law, a plaintiff under a "bystander" NIED claim need only show they were in proximity to the injury of a close relative and watched in happen in real time. New York does not recognize this standard. New York requires the plaintiff bystander also be in the immediate zone of danger. Because it is clear that Dan breached his duty, and there was causation and emotional damages, a bystander NIED claim should be established, for a close family member. Here, Thea is the Aunt of the victim. Although Thea has an extremely close relationship with Child, a niece-aunt relationship is not sufficient to make a NIED bystander claim in New York.

Because the relationship between the bystander-plaintiff was not "close," Thea will not be able to sustain a bystander NIED claim against Dan.

Therefore, the court should rule to dismiss Thea's claim for negligent infliction of emotional distress against Dan.

2. The issue is whether Dan may be held liable for strict liability

A plaintiff may make a claim of Strict liability in tort under three may circumstances. Strict products liability, ultra hazardous activity, and wild or vicious animals. Generally strict liability for animals is reserved for "wild animals," however, if an owner is aware that his animal's breed is vicious, or the specific animal has demonstrated a vicious propensity, he may be held strictly liable.

Here, Mom suing Dan on behalf of Child will need to show that Dan owed a strict duty of care, that he breached it and that the breach was the cause of the sustained damages. Here, it appears that Dan's dog was bred as a guard dog, which itself is not dispositive. A guard dog may not be inherently vicious. However, it appears that Dan and his family noticed on many occasions the dog was defensive and aggressive. Because Dan recognized that his dog was vicious or had vicious propensities, he should be strictly liable for the damages and injuries caused by his dog.

One issue that is not entirely clear is whether or not Dan himself was negligent at the moment the dog pulled from the son. New York does not recognize claims based upon the "negligent supervision of a parent." Here however, Dan does not appear to be "negligently supervising" the son. He is walking with the son and the dog together and should be directly liable to Mom.

Therefore, Dan should be held liable in Mom's negligence action on behalf of Child.

3. The issue is whether Mom may obtain a preliminary injunction forbidding Dan to Walk the Dog in front of Thea's house

Under New York Law, a preliminary injunction is a form of equitable relief which may be granted in New York Supreme Court. A party seeking a preliminary injunction must show the likelihood of success on their underlying action (here the permanent injunction), and they must show that without obtaining the preliminary injunction they are likely to sustain immediate and irreparable harm. Furthermore, because a preliminary injunction is equitable in nature, the party seeking it may be required to show they are not guilty of laches, unclean hands, and have no adequate remedy at law. Additionally, for Mom's permanent injunction, the court will look to ensure the enforceability of the injunction and will seek to balance the equities involved

Here, Mom will be required to show that she is likely to succeed in her underlying action against Dan. Additionally, Mom will need to show that absent obtaining the preliminary injunction, during the pendency of her permanent injunction claim, she is likely to suffer irreparable harm. First, Mom will likely be able to show she has a meritorious underlying claim for her preliminary injunction. Additionally, she can show that absent this preliminary injunction, Dan will continue to walk his dog past her house and continually endanger her and her loved ones. It also appears that Mom is moving on notice for her preliminary injunction immediately after Dan walked past her house with the son walking the dog. She did this rapidly and will not be found guilty of laches. There also does not appear to be any grounds for finding her guilty of unclean hands. Lastly, money damages will not be sufficient to protect her child. Only equitable relief will stop Dan from allowing the dog to be walked past her house.

Therefore, the court should grant Mom's motion for preliminary injunction.

It should be noted that a preliminary injunction is a provisional remedy and Mom may be required to post a bond to indemnify Dan from any losses caused by the injunction.

ANSWER TO QUESTION 4

1. The first issue is whether an easement may be automatically revived after its termination by operation of law.

In New York, if the dominant and servient parcels of land are purchased by the same owner, the parcels are thereby merged and by operation of law the easement that the dominant tenement had over the servient estate is terminated.

In New York, once an easement has been terminated by a merger of the dominant and servient lands, it is not automatically revived if the parcels are subsequently conveyed to different individual buyers or if the owner conveys one parcel to another person without mention of the easement in the new deed.

A dominant tenement is the parcel of land that is benefitted by the easement and the servient tenement is the parcel of land that is burdened by the easement. An affirmative easement appurtenant involves two parcels of land and can be created by express grant, by prescription, by implication or by necessity. An easement by grant is an easement expressly created by the grantor and expressly stated in the deed to the dominant and servient parcels pursuant to whatever lawful terms the grantor may determine.

In this case, the original owner of the land subdivided his land into a dominant tenement (DomAcre) and servient tenement (ServAcre) in 1990 in which the deed to the dominant parcel contained a grant of an easement over the servient land and the deed to the servient land stated that the land was expressly subject to that easement. Thus, the owner of DomAcre was given an easement by grant.

However, in this case, DomAcre and ServeAcre were eventually conveyed to the same person; the dominant parcel in 2001 and the servient parcel in 2002. Therefore, in 2002, the easement by grant was terminated by operation of law due to the merger of the two parcels. When that person subsequently redivided the parcels the language of the deed said "together with the appurtenances and all of the estate and right of the Grantor in and to said premises." However, at the time of the conveyance, the grantor did not have the right to any easement because he owned both parcels and therefore when he transferred the two parcels pursuant to "all of the estate and rights of the grantor" he was not conveying a right to an easement. Furthermore, neither deed contained any mention of the easement.

In this case, the owner of the DomAcre ended up using the terminated easement for a number of years without complaint. However, simply because he used ServAcre without objection by the owner of ServAcre does not entitle him to the revival of the easement that was terminated by the merger of 2002.

Therefore, although the party seeking to enforce the original 1990 easement used ServAcre to get his boat into the pond, he has no right to enforce the 1990 easement declared in the first deed because there was no subsequent revival of the easement.

2. The second issue is whether a potential subsequent purchaser of the servient tenement cancels a contract to purchase the servient parcel based on failure to convey marketable title based on the possible existence of an easement before the court determines whether an easement exists.

In New York, a contract for the sale of land includes an implied warranty of marketable title and the buyer of land has an implied right to cancel a contract for sale if the seller cannot convey marketable title at the closing despite a contract being silent on the issue of quality of title. An easement is a claim to land that would impede a seller's ability to convey marketable title and would entitle a buyer to cancel a contract to purchase the land burdened by the easement.

An easement by necessity is an easement that is created in the servient tenement because the dominant tenement is landlocked and has no reasonable access to a way in and out of the property. An easement by implication is an easement that is created not because the dominant tenement is landlocked but because it assists the dominant tenement in some way other than access. An easement by implication does not arise

because an owner of a parcel not on the water wants to be on the water and therefore decides he will create a roadway to access the water through another person's property. An easement by prescription arises when the owner of a parcel openly, hostily and continuously uses a portion of another's adjacent land.

In New York, a buyer has the duty to inspect the land and a duty to inspect the record for any notice of mortgages, liens, encumbrances or any other claim to the property that would impede the seller's conveyance of marketable title. A buyer has a duty to act as a reasonable buyer and make reasonable inspections.

A seller has a duty to convey marketable title at the closing. If a seller cannot convey such title, the buyer has the right to cancel the contract and sue the seller for damages, if any. On the other hand, if the seller conveys marketable title and yet the buyer refuses to go through with the closing, the seller has the right to sue the buyer for specific performance.

In this case, the seller and buyer entered into a written contract for the sale of the servient parcel. While the buyer was inspecting the premises he spoke with the owner of the dominant parcel who informed buyer that although he had not used the "easement" to access the pond for his boat for the last two summers, he intended on purchasing a boat and resuming his use of the "easement." The owner of the dominant parcel stated that the easement was in the language of his deed and in the prior deeds and claimed that in any event, his prior use entitled him to use of the easement.

In this case, the owner of the once dominant tenement is not entitled to an easement under any of the four methods of achieving an easement. Furthermore, because the prior deed concerning the two parcels was duly recorded, the potential buyer would see that the two parcels were merged and thereafter the easement was not effectively revived.

Therefore, because the easement was not validly revived and the owner of the dominant parcel has no right to an easement over the land the potential buyer contracted to purchase, the buyer cannot cancel the contract to purchase the land because the seller can convey marketable title.

3. The third issue is whether a broker can enforce his oral agreement for commission even in the event the buyer validly rescinds the contract to purchase the land.

In New York, under the Statute of Frauds, an agreement for the commission regarding finding a buyer for a parcel of land must be in writing unless the broker is a licensed real estate broker.

Furthermore, in New York, a commission is generally considered earned by a broker when the broker procures a buyer who is "ready, willing and able" to purchase the seller's land. Generally, unless otherwise stated in a written contract, a closing is not necessary, especially if the reason the closing did not occur was the fault of the seller (e.g., the seller cannot convey marketable title). Generally, if the broker is hired to find a person who is "ready, willing and able" to purchase the land and the broker delivers a person who has those qualifications then the broker can demand his commission.

The courts look to the expectation of the parties and want to make sure the parties receive what they expected.

In this case, the agreement was oral and did not contain a clause concerning whether a closing was necessary. Assuming the broker was a licensed real estate broker, the broker may enforce the agreement and receive his commission because he delivered a buyer who was "ready, willing and able" and that was what he was expected to do. Furthermore, if the buyer does not purchase the land, it will be because the seller failed to convey marketable title, which is not the fault of the broker.

Therefore, the broker can receive his commission even if the buyer rescinds the contract based on lack of marketable title.

ANSWER TO QUESTION 4

1. The issue presented is whether an express easement is extinguished by the merger of the dominant and servient tenements.

An easement is a legal interest in the property of another, allowing for access for a limited purpose or a right of way. There are two types of easement: appurtenant (which involves two pieces of land, a dominant and servient tenement) and gross (which involves access to only one piece of land). In New York, there are four ways to create an easement: express grant, implication, necessity, or prescription. An easement by grant is obtained through agreement of the parties. In order for subsequent takers to enforce the easement by grant, it must be in writing, intended to touch and concern the land, and there must be notice to subsequent property owners. An easement by implication arises when one owner subdivides a property into two parts, and it is reasonably apparent based on the prior use of the two parts that one preserved an easement over the other for an essential aspect of the use of the land. An easement by necessity is similar to that by implication, but requires a showing that the dominant's tenement's use of the easement is the only means of obtaining access to a public right of way. If any alternatively means of access arises, the easement by necessity is automatically extinguished. An easement by prescription is obtained in a similar fashion to adverse possession. The person claiming the easement must have made continuous use for 10 years, the use must have been open

and notorious, and the use must have been hostile (i.e. without consent from the landowner). If all these elements are present, an easement by prescription will arise.

An easement appurtenant (i.e. one with both a dominant and servient tenement), will transfer along with any interests in the land as long as the purchaser is on notice of the easement's existence. An easement in gross is only transferred if it is for a commercial purpose. Notice can be implied through observation of the land, constructive based on records, or actual based on a term included in the deed. If, at any time, the dominant and servient tenements are merged into one through the purchase of both by the same owner, the easement is extinguished. Any attempt to rekindle it would require the creation of a new easement through one of the four methods above.

Here, Dan is attempting to claim a right to cross ServAcre. The original easement granted by Bob to Al had all the requirements for running with the land. It was appurtenant (involving a dominant and servient tenement), in writing, touched and concerned the land, and provided notice through the deeds. However, that easement was extinguished when Cal purchased ServAcre in 1996 after already having title to DomAcre. Once Cal took title to both properties, the original easement was destroyed. Thus, for Dan to have an easement, it must have been created subsequent to 1996. There was no easement by grant at this time, as neither Dan's nor Ed's deeds made reference to any such right with any degree of specificity. There was also no easement by prescription, as Dan only used the path over ServAcre for 7 years, from 2001 to 2008, an insufficient amount of time to create an easement by prescription. Even had Dan not stopped his use, 10 years have not elapsed since he took title to the land in 2001, thus it is impossible for an easement by prescription to have arisen. DomAcre does not require access over ServAcre to reach a lawful right of way, so no easement by necessity can have arisen.

Dan's only possible argument is that when Cal re-divided DomAcre and ServAcre, an easement by implication was created. However, an easement by implication requires the claimed easement to be related to an essential aspect of the use of the dominant parcel that was immediately apparent to both parties, not merely a courtesy of access to a pond for launching a boat. Thus, Dan will likely fail to prove that he has a valid easement. Without an easement, Dan will not be successful in claiming a right to cross ServAcre.

2. The second issue is whether a party may claim that he has received unmarketable title based on a neighbor's assertion of an easement onto the property.

Under the New York Real Property and Procedures Law (RPAPL), a seller has a duty to convey marketable title to a buyer. Marketable title is title that is free from any cloud or subject to any adverse claim. The buyer must not be made to "buy a lawsuit" along with her land. When a seller enters into a land contract without specifying what quality of deed may be conveyed, that contract is permissible, but the seller must

eventually transfer a deed making some (or no) warranties. There are 3 types of deeds: quitclaim, warranty, and bargain and sale. In a quitclaim deed, the seller makes no warranties to the buyer. In a warranty deed, the seller offers six covenants to the buyer, assuring her, among other things, of the lack of encumbrances on the land and her right to claim it. In a bargain and sale deed, the seller only warranties that she has not transferred title to the land to anyone else and that she is unaware of any adverse claims to the property. If, during the pendency of a land sale contract, but before closing, a buyer learns that there is a cloud on the title of the land, a claim of adverse possession, a zoning violation, or any other issue that would render title unmarketable, she may withdraw from the contract without penalty.

Here, Buyer has a pending land sale agreement with Ed/Broker. During the pendency of this agreement, Buyer has learned that Dan has a colorable claim to an easement over the property. If it were held to be valid, and easement would burden Buyer's interest in ServAcre. However, the easement would not render title to ServAcre unmarketable, because Buyer would hold valid title in ServAcre whether there is an easement over it or not. Thus, Buyer may not cancel the purchase contract based solely on a concern about Dan's easement.

3. The final issue is whether an oral agreement to pay a commission to a licensed real estate broker is enforceable under the Statute of Frauds.

The statute of frauds is a statutory provision that requires certain contract to be in writing in order to be enforceable in a court of law. These contracts include 1. contracts related to marriage, 2. service contracts incapable of performance in a year from their making, 3. contracts transferring an interest in land, 4. an executor's promise to answer for the debts of an estate, 5. an agreement to sell goods for more than $500 or lease goods for more than $1000, or a suretyship (a promise to answer for the debts of another). New York also requires a promise to pay a commission be in writing, unless that commission is payable to a licensed attorney or real estate broker. When a contract for a broker to find a purchaser does not specify that a closing is required to obtain the commission, that term will not be imputed into the agreement. Instead, the broker fulfills her obligations by producing an able and willing buyer for the seller.

Here, Broker is attempting to enforce an oral agreement between her and Ed for Ed to pay a 5% commission upon location of a purchaser for ServAcre. This contract is not governed by the statute of frauds, because New York does not require such agreements to be in writing if the promise is made to a licensed real estate broker. Broker is such a licensed broker. A closing also need not occur in order for Broker to be paid. She has fulfilled her obligations under the contract by producing a ready, willing, and able buyer in the person of Buyer. The fact that the contract could be affected by Dan's claim of an easement is irrelevant. Broker has performed all of her obligations under the

contract and is thus entitled to a performance by Ed, i.e. payment of the 5% commission on the sale of ServAcre.

ANSWER TO QUESTION 5

1. The issue is whether a shareholder of a close corporation has a right to inspect the corporation's books and records to determine whether a buy-out price offered to him is fair and reasonable.

Under the New York Business Corporations Law (BCL), a shareholder has a right, upon five days written demand, to inspect the shareholder meeting minutes and a list of all record shareholders. The corporation may require the shareholder to first furnish an affidavit that his interest is not other than in the best interests of the corporation. If the shareholder refuses to provide this affidavit, the corporation may deny the requested records. A shareholder also has a right, under the BCL upon two days written demand, to obtain a list of all directors and officers. A further right exists to obtain all profit and loss statements, balance sheets and other public financial disclosures of the corporation via regular mail. Finally, a shareholder has a common law right of inspection at a reasonable time and at a proper place, for a proper purpose. The Court of Appeals of New York has specifically held that a desire to learn the names of shareholders to solicit a proxy challenge is, indeed, a proper purpose for inspection under the BCL, but a desire to investigate whether shareholder assets are being mismanaged is not a proper purpose. Rather, the Court of Appeals has stated, the latter is more appropriately redressed by way of a shareholder's derivative suit.

Here, Smith does have a right under the BCL to inspect the shareholder meeting minutes and a list of all shareholders of Omega. Smith also has a right to inspect a list of the directors, useless here since he knows who they are. Smith also has a right to obtain all financial statements of Omega, which might be useful to him to determine whether $35/share is a reasonable price for his shares. Finally, Smith may exercise his common law right of inspection and demand corporate books and records at a proper place and for a proper purpose. Determining whether one's shares are worth what the managing shareholders in a close corporation claim they are worth would likely be upheld as a proper purpose by the court, because the remedy is designed to avoid oppression of minority shareholders. Even though Smith's desire to inspect for purposes of valuating his shares runs dangerously close to the improper purpose of investigating whether shareholder assets are being mismanaged, the court is likely to uphold Smith's right to inspect, at the very least, the financial statements of Omega so as to allow him to make a reasonably-informed judgment as to whether to accept the board's offer for his shares. The aim of the court in this situation is one of preventing the cashing out of Smith, a minority shareholder, unfairly by the dominant managing shareholders who, together, own 90% of Omega. Accordingly, Smith will be entitled to inspect the books and

records of Omega to determine the value of his shares, most likely under his common law right of inspection but perhaps also under the BCL.

2. The issue is whether a suit to compel payment of a dividend is a personal claim, suited for individual action, or a corporate claim suited for a derivative action in which demand upon the board must be made.

Under the BCL, when a shareholder seeks to enforce a claim of the corporation against the directors, the shareholder must first make demand upon the board to sue. Claims of the corporation often involve directors' breach of their fiduciary duties of care and loyalty. These breaches are claims in the corporation's right because the harm is, in actuality, suffered by the corporation. Personal claims, however, are not those of the corporation but, rather, of individual shareholders and are not suited for a derivative action. Accordingly, no demand need be made in a personal claim, but personal claims will not be permitted against directors for failure to declare a dividend. Rather, the failure to declare a dividend will only be subject to a derivative action, and even then it is only a proper subject for a derivative action when the directors engaged in some sort of mismanagement or breach of duty, with the harm flowing to the corporation, in connection with the failure to declare a dividend. Pursuant to the BCL, shareholders have no enforceable "right" to dividends until the board makes an official declaration of the dividend. Declarations of distributions are entirely within the board's discretion, and a court will not order the board to make a distribution unless it finds that the failure to declare was motivated by bad faith or a dishonest purpose. Accordingly, in the vast majority of situations, shareholders will not have a claim against the directors to require them to declare a dividend.

The only time where failure to declare a dividend may be the proper subject of a derivative action is when the failure to declare was also the result of some harm to the corporation. Where the shareholder is able to assert a claim on the corporation's behalf, he may pursue by way of a derivative suit. To bring a derivative suit under the BCL, the plaintiff-shareholder must meet the following requirements: (a) he must own the corporation's stock at the time the cause of action accrued; (b) he must own the stock by and through entry of judgment; (c) he must adequately represent the interests of the corporation; (d) he must post a bond for the corporation's reasonable litigation expenses, unless he owns 5% or more of the corporation's shares or his shares are worth more than $50,000 (the purpose of this requirement being to deter strike suits); and (e) he must make demand upon the board of directors to sue or establish why such demand would be futile. "Demand futility" may be established only where a majority of the board is interested, the directors did not inform themselves to the extent reasonable under the circumstances, or the transaction is so egregious on its face that it could not have been the result of sound business judgment. The BCL requires that the plaintiff plead, with particularity, his efforts to get the board to sue or his reasons for not doing so. Where a shareholder makes demand and the board declines to bring suit, the shareholder may only

proceed with his claim if he can establish that a majority of the board is interested or that the procedure for ruling on the demand was inadequate. When considering the adequacy of such procedure, courts look at the independence of those making the investigation and the sufficiency of the investigation, both of which will usually be within appropriate bounds given the prevalent use of Special Litigation Committees to rule on demand requests.

Here, there is no indication that Baker and Jones' failure to declare dividends was the product of mismanagement or breach of duty. If anything, the failure to declare dividends has contributed to Omega's burgeoning success and Baker and Jones have decided to keep earnings within Omega's coffers to foster its continued expansion. Thus, Omega itself has not been harmed by the failure to declare. Accordingly, since the corporation itself could not bring suit on this ground, neither can Smith, as a shareholder. Rather, Smith's action is a personal action and not subject to the demand requirement.

3. The issue is whether a suit to compel payment of a dividend will be successful despite a lack of evidence of the board's bad faith or mismanagement.

Under the BCL, failure to declare a dividend will only result in a proper derivative action, and probable success in that action, if the failure was the result of mismanagement by the board or breach of fiduciary duty. Directors owe the corporation and its shareholders a fiduciary duty of care, requiring them to discharge their duties in good faith and with that degree of diligence, care and skill that an ordinarily prudent person would exercise under similar circumstances. Directors also owe the corporation and its shareholders a duty of loyalty, requiring them to act in good faith and with the conscientiousness, honesty, fairness and morality that the law requires of fiduciaries. Breach of either of these duties will form a proper basis for a derivative suit brought in the corporation's name to compel an accounting for violation of duty. The failure to declare a dividend, inasmuch as there is no right of the shareholders to receive one, will only be subject to a successful derivative action where the reason for the failure was breach of duty of care or loyalty. Absent evidence of egregious mismanagement, bad faith or dishonest purpose, courts will not enforce a shareholder's derivative claim to compel declaration of a dividend. Furthermore, the Business Judgment Rule immunizes directors from liability where there decisions, though not the most successful, were reasonably informed and rationally-based. The BCL does not impose upon directors the onus of being guarantors of corporate success. The directors are empowered with the authority to manage the business affairs of the corporation under the BCL, and absent evidence of self-dealing, bad faith, or extraordinarily uninformed decision-making, they are not subject to attack on their management decisions.

Here, there is no indication that either Baker or Jones, both directors of Omega, have acted in bad faith or breach their fiduciary duties of care or loyalty. Baker and Jones receive appropriate salaries for directors in their position according to industry

standards, so their compensation as directors is not to be deemed excessive and a waste of corporate assets. It appears that Omega's success is attributable to the fact that Baker and Jones have decided, in their reasonable judgment, to keep any undistributed earnings within the corporate accounts. This has led to Omega's considerable expansion of business. This decision not to declare the dividend, then, is based on reasonably-informed judgment that has a rational business purpose. Baker and Jones, intending to continue Omega's success, have decided to keep all earnings within the corporation as it expands. Although Baker and Jones could have phrased their authority more delicately, they are indeed entitled to manage the business affairs of Omega and any decision by them whether to declare a dividend or keep the earnings within the corporation is subject to their reasonable discretion.

Smith may argue that Baker and Jones, as the directors and managing shareholders of Omega, are acting in a manner that is oppressive to Smith, the minority shareholder, and thus this is a breach of duty giving rise to a successful claim to compel declaration of a dividend. This claim will fail, though, because the rights of minority shareholders are not consonant with the rights of the corporation. And, where there is no evidence of mismanagement or breach of fiduciary duty causing a failure to declare a dividend, a claim to compel such distributions will ultimately fail. Here, there is no evidence that Baker and Jones are motivated by any dishonest purpose or are trying to oppress Smith, the minority shareholder. Baker and Jones are acting as prudent managers of Omega and there is no indication that they are distributing dividends or exorbitant salaries to themselves while leaving Smith to fend off of Omega's scraps. Accordingly, Smith's claim to compel declaration of dividends will fail.

ANSWER TO QUESTION 5

1. The issue is whether a shareholder of a closely held corporation has a right to inspect corporate books and records to determine a fair price of his shares.

The rule under New York Business Corporations Law (BCL) is that a shareholder in any corporation has various rights regarding a right to inspect corporate books and records. There exists a common law right of access or right to inspect. While it is not clear how broad or far-reaching this common law right is, it provides reasonable access for a shareholder. Shareholders also have the right to demand the minutes from corporation meetings, both shareholder meetings and board of director meetings. Upon request, a corporation may require the requesting to provide an affidavit that their interest is none other than to support the interest of the corporation and that they have not sold shareholder lists to anyone within the last 5 years. Upon receipt of such an affidavit, a corporation must provide the notes or transcript of the meetings. In a closed corporation which is not sold on a major publicly-traded stock exchange, there is no reasonable way to determine the value of a shareholder's stock without looking to the corporation's

minutes or notes or discussion regarding the topic. Par value is the minimum price for which an issued stock is sold. Shareholders also a right to a copy of the corporation's most recent financial statements.

Here, it appears that Smith has no means of assessing the value of his stock without access to corporate books and records. The stock is not traded publicly, e.g. on Nasdaq, so there is no reasonable way to assess the reasonable value. If given reasonable access to notes of corporate books and records, Smith will likely be able to gain an accurate idea of the value of his stock is. He is essentially attempting to determine the par value of the stock, which would be the minimum value if traded publicly. Thus, pursuant to his shareholder rights under the BCL and/or common law, Smith does have a right to access the corporate books and records to evaluate the fair market value of his shares.

2. The issue is whether a shareholder bringing a suit to compel payment of a dividend must first make a demand on the corporation.

The rule is that a shareholder bringing suit on behalf of the corporation, in what is known as a shareholder derivative suit, must make a demand on the corporation unless to do so would be futile. Demand involves a request that the corporation perform the requested action, here pay a dividend. Demand is futile if the directors are interested or oppressive and making such a demand would reasonably result in any corporate change. If the suit is not on behalf of the corporation but is purely personal in nature, a demand would not be required.

Here, it is not entirely clear if the suit is personal in nature or on behalf of the corporation, i.e. derivative in nature. If the court determines that Smith is suing solely on his own behalf to receive money he feels he is personally entitled to, then it would considered purely personal in nature and demand would not be required. If the court determines that Smith is bringing an action on behalf of the corporation because he feels it is in the corporation's best interests to pay a dividend, it would be considered a shareholder derivative action. However, Baker and Jones have already refused to reveal their salaries and refused to give Smith information regarding the value of his share. Thus it appears they are not helpful or cooperative with Smith and thus demand would be futile. In that case, demand would also not be required.

Thus, whether the court deems the action personal or derivative in nature, demand would be not required.

It should be noted that in a shareholder derivative action, the party bringing the suit must also post a bond unless they own 5% of $50K of stock, show that they would adequately represent the corporation, and include the corporation as a defendant in the lawsuit.

3. The issue is whether a minority shareholder has a right to compel payment of a dividend.

The general rule is that there is no shareholder right to compel a corporation to provide a distribution, whether in the form of a dividend or otherwise. However, in a closely held corporation which is not publicly traded an oppressed shareholder may have other rights. A closely held corporation involves a small number of shareholders and whose stock is not publicly traded. Given that a minority shareholder in a closely held corporation has fewer rights or means of recourse than someone in a publicly traded corporation, the shareholder may have additional legal options. In closely held corporations, directors, officers, and controlling shareholders owe an elevated fiduciary duty to the corporation, and particularly to minority shareholders. Duties include a duty of obedience, duty of loyalty, and duty of care. The duty of obedience involves a duty to obey the law, notably the BCL in NY. The duty of loyalty involves a duty not to engage in interested transactions, self-dealing, etc., and to exercise the utmost degree of loyalty as a reasonable director/officer/controlling shareholder would to protect the corporation. The duty of care involves the duty to exercise the degree of prudence, diligence, and reasonable care as a reasonably prudent business person acting under those circumstances would act. In the duty of care, there involves a business judgment rule, whereby decisions of the corporation will not be second guessed if based on a reasonably prudent business decision done with a reasonable degree of diligence and homework in making the decision.

Here, Smith does not appear to have shown any violation of the fiduciary duties of obedience, care, and loyalty that Baker and Jones owe the corporation. There is no evidence of interested transactions or self-dealing which would implicate the duty of loyalty, and no evidence of any illegal act which would violate the duty of obedience. Pursuant to the duty of care, baker and Jones have pointed to reasonable business strategies as logical justifications for their actions, namely that they wanted to retain the corporation's earnings for business expansion and data showing that in fact they have expanded considerably. While data is not conclusive evidence of complying with the duty of care, there does appear to be sufficient business justification and rational basis for baker and Jones to have complied with the duty of care. Given the general rule not allowing a right to compel payment of dividends and absent a breach of fiduciary duty, it appears that Smith will not likely be successful in his suit to compel payment of a dividend. He likely has other means of achieving his goals.

It should be noted that an action to sue the officers, directors, or controlling shareholders of a closely held corporation for violation of fiduciary duties is often referred to as piercing the corporate veil and is only available in close corporations.

ANSWER TO MPT

ARGUMENT

I. The Evidence Obtained From McLain's Vehicle and Shed Must Be Suppressed Because Officer Simon Did Not Have A Reasonable Suspicion To Stop McLain's Vehicle

The evidence obtained from McLain's vehicle and shed must be suppressed because receiving a tip from an anonymous, unknown informant and viewing McLain walk out of a grocery store with a paper bag did not give Officer Simon a reasonable suspicion to stop him.

"The Fourth Amendment protects individuals from unreasonable searches and seizures." State v. Montel (Fr. Ct. App. 2003). However, under the leading case of Terry v. Ohio, 392 U.S. 1 (1968), police may make brief investigatory stops if they have a reasonable suspicion that the person detained is involved in criminal conduct. Montel. To conduct a lawful *Terry* stop, officers must have "a reasonable suspicion, grounded in specific and articulable facts, that the person [is] involved in criminal activity." Id. (quoting Terry). In determining whether the officer's suspicion is reasonable, courts looks at the totality of the circumstances. Id.

Cases involving anonymous informants are particularly suspect. In Franklin and elsewhere, courts have long recognized that tips from anonymous informants lack the reliability of tips from known or identified informants. Montel. Accordingly, to support a reasonable suspicion, an anonymous tip must be (1) "reliable in its assertion of illegality, not just in its tendency to identify a determinate person," as well as (2) corroborated, "such as by investigation or independent police observation of unusually suspicious conduct . . . ." Montel (quoting Florida v. J.L., 529 U.S. 266, 272 (2000).

In this case, the totality of the circumstances indicates that Officer Simon did not have enough grounds to form a reasonable suspicion: the anonymous tipster who called the police about McLain was unknown to the police and otherwise lacking in reliability, and the tip itself was not supported by sufficient independent corroboration. For these reasons, Officer Simon's stop of McLain and subsequent search of his car and shed were unconstitutional, and the fruits of those unlawful searches must be suppressed.

A. The Anonymous, Unknown Tipster Who Identified McLain's Activity As Suspicious Was Lacking In Reliability

Officer Simon lacked reasonable suspicion justifying his decision to stop McLain because his primary source of information was entirely lacking in reliability. In a similar case, State v. Sneed (Fr. Ct. App. 1999), police stopped the defendant after he visited a

house that police had been surveilling based on a tip from an "untested confidential informant." The court held that the police did not have reasonable suspicion to stop the defendant, noting that they stopped him without verifying the tip through independent investigation. Likewise, in Montel, a tip from even a known informant did not support a reasonable suspicion when it was otherwise lacking in reliability.

Here, the tipster who called the Centralia police hotline was an untested, anonymous informant who refused to give the hotline his name. Unlike previous hotline calls from the Oxford Street area, which had been from Shop-Mart managers and employees, this call was not from a Shop-Mart manager or employee and was otherwise unknown to the police. Moreover, whereas previous calls had involved shoplifting, this call was the first to report methamphetamine activity. Additionally, the informant did not have any firsthand knowledge that McLain was purchasing the items in question to manufacture drugs. Rather, the tipster made clear in the call transcript that it was his own conclusion that McLain was "clearly up to something." Unlike the tipster in State v. Grayson (Fr. Ct. App. 2007), who gave police specific details indicating knowledge that the defendant had cocaine in his briefcase, the tipster in this case had no concrete knowledge of unlawful activity, only a suspicion. Lastly, the informant refused to identify himself. All of these factors seriously call into question the reliability of the tipster. As in Montel, because the tip had a "relatively low degree of reliability, . . . [t]he tip, standing alone, was insufficient to provide reasonable suspicion for the officers' stop." Montel.

B. The Anonymous Tip Was Not Supported By Sufficient "Independent Police Corroboration"

Moreover, the "independent police corroboration" in this case falls fall short of the corroboration needed to supplement an otherwise unreliable tip. Independent corroboration can include such evidence as independent police observation and unusually suspicious conduct. Montel. It may also include specific knowledge that a location or area is often used for a particular illegal purpose. See Sneed (finding no reasonable suspicion where there was no evidence that the area was known for drug trafficking or that the house under surveillance had experienced short-term traffic); cf. Montel ("A person's mere presence in a high-crime area known for drug activity does not, by itself, justify a stop.")

Officer Simon's "independent police corroboration" in this case consisted solely in locating McLain's car, verifying that he matched the description given, and observing him coming out of the Cullen's Food Emporium with a small paper bag in his hand. Merely identifying that McLain's car and appearance matched the description given goes only to identification; it is insufficient to give rise to a reasonable suspicion of criminal activity. Officer Simon's observation that he matched the description is no more confirmatory than the observation made by the police in Montel that the defendant had a

white Honda, and which the court held to be insufficient. Innocent shoppers walk out of grocery stores all day, and had the informant been lying or mistaken, Officer Simon could well have stopped and searched an innocent person. In such a case, his suspicion would clearly appear to be unreasonable.

This police work also falls short of the independent corroboration conducted by the police in Grayson. In Grayson, police followed the defendant and confirmed that he had followed the exact route that the informant had said he would. Moreover, in Grayson, the police also had more specific information from the informant that indicated that the informant had personal knowledge of the defendant's possession of illegal cocaine.

Moreover, McLain's conduct was not unusually suspicious. Viewing a man walk out of a grocery store with a paper bag falls far short of suspicious activity. While the informant had told police that McLain had purchased Sudafed from the Shop-Mart and had asked about engine-starter fluid, this information must be treated as suspect because of its unreliable source.

Finally, there is no indication here that the Oxford and 8th Street area is known for methamphetamine activity. While the area has experienced an uptick in crime, the fact that an area is high in crime is, by itself, insufficient. Montel ("The fact that the area of Franklin City where Montel's car was stopped is a high-crime area did not warrant the stop."). As Officer Simon testified, this was the first report of methamphetamine activity in the area. Therefore, Officer Simon's suspicion was lacking in this independent basis of support as well.

Because the anonymous tip was unreliable, and Officer Simon had not done sufficient independent police work to corroborate the tipster's information, he did not have a reasonable suspicion to stop McLain, and the motion to suppress should be granted.

II. The Equipment Possession Count (Count Two) Must Be Dismissed Because It Is A Lesser-Included Offense of the Manufacture Count (Count Three)

The equipment possession count, Count Two, against McLain must be dismissed because it violates McLain's constitutional right not to be placed in double jeopardy for the same criminal act. Where a criminal defendant is prosecuted for a "greater" crime which necessarily includes the "lesser" crime, "the latter offense is a lesser-included offense and prosecution of both crimes violates double jeopardy." State v. Decker (Fr. Sup. Ct. 2005) (citing Blockburger v. United States, 284 U.S. 299 (1932)). "A lesser included offense is necessarily included within the greater offense if it is impossible to commit the greater offense without first having committed the lesser offense."

Courts in Franklin analyze whether a crime is a lesser included offense by applying the "strict elements" test--comparing the elements of both offenses. Decker. Here, Franklin Criminal Code section 43 defines unlawful methamphetamine equipment possession as (1) knowingly (2) possessing equipment or chemicals (3) for the purpose of manufacturing methamphetamine. Franklin Criminal Code section 51 defines unlawful methamphetamine manufacture as (1) knowingly (2) manufacturing methamphetamine. Section 51 further defines "manufacture" to mean "produce, compound, convert, or process methamphetamine, including to package or repackage the substance, either directly or indirectly by extraction from substances of natural origin or by means of chemical synthesis."

The fact that the elements do not read exactly in the same way does not preclude a finding that equipment possession is not a lesser-included offense of manufacture. "Franklin case law does not require a strict textual comparison such that only where *all* the elements of the compared offenses coincide *exactly* will one offense be deemed a lesser-included offense of the greater." Decker. Here, the element "manufacturing methamphetamine" necessarily includes the elements of the equipment possession count; one cannot manufacture methamphetamine without knowingly possessing equipment or chemicals for the purpose of manufacturing methamphetamine. This case is not like State v. Jackson, in which the court concluded that possession of drug paraphernalia was not a lesser-included offense of possession of cocaine because one can possess drugs and not paraphernalia, as well as paraphernalia without drugs. Here, one cannot manufacture methamphetamine without knowingly possessing equipment or chemicals for the purpose of manufacturing methamphetamine. For these reasons, the equipment possession count is a lesser-included offense of the manufacture count, and the Constitution prevents the State from prosecuting McLain for both. Accordingly, the equipment possession count should be denied.

ANSWER TO MPT

Argument

I. Officer Simon Had No Reasonable Suspicion to Justify the Stop and Interrogation of McLain.

A police officer may not stop and interrogate a person suspected of criminal conduct unless the officer has "'a reasonable suspicion, grounded in specific and articulable facts, that the person [is] involved in criminal activity' at the time." *State v. Montel* (Fr. Ct. App. 2003) (*citing Terry v. Ohio*, 392 U.S. 1 (1968).

While an anonymous tip from an informant who has proven reliable to police in the past may provide a reasonable suspicion, "an anonymous tip is different; it must be

corroborated, such as by investigation or independent police observation of unusually suspicious conduct, and must be 'reliable in its assertion of illegality, not just in its tendency to identify a determinate person.'" *State v. Montel* (Fr. Ct. App. 2003) (*citing Florida v. J.L.*, 529 U.S. 266, 272 (2000). A stop "based solely on information received by an informant without [an independent investigation verifying the informant's investigation]" is invalid. *State v. Montel* (Fr. Ct. App. 2003) (discussing with approval *State v. Sneed* (Fr. Ct. App. 1999) wherein the *Sneed* court held that a tip from an untested confidential informant that a house was being used to peddle heroin was not sufficient to justify the search of an individual visiting the house where heroin was avertedly being peddled).

Officer Simon's stop and interrogation of McLain was exactly the sort of stop and interrogation based solely on an anonymous tip that is forbidden by *Montel*, and as the stop and interrogation violated McLain's Fourth Amendment rights, all evidence and statements following the stop must be suppressed under the fruit of the poisonous tree doctrine.

According to Officer Simon, McLain was stopped on the basis of the anonymous tipster's tip, and Officer Simon alluded to the justification that he further stopped McLain on the basis of his presence in a high-crime area. However, the averred high rate of criminal activity referred to by Officer Simon related to shoplifting and vandalism, and such crimes are irrelevant to the drug activity alleged by the anonymous tipster. In any event, any such assertion by Simon is irrelevant, as "a person's mere presence in a high-crime area known for drug activity does not, by itself, justify a stop[,]" and presence in a high-crime area does not suffice as sufficient corroboration to an anonymous tip to constitute reasonable suspicion justifying a stop and interrogation. *State v. Montel* (Fr. Ct. App. 2003).

Further, the anonymous tipster did not even allege and criminal activity. The tipster merely speculated that a person buying cold medicine and coffee filters, and commenting on the sale of engine-starter fluid, was engaged in the manufacture of methamphetamine. As Officer Simon testified, the purchase of all these items is perfectly legal, and as Officer Simon testified, the tipster omitted that McLain also purchase other innocuous and legal items.

Moreover, the situation here is distinguishable from that in *State v. Grayson* (Fr. Ct. App. 2007). In *Grayson*, the Franklin Court of Appeal held that an anonymous tip was "sufficiently corroborated [by independent police investigation]" as the tipster correctly predicted specific behavior that an individual would engage in, and the police then watched the individual to verify the tipster's reliability by cross-referencing the individuals behavior to the tipster's predictions. The tipster was able to accurately predict that the individual stopped left a particular apartment building, entered a particular vehicle with a broken tail-light, and followed a route described by the tipster. *Id.*

Here the anonymous tipster was only able to provide a general description of a "skuzzy looking" individual matching McLain's general description. Moreover, the anonymous tipster stated the "skuzzy looking" individual was at the Oxford Street Shop-Mart, when in fact, Officer Simon testified McLain was neither at Shop-Mart nor in Shop-Mart's parking lot. Further, the anonymous tipster reported that the "skuzzy looking" individual had purchased coffee filter, but omitted the fact he purchased coffee. According to Officer Simon coffee filters are commonly used to manufacture methamphetamine, but as a matter of common knowledge coffee filters are assuredly more often purchased to brew and manufacture coffee.

Unlike *Grayson*, here the tipster provided inaccurate information that Officer Simon actually proved false by his independent investigation. The tipster's vague and speculative assertions of criminal activity were not only uncorroborated by independent police investigation, but were proven false by independent police investigation. The tipster's observations were false, involved a pyramid of assumptions based upon inaccurate and incomplete evidence, and in no way justified a stop and interrogation of McLain.

Thus, here, as in *Montel*, the tip from the unidentifiable caller was "hearsay . . . there was no way of knowing [the unidentified tipper's] state of mind at the time [the tipper] gave the information, or whether [the tipper] could reliably and accurately relay events." *State v. Montel* (Fr. Ct. App. 2003). As independent investigation from Officer Simon proved the anonymous tipper's tip false and omissive, Officer Simon had no reasonable suspicion of criminal activity when he stopped McLain, and as a result, both the stop and subsequent search violated McLain's Fourth Amendment rights under the Federal and State Constitution. All evidence and testimony subsequent to Officer Simon's stop and interrogation of McLain must be suppressed, as such testimony and evidence was obtained in violation of McLain's Fourth Amendment rights and is thus excludable under the fruit of the poisonous tree doctrine.

II. Count Two of The Criminal Complaint Must be Dismissed as it is a Lesser Included Offense of Count Three.

When the same series of events gives rise to two separate statutory actions, and the elements of a "greater" statutory action necessarily includes the elements of the other "lesser" statutory action, prosecution of both crimes violates the double jeopardy clause of the United States Constitution. *See State v. Decker* (Franklin Supreme Court 2005) (citing *Blockburger v. United States*, 284 U.S. 299 (1932)); *see also* Franklin Criminal Code Section 5(2). A lesser included offense is necessarily included within the greater offense if it is impossible to commit the greater offense without having committed the lesser offense. *Id*.

Moreover, "Franklin case law does not require a strict textual comparison such that only where *all* the elements of the compared offenses coincide *exactly* will one offense be deemed a lesser-included offense of the greater . . . if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are multiplicitous." *State v. Decker* (Franklin Supreme Court 2005).

Here, Defendant McLain has been charged with both (1) the manufacture of methamphetamine and (2) possession of equipment or supplies with intent to manufacture methamphetamine.

The criminal code prohibiting manufacture of methamphetamine is codified in Franklin Criminal Code Section 51. Section 51 states in part that "[i]t is unlawful for any person to knowingly manufacture methamphetamine. 'Manufacture' means to produce, compound, convert, or process methamphetamine, including to package or repackage the substance, either directly or indirectly by extraction of substances of natural origin or by means of chemical synthesis." Franklin Criminal Code Section 51.

The criminal code prohibiting possession of equipment or supplies with intent to manufacture methamphetamine is codified in Franklin Criminal Code Section 43. Section 43 states in part that "[n]o person shall knowingly possess equipment or chemicals, or both, for the purposes of manufacturing a controlled substance, to wit, methamphetamine . . . ." Franklin Criminal Code Section 43.

Thus, under the Franklin Criminal Code, to unlawfully manufacture methamphetamine, one must take raw elements or chemicals and through scientific process or chemical synthesis create methamphetamine. Further, under the Franklin Criminal Code, the possession of the raw elements of chemicals or the scientific equipment necessary to synthesize methamphetamine is considered criminal possession of equipment or supplies with intent to manufacture methamphetamine.

As a matter of law and logic, the crime of unlawfully possessing equipment or supplies with intent to manufacture methamphetamine is the lesser included offense of the crime of manufacturing methamphetamine. Under the statutory definition of "manufacture[,]" one must have the raw elements necessary to manufacture methamphetamine in order to actually manufacture methamphetamine. The possession of these raw elements is a necessary element in the crime of the unlawful production of methamphetamine.

As one cannot make an omelet without eggs, one cannot manufacture methamphetamine without the raw materials necessary to do so. As Officer Simon testified, the items McLain purchased or possessed (coffee filters, Sudafed cold medicine and matches) were all simply the raw elements that could allegedly be used for the

manufacture of methamphetamine. Therefore, one must violate the statute prohibiting possession of the raw materials to manufacture in order to subsequently run afoul of the statute prohibiting manufacture.

Much as the elements of first-degree burglary necessarily include the elements of assault, the elements of manufacturing methamphetamine necessarily include the elements of unlawfully possessing equipment or supplies with intent to manufacture methamphetamine. *See State v. Decker* (Franklin Supreme Court 2005) (holding that since first-degree burglary requires intent to cause bodily injury and the causation of serious injury, and since assault required the same two elements, assault is a lesser included offense of first degree burglary). Just as the crime of first-degree burglary necessarily requires the commission of assault, the crime of manufacturing methamphetamine requires the commission of the crime of unlawfully possessing equipment or supplies with intent to manufacture methamphetamine.

The fact that the literal language of the statutes does not overlap is irrelevant, as under *Decker* a literal linguistic overlap is unnecessary for one crime to be the lesser included offense of another.

Moreover, the situation at hand differs from that in *State v. Jackson* (Fr. Ct. App. 1992), wherein possession of drug paraphernalia was found to be a separate and distinct offense from possession of drugs. One can possess drugs without possessing paraphernalia, yet here, one cannot manufacture methamphetamine without with raw materials to do so.

Count Two of the Criminal Complaint (for unlawfully possessing equipment or supplies with intent to manufacture methamphetamine) must be dismissed as it is a lesser included offence of Count Three (for unlawfully manufacturing methamphetamine), and thus prosecution of McLain for both crimes would violate the double jeopardy clause of the United States Constitution and constitute reversible error. *See State v. Decker* (Franklin Supreme Court 2005).