February 2023 Georgia Bar Examination Sample Answers

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Essay 1 – Sample Answer 1

1. Causes of Action

a. Sally

The Smiths can bring a cause of action for breach of the duty of loyalty against Sally. Both officers and directors of corporations owe the corporation duties of loyalty and care. These duties can be limited by agreement but nothing in the facts indicates that is the case here. The duty of care involves a director or officers standard of care when conducting business. They duty of loyalty is more directly impacted here as Sally must put the corporations interest in front of her own. Sally has violated her duty of loyalty by continuing communications with BT after being told not to, her secretive meetings with key employees and using the firm's money to pay for her own lawyers. Sally was correct to present BT's proposal to the board. The merger proposal was rejected. Thus it would be ok for Sally to pursue this opportunity individually as the corporation turned it down, but that is not what happened. She continued to meet to discuss the merger, not simply going to work for the other firm. This violates the duty of loyalty as she is acting against the expressed wishes of the board. Sally may try and argue that she was allowed to do this as CEO but the furtive nature of her actions coupled with the fact that the merger proposal was denied by the board illustrates a violation of her duty of loyalty. The fact that the outside firm she engaged with specializes in squeezing out majority shareholders illustrates bad faith on Sally's part. She appropriated the corporations funds for her own use, which also violates the duty of loyalty. Arguably, she is liable for theft by conversion here as she is misappropriating property that she had control over, as CEO, under an agreement in violation of that agreement. Her belief that these actions were good for the corporation will fail. The business judgement rule will also not be applied here as the board did make the decision to not go through with the merger. If this was sent to a shareholder vote she would have lost and the corporation would again reject the proposal given the number of shares and the fact that major changes like this require a majority vote of the outstanding shares.

There may also be a claim for breach of contract here. Sally has an employment contract with the firm that she is in breach of. She has continued to talk to another company about possible employment. Her initial notice to the board was of the merger, not any potential move by her. She has failed to give adequate notice. She also likely has shared trade secrets and other sensitive information in violation of the stated terms of the employment agreement in direct violation of the stated terms of the employment contract.

Sally is liable for tortuous interference with a business relationship. TO prevail on a claim here the Smiths would need to show the existence of a business expectancy or relationship, an act by Sally interfering with that, intent to interfere on behalf of Sally and actual interference. They can likely prevail on these claims. Sally knows of the firm's employment relationships with their existing employees. Sally has specifically intended to disrupt those relationships by meeting and trying to convince the employees to threaten to resign if the board doesn't accept the merger. We are not told that anyone has quit as of yet so the Smiths may struggle to show damages here in the form of actual interference. If an employee does quit then this will be easy to prevail on. Regardless Sally is clearly and intentionally trying to interfere. The plaintiffs will just need to establish damages here to win on this claim, which does seem very possible. Sally will likely argue she was entitled to do these things as CEO of the company who is in charge of day to day operations . This argument should fail as these actions are in direct violation of the duty of loyalty she owes the corporation and the fact that the proposed merger was struck down by the board when presented to them. Even if the board is wrong and the merger would in fact be a good thing their decision would be protected by the business judgment rule provided they made an informed decision. That is also not at issue here as no one is suing the Smiths.

b. BT

The smiths could try and bring an action against BT for tortuous interference with a business relationship. The elements will be the same as articulated above. This will be harder for the Smiths to prevail on as there is nothing indicating that BT was told of the rejected merger option. Further, there is nothing suggesting that BT has contacted any employees beyond Sally to discuss the merger or changing employment. Further, there is an exception to this tort for acts done in commercial competition. BT could argue that it and ATI are competitors in this space and thus they have a right to try and compete. Lack of knowledge and actual interference will likely defeat this claim.

2. Individuality of Actions

The duties discussed above are owed to the corporation. Thus, the corporation ought to be joined to any action regarding Sally's violation of duties. The employment contract was also entered into between ATI and Sally. Not the brothers individually. The brothers would be suing to vindicate the rights of the corporation, not their individual rights and they would be suing as the directors of the company, not as individuals. Thus the corporation must be joined to any lawsuit under the claims discussed above. They could try and sue as shareholders but even then they would be filing a derivative suit on behalf of the corporation. The corporation will be a

necessary party to each of the actions mentioned. They have an interest that could be harmed by the litigation. There should be no issues of jurisdiction here as presumably ATI, Sally and the Smiths are all domiciled, or at home, in Georgia and thus subject to general jurisdiction.

3. File Suit on Behalf of ATI

The Smiths need to present the proposed litigation to the board of directors, thus giving them notice, prior to bringing any cause of action involving ATI. Then they must wait for the board to either accept the suit or reject it before then bringing it on their own. The board will approve of the suit here as they make up 2/3 of the board of directors. The Smiths should bring notice of the potential suit against Sally for violations of duties to the board and have the board approve it at which point they can bring the action on behalf of the corporation itself. This requirement is sometimes excused if it would cause the corporation harm to present the porposal or if it would be pointless due to the directors all being interested. Here only Sally would be considered an interested director.

4. Injunctive Relief

a. Temporary Injunctive Relief

To get a temporary restraining order you must show (i) irreparable and immediate harm, (ii) a meritorious claim and (iii) a balance of the hardships. A TRO is meant to maintain the status quo until a hearing can be had on the issue of a preliminary injunction. They can last for a maximum of 30 days and cannot be appealed. To get preliminary injunctive relief the same elements listed above must be shown. Here the corporation is being irreprably and immediately harmed due to Sally's ongoing discussions with both employees and BT. The merit of the Smith's case is shown by the facts themselves and it is likley they will win on a claim of violation of duties here. To offset the risk of them losing and thus the D being harmed, the Smith's may be made to post a bond. Finally, Sally is not greatly harmed by an injunction as she need only stop violating her duties to the corporation where as the corporation will avoid alot of harm. Thus a court will likely grant preliminary injunctive relief here. They will order her to stop talking with the employees and BT.

b. Permanent Injunctive Relief

To get permanent injunctive relief the Smiths must show (i) inadequacy of legal remedy, (ii) feasibility of enforcement, (iii) balance of hardships and (iv) a lack of equitable defenses. The legal remedy is money. Money would likely be inadequate here as they would lose a valuable employee and the "the brains" behind the corporation. They couldn't simply go buy another Sally. She is unique and highly skilled. Enforcement is feasible as presumably Sally and BT are within the jurisdiction of the court. The court merely needs to ensure Sally stops talking to employees about quitting and stops talking to BT. The hardships here balance in favor of the Smiths. Sally will keep her job at ATI, or simply go find another one after waiting 2 years, and ATI will not be harmed by her continuing breach. Trade secrets and other sensitive information will stop being

shared.There are no applicable equitable defenses. The smiths have not done anything wrong and the smiths were timely in bringing their action. Sally may argue the employment contract is too broad in time as it lasts forever. A court may impose a reasonable time limit on the employment ban. A court will also enforce the employment agreement and prohibit Sally from taking other similar employment for a reasonable period of time. An indefinite injunction on this point is not likely to be seen as reasonable. Non competes must be reasonable in geographic scope as well as time to be enforceable. The time limit stated here, 24 months, is likely proper. The indefinite geographic scope may be considered unreasonable. A court is more likely to enforce an indefinite injunction on sharing trade secrets given the nature of the harm that results from that.

A court will not grant injunctive relief forcing Sally to work for ATI however. That would likely violate the 13th amendment and would be very hard to enforce. Courts don't use injunctions to force people to do, or keep, a job.

5. Evidence Issues

a. Corporate emails

The corporate emails should be admissible over a objection by Sally as they were sent via corporate email accounts. Sally does not have a reasonable expectation of privacy in the emails given that. They can be admitted over hearsay objections as either admissions, by Sally herself, or if offered to show Sally's intent rather than the truth of the matter they assert. Hearsay is an out of court statement offered for the truth of the matter asserted in the statement. The emails constitute out of court statements. They were made by a party to the case though, thus they are opposing party admissions or statements. The evidence is relevant and the relevance is not substantially outweighed by risk of prejudice to D. These will not constitute business records as they were not regular reports generated in the usual course of business by one with knowledge.

b. Sally and outside Firm

The Smiths likely cannot obtain the communications between Sally and the outside firm even though she used their money to pay for it. This invokes attorney client privilege which protects statements made by a client to an attorney in furtherance of getting legal services. The statements must be intended to be confidential in order for this to apply. Presumably the emails were about potential representation and actions the firm may take on Sally's account. They were intended to be confidential as they were not shared with anyone by Sally. The mere fact that the corporation is paying does not mean the outside firm is representing them or owes them any duties. Their client is Sally. These communications are likely protected under attorney client privilege. Attorneys always owe duties to their clients, not the people paying. Also, anything prepared by the attorneys in contemplation of litigation will fall under the work product doctrine. Attorney's mental impressions and opinions are not discoverable and are protected by the work product doctrine. Thus any documents made by the outside lawyers in contemplation of litigation against ATI that contain their opinions will not be discoverable here either.

c. Recording made via hidden microphone

These recordings are likely admissible as opposing party statements. These are all conversations where Sally is discussing the very actions giving rise to this case. Sally does not have a reasonable expectation of privacy in her office as it is the corporations property. Sally may try and bring an action for intrusion upon seclusion based on the secretive nature of the recordings but that will fail due to the fact that Sally does not have a reasonable expectation of privacy in her office owned by the corporation. The statements are opposing party admissions and thus non-hearsay in Georgia. The fourth amendment doesn't apply to private companies so there is no need to do a constitutional analysis on whether this was a permissible act. You can plant bugs on your own property.

Essay 1 – Sample Answer 2

1. Causes of Action

A. Sally

There exist two possible causes of action against Sally. The first is for a breach of the employee agreement, and the second is for the breach of the duty of loyalty. As for the employee agreement, while the length and severity of the non-compete covenant is somewhat suspect, that is not really what is at issue in this case. The contract stipulated that Sally was prohibited from divulging company information as well as trade secrets. As it were, doing either of those things would also breach Sally's duty of loyalty to ATI, because in Georgia, the duty of loyalty requires all agents to in good faith pursue the interest of their principals. Divulging important information and trade secrets to a competitor would definitely be a breach of the duty. In the facts, it is not clear what exactly Sally has told BT, but it seems highly likely that at least some confidential company information has been divulged. As such, it more facts are needed.

Regardless of whether or not she has divulged trade secrets or other important information, the duty of loyalty would still give a cause of action, because she used $1 Million of company funds to pay for lawyers. While it is not necessarily a problem for a CEO to hire lawyers for the company, the problem is that she did so with express disapproval of the board, as the Smith brothers (who make up a majority of the board) expressly told her not to continue talks with BT, and she hired the lawyers to help her get BT and ATI to merge. Therefore, she breached the duty of loyalty by hiring the lawyers with company funds.

B. BT

Unfortunately for the Smith brothers, there is no good cause of action that will lie against BT. As far as the facts show, it is strictly Sally who is the bad actor here. BT is merely attempting to communicate with another company in order to facilitate a merger. As far as we know, all of its goals and actions have been lawful and non-actionable.

II. Smith Brothers Personally Suing

In cases involving wrongful acts by an agent, like the CEO, under a duty of loyalty claim, it is possible for stockholders to bring a claim on behalf of the corporation. The corporation will not be seen as a necessary party, but the board will have the chance to vote whether to sue as a corporation beforehand. As such, the duty of loyalty claim may be brought by the Smith brothers on their own. If they really want to keep ATI out of the case, since they make up a majority of the board, they can simply vote not to intervene. Unfortunately, since the employee contract was expressly between Sally and ATI, ATI is a necessary party in that case.

III. Procedures

In order for the Smith brothers to personally file suit on behalf of the corporation, they must inform the board of their intent and allow the board the chance to sue as the corporation instead. If the board declines, then the corporation will not get involved. As mentioned above, since they make up a majority of the board, they can just vote to not have the corporation get involved. If they are victorious, their attorney's fees must be reimbursed by the corporation.

IV. Injunctive Relief

A. Pretrial Injunctions

The first thing they should try and do is get a temporary restraining order placed on Sally, prohibiting her from divulging any company secrets, etc. This may be done ex parte, but it is not permanent, and they will need to get a preliminary injunction if they want a long-term pre-trial solution. In order to get a temporary restraining order, they will need to file a motion with the court, alongside affidavits attesting to evidence that there is a serious and reasonable threat the suspected harm is imminent. In this case, that suspected harm would be Sally divulging trade secrets, etc. This would need to be proved with a preponderance of the evidence. As discussed above, they need more information to really be sure, and it is unlikely that the temporary restraining order will be granted. If it is granted, it will only last 60 days. Regardless, a preliminary injunction may be sought at a pretrial hearing. Once again, they will have to prove that she either has been or will soon be revealing company information and trade secrets to BT by a preponderance of the evidence. Hopefully by then, more evidence will come to light, but it is unlikely.

B. Permanent Injunction

While the preliminary injunction will last till it is overturned either on appeal (Note: it is immediately subject to appeal) or at trial, a permanent injunction may be granted at trial. In order to get one, they need to actually show by preponderance of the evidence that Sally is divulging trade secrets and/or company confidential information. This injunction could prevent her from divulging such secrets to BT. Once again, more evidence is needed.

V. Evidentiary Issues

A. Corporate Emails

Corporate emails sent by Sally should be easily obtainable and are admissible as admissions by a party opponent; however, emails sent to Sally may be hearsay. In Georgia, hearsay is an out of court statement used to prove the truth of the matter asserted. Admissions by a party opponent are considered non-hearsay, so are allowed, but statements by other parties may not fall within an exception.

B. Communications with Lawyers

While it at first seems like the communication with lawyers may be privileged, as they are confidential information, this is not true. The lawyers, being paid with company money, are actually the attorneys of ATI, not Sally, so no confidentiality can block discovery of her communications with them. While discoverable, they may not all be admissible, as, again, some of them may be hearsay not within an exception. Statements by Sally would still be admissions by a party opponent so not hearsay.

B. Microphone

While frankly rather scummy, the microphone recording is technically admissible. Once again, it may be subject to hearsay rules, especially for non-party declarants who are recorded. Even so, as regards to Sally's recorded statements, it is perfectly acceptable as an admission by a party opponent.

Essay 1 – Sample Answer 3

1. The first issue is to identify the potential causes of action against: (a) Sally and (b) BT.

(a) Sally

Breach of fiduciary duties

The directors and officers of a corporation owe several fiduciary duties to the corporation and its shareholders. Paramount among these duties is the duty of care and the duty of loyalty.

The duty of care requires the officers and directors of a company to exercise reasonable prudence and judgment when operating the company and making decisions on behalf of the company. The duty of care includes a duty of good faith to the company. The business judgment rule in Georgia creates a presumption that an officer or director acts in good faith and with due care, which may be rebutted with evidence of gross negligence.

Here, Sally likely violated her duty of care to the company and shareholders by trying to push for a deal that may not be in the best interest of the company and provide the most profitable merger for the company based on the Board's advice. She ignored the Board's advice to wait for continued growth to increase returns, and therefore is pursuing a less lucrative deal to the company. This likely violates the duty of care.

The duty of loyalty requires officers and directors to act in the best interests of the company and not to engage in interested transactions or self dealing. The officers and directors cannot obtain an interest in transaction or be a party to a transaction in most instances. The officer or director must disclose all material facts to the Board about the transaction and only a majority vote with a quorum of disinterested Board members may vote to approve the transaction. Otherwise, the transaction must be approved by majority of disinterested shareholders. The officer or director can also prove the transaction was otherwise fair to the company.

The officer or director is liable to the corporation for damages caused to the company by violating these duties and may be required to disgorge any profits from an interested transaction.

Here, Sally likely breached her fiduciary duties, primarily her duty of loyalty to the company by engaging in secret discussions to further her own personal interests at the expense of the company. After reporting her initial call with BT, she was told to cease conversations by other Board members (the majority), yet she continued despite their wishes to further her own agenda and therefore she likely breached her duty of loyalty. Sally "wanted to finalize the deal," and also diverted funds from the corporation in violation of her duty of loyalty by paying an outside law firm for services for her own personal benefit as a minority shareholder. She also

breached the duty of loyalty by trying to encourage employees to support her own personal agenda and making undue threats to quit if they did not.

Therefore, Sally likely violated her duty of loyalty to the company and duty of care.

Breach of Employment Agreement (breach of contract)

To state a claim for breach of contract the brothers must show they have a valid contract, that all conditions were performed or waived, and that the other party materially breached the contract and the other party suffered damages as a result.

Here, Sally has an employment agreement with the company that precludes her from engaging in discussions about change of employment without notice to the Board.and prohibiting her from disclosing confidential information. There is evidence that Sally divulged confidential information which would be a material breach of this contract. If the company suffered damages as a result of this breach they could recover under a breach of contract theory.

Breach of Shareholders Agreement (breach of contract)

Similar to the above, Sally may have also violated or breached the shareholders agreement that required her to give the other shareholder brothers a veto on any potential transaction changing control of the company. Sally is secretly engaged in negotiations to merge the company with another and may change control of the company. She has avoided this agreement giving the brothers a right to veto that change, and would therefore constitute a separate action for breach of contract. Therefore, Sally may be liable for breach of contract of the shareholder agreement as a separate cause of action.

(b) BT

Tortious interference with business relations or contracts

In Georgia, where a party has knowledge of an actual or prospective business relationship between other parties, and is a stranger to that relationship, if they knowingly or intentional interfere with those relations and cause a party damages they may be liable for the tort of tortious interference with actual or prospective relations. A possible defense is fair competition.

Here, BT may know of Sally's agreements with the ATI company including the non-compete and non-disclosure agreements, yet it is engaged with secrete conversations with Sally to merge the companies as well as obtaining confidential information. If BT had knowledge of these agreements and induced Sally to engage in conversations despite those agreements, BT may be liable for tortious interference with business relations and be liable to the company for damages.

2. The second issue is to identify which causes of action may be brought by the Smiths individually, without making ATI a party plaintiff.

Typically, shareholders or officers cannot bring direct claims against other officers or directors for breach of fiduciary duty unless they suffered a special individualized harm, independent from the company unique to their status as a shareholder. Otherwise, the suit must be brought as a derivative action on behalf of the company. To bring a derivative action one must give the company or Board 90 days notice of the intent to bring the claim, and if there is no response within that time or the company does not bring the claim the shareholder can maintain a derivate lawsuit against the officer or director.

Here, there are no specific facts to identify unique harm to the brothers as a result of Sally's breach independent of the generalized harm to the company as a whole. Therefore, the brothers likely cannot bring claims individually based on breach of fiduciary duties but must bring a derivative claim.

For breach of contract the parties to agreement are those with standing to bring the claim unless third parties are intended beneficiaries. These parties must be identified in the agreement.

Here, the brothers are parties to the shareholders agreement, but not the employment agreement. Therefore, the brothers can bring a claim individually to enforce the shareholders agreement but not the employment agreement.

3. The third issue is to address the procedures that the Smith brothers must follow before they would be able to file suit on behalf of ATI, if ATI is a necessary party plaintiff to any of the causes of action against Sally.

As discussed above, the Smith brothers must give the company or Board 90 days notice of the intent to bring the claim, and if there is no response within that time or the company does not bring the claim the shareholder can maintain a derivate lawsuit against the officer or director on behalf of ATI.

4. The fourth issue is to address (a) the likelihood that the Smith brothers would be able to obtain any form of injunctive relief in advance of a final judgment on the merits to stop Sally from talking further with BT; and (b) the likelihood of obtaining any form of permanent injunctive relief.

(a) Injunctive relief prior to final judgment
Temporary Restraining Order (TRO)

In Georgia, a TRO is an extraordinary remedy that provides preliminary injunctive relief pending without notice to the other party. In order to obtain an TRO the party must file a verified complaint or affidavit setting forth specific facts showing the party will suffer irreparable harm if a TRO is not immediately issued and that the party has no adequate remedy at law warranting extraordinary equitable relief. Further, the party must set forth specific facts of all efforts made to put the opposing party on notice and the reasons why notice to the other party should not be

required under the circumstances. The party must also provide sufficient security, in the form of a bond, that will protect the party who is enjoined if the TRO is wrongfully issued. In Georgia, a TRO may not last more than 30 days. The opposing party must be afforded an opportunity to be heard as soon as possible, at which time the court may consider a preliminary injunction.

Here, the brothers would have to establish that these elements and also show the court why they cannot give Sally notice in time to be heard or why no notice should be required. It is likely these elements can be met since Sally is potentially divulging confidential trade secrets on an ongoing basis that would cause the company irreparable harm. Once the TRO is entered, the parties should put Sally on notice as soon as possible for a preliminary injunction hearing.

Preliminary Injunction

A preliminary injunction is a temporary injunction that is provided after a hearing and opportunity for the opposing party to be heard. The moving party must establish they will suffer irreparable harm and have no adequate remedy at law, but also must establish: (1) likelihood of success on the merits; (2) that there is not undue harm or cost imposed by the injunction; (3) that enforcement of the preliminary injunction is feasible; and (4) that issuing the preliminary injunction will not offend public policy. The purpose of the preliminary injunction is to maintain the status quo between the parties pending final resolution on the merits of the case.

As discussed above, the elements are likely met here because the brothers can show enforceable contracts including non-disclosure agreements as well as fiduciary duties are being violated. This establishes likelihood of success on the merits. Further there is little harm to Sally since she is violating these agreements and the injunction serves a public policy purpose of honoring private contracts and protecting commercial trade secrets. Therefore, the company can likely obtain preliminary injunctive relief against Sally.

(b) Permanent injunctive relief

To establish entitlement to a permanent injunction the party must hav e full trial on the merits (bench trial) and prove (1) irreparable harm; (2) no adequate remedy at law; (3) the injunction may be sufficiently enforced by the court and does not require judgment that makes it unfeasible; (4) the harm or cost imposed on the defendant does not outweigh benefits of the injunction; and (5) the injunction will not offend public policy.

As discussed above, if Sally is engaged in the above conduct the court will likely enter a permanent injunction to enforce the agreements to prevent her from divulging trade secrets. The court may impose reasonable terms and restrictions on time, scope, and breadth of these restrictions in accordance with Georgia public policy (to include the restrictive covenant act that includes presumptions of reasonableness for these types of non-compete or disclosure agreements).

5. The fifth, and final, issue is what evidentiary issues we may encounter in proving claims against Sally or BT with the following evidence:

(a) Copies of Sally's corporate account emails;

Evidence that is relevant is generally admissible. Relevant evidence is any evidence tending to make any issue of consequence in a case more or less probable than it would be without the evidence. Further, out of court statements that are introduced for the truth of the matter asserted may be hearsay. But an exception to hearsay is an admission of a party opponent. Further, out of court statements used not for their truth but for legal effect or issues do not constitute hearsay and are admissible.

Sally's email accounts were part of ATI's employment agreement and she agreed that ATI may access that information. Otherwise Sally may claim a right to privacy in those emails. However, here, that right has likely been waived and ATI can access those emails and use them as evidence in support of its claims. Further, the emails contain relevant evidence in support of the claims for divulging trade secrets or confidential information. Because the emails contain relevant evidence of the claims for breach of fiduciary duties and breach of contract they should be deemed relevant and admissible in a claim against Sally or BT. Finally, the emails between Sally or BT may constitute admissions of party opponents in suits against them, and would otherwise potentially be admissible for their legal significance not for their truth, because they may establish breach of the contract and fiduciary duties.

Therefore, the corporate emails should be generally admissible as evidence in support of these claims.

(b) Any communications (whether corporate or personal email or otherwise) between Sally and the outside law firm she retained at ATI's expense;

Attorney-client privilege

The attorney-client privilege protects communications between a client and their attorney that is in furtherance of legal advice. Even if a third-party pays a lawyer, the lawyer owes the duty and privilege to the client, not the third party. Here, Sally retained independent counsel to advise her on issues related to her rights as a minority shareholder. Those communications will be protected by the attorney-client privilege and are likely not admissible as evidence in a suit against Sally and are likely not discoverable. The fact she used corporate funds to pay for the attorney does not change the outcome.

(c) The recording made by the hidden microphone in Sally's office.

Georgia's wiretapping statute

Georgia's wiretapping statute creates criminal offenses for certain prohibited recordings of telephone conversations or other recordings without consent of the parties. Any recordings obtained in violation of this statute are inadmissible in evidence in a civil proceeding. Georgia requires at least one party to a telephone conversation to consent to the recording, even if the other party is not aware of the recording. Further, Georgia makes wire tapping or interception of other person's conversations illegal without knowledge or consent of at least one party involved.

Here, the wiretapping of Sally's office was done outside the scope of the employment agreement and was not done with Sally or others in the office's consent or knowledge. Therefore, these recordings violate the Georgia wiretapping statute and are likely inadmissible as evidence in any suit against Sally or BT.

Essay 2 – Sample Answer 1

MEMORANDUM

A prima facie case for negligence must establish: (i) a duty of care owed to the plaintiff; (ii) a breach of that duty of care; (iii) the breach was the actual and proximate cause of plaintiff's injury; and (iv) damages.

In this case, Walker engaged EMC and CEO to represent him as a non-lawyer agent in seeking new employment opportunities in the music industry. The duty of care is normally that of a reasonably prudent person. The duty is owed to all foreseeably plaintiffs. Here, EMC and CEO had the duty of that of a reasonably prudent agent. It appears from the facts presented that CEO may have breached that duty of care by failing to schedule a calendar reminder to inform World's representative that Walker had agreed to all material terms of the contract and making a formal writing. A reasonably prudent agent should put the needs of the principal before their own needs and must follow the duties of care, loyalty, and obedience. Here, CEO breached the duty of obedience by not following directions promptly. He also may have breached the duty of care by failing to adequately follow up on the contract.

Under the doctrine of vicarious liability, EMC will be liable for CEO's tort claims committed within the scope of his employment. Under the respondent superior theory of vicarious liability, an employer is responsible for the tortious acts of their employees committed within the scope of their employment. Since CEO was negligent in the course of his employment responsibilities with EMC, they will also be liable for CEO's negligence.

The case for negligence falls apart in the causation analysis. The issue is whether or not CEO and EMC's negligence with the actual and proximate cause of Walker's injury (not having the employment contract). The actual cause is the direct cause of plaintiff's injuries (i.e., but-for defendant's conduct, plaintiff would not be injured). The proximate cause is within the casual chain of liability (i.e., there is no unforeseeable intervening cause that breaks the chain of liability). Here, but-for CEO's negligence, Walker would still not have a contract. When CEO called World about the contact, albeit one week after the deadline, World's representative stated they learned adverse information about Walker and chose not to employ Walker. Even if Walker argues that World might have learned that information in the intervening week between his communication with CEO and CEO contacting World, there is still no causation as World denies ever reaching an agreement with Walker.

Without proving causation, Walker will not have a claim. If he were able to, he would argue his damages were $1.5 million per year and a $500,000 signing bonus.

The oral contract:

The causation and damages defense available to EMC and CEO is even stronger if Walker asserts he had an enforceable oral employment agreement with World. The oral agreement is not

covered under the statute of frauds so it does not matter that it was not in writing. However, if he is able to prove the oral agreement existed than Walker will have a weaker claim.

The issue is whether CEO and EMC were the actual and proximate cause of Walker's injury. If Walker can prove he had an oral agreement with World, then there is no injury. In the claim above, Walker is asserting that CEO's negligence is the failure to timely document the alleged agreement caused him damage and the loss of the value of his contract. If Walker asserts that he had a contract, and it is enforceable, then there is no injury. As stated above, the oral agreement is not subject to the statute of frauds and therefore is enforceable even without a writing. The injury in this case would be World's breach of contract, not CEO's negligence. Therefore, Walker would still not have a claim for negligence against CEO and EMC.

Essay 2 – Sample Answer 2

Memorandum

To:

From: Examinee

Date: Today

Re: Claims for negligence against EMC and CEO

Issue: The issue that will be addressed in this memorandum is whether the facts provided state a claim for negligence against EMC and CEO

Negligence

In Georgia, the common law tort of negligence requires four elements: (1) a legal duty owed by the Defendant to the Plaintiff; (2) a breach of that duty by the Defendant; (3) actual and proximate causation; and (4) damages to the Plaintiff as a result of the Defendant's negligence. These elements will be addressed below.

i. Duty

A defendant owes a legal duty to all foreseeable plaintiffs that are within a foreseeable zone of danger that could be harmed or impacted by the Defendant's conduct. A defendant typically owes a plaintiff and foreseeable plaintiffs a duty to exercise reasonable care under the circumstances. This standard of care is measured as an ordinary prudent person in the local community would act under similar or like circumstances. Professionals and certain other industries may be held to a higher standard of care and will be measured by the exercise of care of those with similarly held professions with good standing in their field, and judged by reasonable like professionals under similar circumstances. A defendant may owe a duty through an affirmative undertaking include by contract or other conduct.

Here, EMC and CEO undertook to assist Walker with representing him as an agent to seek opportunities in the music industry and negotiate and document new employment agreements. Based on these facts, EMC and CEO likely owed Walker a duty to exercise reasonable care as a like professional in the music industry, i.e., a talent agent would exercise in the local community or within the profession at large, under similar circumstances. Typically, the company would undertake the duty, and its employees may be liable based on their course and scope of employment (vicarious liability imposes derivative liability on an employer for the negligence of the employee for acts within the course and scope of the employee's employment with the employer), but here the facts tell us that both EMC and CEO were engaged to represent Walker. Therefore, because both were engaged to represent Walker both would owe an independent duty of care.

ii. Breach

The second element of negligence requires the plaintiff to prove breach of the legal duty owed. This is typically accomplished by evidence that the defendant violated the applicable standard of care under the circumstances. As discussed above, professionals in a specific industry will typically be evaluated based on industry standards and standard of care for like professionals within their industry. Further, a mere accident may not be negligence if it did not amount to an unreasonable act or omission within the applicable standard of care.

Here, Walker may be able to establish that EMC and CEO breached their duty to document employment contracts because the CEO admits he failed to timely document the contract. CEO mistakenly set a reminder for a week beyond the date the contract was initially agreed to document the contract and within that time the other party disputed the existence of the contract. CEO likely breached his duty of care because he also failed to fully understand that a contract was "agreed to" when Walker told him on Friday February 10 that the terms were "agreed." CEO and EMC may argue that it was reasonable under the circumstances for CEO to attempt to wait at least until the following Monday to confirm whether the terms were agreed to or drafting an acceptance of the offer, and that the weekend would not have provided a reasonable time to make contact with their client.

However, this argument seems unlikely given the time-sensitive nature and urgency of commercial relationships in the music industry. The CEO likely could have, or should have, reached out to their client immediately to confirm the details of the contract and acted more diligently under the circumstances. CEO and EMC may also attempt to argue that this was a mere accident, and not a breach of the applicable standard of care, since the reminder was set for the wrong day. However, this argument may fail as well for similar reasons, because in this highly competitive and selective environment of a music industry talent agent, they will likely be held to a higher standard of care within the professional community and these types of accidents should not happen in such high stakes negotiations.

Therefore, Walker will likely be able to establish that EMC and CEO breached their duty of care under the circumstances by failing to timely document the agreement.

iii. Causation

Actual cause

In order to be liable for negligence, a defendant's conduct must both be the actual cause and legal cause of injury or damage.An actual cause is the "but for" cause of injuries. That is, but for the defendant's negligence the plaintiff would not have suffered their resulting damages. There may be more than one actual cause. If there are more than cause, either may be an actual cause if it was a substantial contribution to the plaintiff's damages.

Here, CEO and EMC's conduct will likely not be deemed an actual cause of Walker's damages or the ability of World to deny the existence of the contract. CEO and EMC may be able to argue that actual causation is not met because it cannot be said that "but for" CEO's failure to document the agreement World would not still try to deny the agreement. It is not clear that Walker would

simply accept the terms of the agreement just because they were written down because World has taken the position that they have not reached an agreement "on all material terms" of the employment agreement. World may have taken the position, even if an agreement was documented in writing, that the terms of employment still needed to be further worked out. Indeed, there are insufficient facts to tell us the details of the January 10, 2022 proposal or the February 11, 2022, agreement and material terms according to Walker. Further, even if CEO and EMC drafted the "agreement," World could *still* refuse to sign the agreement and could still challenge the agreement in court. Significantly, World has taken the position it merely made a "prior offer," and the fact it rescinded was not based on the writing or oral agreement, but based on new adverse facts it learned after the Feb. 10, 2022, conversation.

Therefore, more likely than not World would likely deny that the lack of a writing is the reason or even a substantial reason for disclaiming the contract or "withdrawing" its offer. Further, as discussed below, the outcome of Walker's separate lawsuit against World will also determine whether Walker can establish that CEO and EMC's breach was an actual or legal cause of his damages as a matter of law.

Proximate cause
The proximate or legal cause is a foreseeable cause of the injuries or damages to the plaintiff. The focus is on whether it was foreseeable cause.

Here, as discussed it does not appear the threshold element of actual cause has been met. But assuming *arguendo* it were met, CEO and EMC could make similar arguments that the other party's refusal to honor the contract was not a foreseeable result of failing to document it. However, if actual causation *were met* and their conduct was deemed a but for or actual cause of the failure of the contract to be honored, then more likely than not, it would also be deemed proximate cause as well because it is reasonably foreseeable that the failure to document a contract could have adverse legal consequences to the parties involved.

Therefore, *if* actual cause were met, then more likely than not proximate cause would be met as well under Walker's claim for negligence.

Damages
The final element of negligence is proof of damages. This generally includes special and general damages, including consequential damages or damages that were a foreseeable and natural consequence of the defendant's conduct. In commercial cases, this may include lost profits or economic damages that are proven within a reasonable degree of certainty. f damages are merely speculative they should not be recoverable.

Here, Walker would argue that he is entitled to the lost employment contract which included a $1.5 million per year salary and $500,000 signing bonus. Assuming that all of the elements above were met, which they may not for reasons discussed above, Walker may be able to recover his lost economic damages including the salary and signing bonus but only within a reasonable degree of certainty. If Walker cannot establish a sufficiently reasonable projected length of

employment based on articulable facts within some degree of certainty they are likely not recoverable. If damages are merely speculative they should not be recoverable. Thus, Walker may be able to recover for at least a year employment and signing bonus, but any future years of employment may be speculative and not recoverable.

Potential defenses to causation based on Walker's separate lawsuit seeking to enforce the oral contract

Generally, a plaintiff is entitled to seek alternative forms of relief in a lawsuit even if they are inconsistent with each other. However, a plaintiff may not have a double recovery or ultimately have two forms of recovery that are inconsistent once a case is decided on the merits.

Here, Walker's negligence claim against EMC and CEO is fundamentally based on the non-existence of the employment contract and his *resulting damages*. Therefore, if Walker is ultimately able to establish the existence of the employment contract, as an oral agreement, then EMC and CEO would likely be able to defend against his negligence claim on the basis that there was no actual or proximate cause of damages due to CEO and EMC's negligence and that Walker otherwise has failed to establish the damages element of his claim.

To this end, CEO and EMC may be able to seek a stay on their negligence claim pending the outcome of the separate lawsuit determining the critical and dispositive issue of whether the oral employment agreement is enforceable. If the oral agreement is enforceable, then Walker's negligence claim against EMC and CEO would likely fail for lack of the required elements of causation and damages.

Essay 2 – Sample Answer 3

To: Client

From: Examinee

Date: February 21, 2023

Re: Walker Contract

It is likely that there is not a valid claim of negligence by Walker against CEO and EMC. In order to be liable for negligence, the following elements must be met: (1) there must have been a duty owed, (2) there must have been a breach of that duty, (3) the breach of the duty was the actual and proximate cause of the loss, and the plaintiff must have suffered damages.

Here, there was a duty owed by CEO and EMC. CEO and EMC owed a duty to act as a reasoanble, ordinary prudent person would have done. However, if CEO and EMC are considerd porfessionals, then there duty of care would be elevated to that of a professional standard of care, which is what a reasoanble, averge member of the profession would have acted under the circumstance. Here, CEO and EMC were likely professionals in the industry, but even if they were deemed not be, they still owed a duty of care to Walker as their non-lawyer agent to negotiate and document any employment agreeements made by Walker and others in the music industry, and in this case that being World. Thus, CEO and EMC owed a duty of professional care to Walker. CEO and EMC likely breached this duty when they failed to record the the oral agreement between Walker and World. This breach occured when CEO failed to notate the reminder entry on Feb 14, instead marking it on Feb 21. The CEO didnt realize this until to February 16, when World windrew their previous agreemnt with Walker. It is likely that a reasonable professional in the music industry would have notcied and correctec the mistake, and thus the CEO and EMC breached their duty with Walker.

Next, causation can be broken down into two distinct parts. But for causation is that, but for the negligence of the defendant, the injury to the Plaintiff would not have occurred. Proximate cause is when the negligent breach and the loss resulting from the breach is a foreseeable result of the negligent act of the defendant. Walker would argue that but for CEO/EMC's negligence, Walker would not have lost his contact with World and that it was foreseeable that as a result of CEO/EMC failing to document the agreement, that the oral contract could be rescinded by World. However, CEO/EMC could argue that Walker's adverse information that World learned about Walker was a superceding event that breaks the caual connection. A superseding cause is an event that which is not reasonably foreseeable flow from the negligent act that breaks any causation between the defendant and plaintiff. CEO/EMC would argue that World learning about Walker's adverse information was not foreseeable from their neglgient recording of the agreement, and that their failure to record the contract in writing was not the proximate cause of Walker's injury.

Next, Walker will argue that as a result of CEO/EMC's failure to record, he suffered damages and loss of value of his contract with World since he is not employed. However, CEO/EMC will argue that Walker filed a seperate lawsuit that he in fact had an enforceable oral agreeement with World and had sued World in this separate action for breach of the alleged oral employment agreement. CEO/EMC can also argue that Walker hasnt suffered any damages from their alleged neglgience in failign to record the contract, since Walker is essenatially arguing in his seperaet lawsuit that the agreement is already enforeaceble and that World breached their contract with Walker would they refused to perform. This would mean that Walker is aruing duplicative asssertions, and that he in fact cannot prove he suffered dmaages from CEO/EMC's breach of their duty if the contract between Walker and World was already enforceable. Though it would likely fail, CEO/EMC may argue issue preclusion as well. Issue Preclusion is a defense that bars the relitigation of an issue that is based on the same principles of law and fact that has been issued a final judgment on the merits. CEO/EMC would state that the issue in Walker's separate lawsuit against World is based on the same underlying negligence claim as he is asserting against CEO/EMC, and if there had been a final judgment on ther merits, then his claim should be barred by issue preclusion.

In conclusion, it is likely that Walker doesnt have a vialbe negligence claim against CEO/EMC since Walker's adverse info learned by World may be superseding cause, and the fact that Walker is asserting in a seperate lawsuit that the contract was enforcabel agianst World, thus there arent any damages suffered by Walker by the negligent failure to record by CEO/EMC.

Essay 3 – Sample Answer 1

The issue is, what rules of professional conduct have Lawyer violated and what actions she should take to avoid any violations or further violations on each day described.

I. Monday

A lawyer has the responsibility to represent the clients to the best of her ability and to avoid conflicts of interest. Some conflicts of interest can be waived with informed consent, that is, by explaining in detail and in writing the nature of the possible conflict of interests, providing the clients with a reasonable opportunity to obtain advice from independent counsel, and then obtain a written consent from them. A corporate general counsel's client is the corporation, not any of its employees or officers, unless otherwise agreed upon.

Here, because the company is the lawyer's current client, and the CEO, a prospective client, seeks to become a client in the case where both the CEO and the company are named defendants, this leads to a possible conflict of interests because the interests of the company could become adverse to the interests of the CEO, and vice versa. Therefore, the lawyer should seek to avoid this conflict of interests and recommend the CEO obtain a separate counsel, however, if the CEO insists, then she should explain to the CEO and to the company (probably represented by the board of directors in this case) the nature of the conflict, give them the opportunity to obtain advise from the outside counsel, and then, if both CEO and the company agree, she could represent both. The company may be amenable if the CEO has an indemnification clause and if the company promised to defend him against legal action in the course of the duties, however, this may not be applicable because the CEO acted outside his scope of authority. If this proves to be the case and the CEO's interests become materially adverse to that of the company, the lawyer may have to withdraw from further representation.

II. Tuesday

A company's lawyer's client is the company, not its employees. When dealing with the employees, the company lawyer is required to inform the employees that she represents the company, not that employee. However, the lawyer owes a duty of confidentiality to the clients and prospective clients who came seeking legal advice.

Here, because the lawyer works for the company, an employee would not be her client. But because the employee came seeking legal advice, and the lawyer's silence could be construed as assent to that legal advice, the lawyer would be bound by the duty of confidentiality to keep the information learned in the conversation private. The lawyer should have informed the employee that she works for the company and the company is her client, not the employee. Furthermore, the lawyer has a duty of loyalty to the company as the existing client. Here, the lawyer learned the facts that are harmful to the company, but because she

created the impression of being in a confidential relationship with the employee, she may be forced to breach that duty.

III. Wednesday

An attorney owes the clients a duty to competently represent them in the matters that the lawyer has the prerequisite expertise to provide the competent representation and other necessary resources (such as time).

Here, because the lawyer generally handled tort cases and had no prior experience with the IRS - a highly specialized area of the law - the lawyer does not have the necessary expertise to competently represent the company. This could be remedied if the lawyer had the sufficient time to study the law and prepare herself for the representation, but given that the detailed legal response to the IRS is due on Friday, only two days away, this study and preparation is impractical.

Therefore, to avoid violating the rules of professional conduct, the lawyer should decline this request and either refuse to represent the company in this matter entirely, request that an outside counsel with the necessary expertise is hired if that counsel would have the time to deal with the problem before Friday, or withdraw from the job as the inside counsel altogether.

IV. Thursday

The lawyer's duty of loyalty to the client extends only to the legal matters. Here, if the implications of the proposed transaction are only economic in nature and carry no legal issues, the lawyer can choose to share her opinion of the transaction to the extent it would be permissible for any other employee, but she should be careful to express this in terms of her personal opinion and not a legal opinion so as not to create the impression of undue authority where there is none.

V. Friday

A lawyer has a duty to report violations of the rules of professional conduct that she becomes aware of. A lawyer has a duty to keep the client funds separate and access them only if they are earned. Taking client funds from a trust account is a serious violation of this duty.

Here, because lawyer became aware that another lawyer committed a serious violation of her duty to keep clients' funds separate and only take what she earned, the lawyer has a duty to report this violation to the Bar. The lawyer should make this report as soon as practicable.

Essay 3 – Sample Answer 2

The issue is which rules of professional conduct Lawyer may have already violated with regard to the below days and what actions she should take to avoid any violations or further violations.

1. Monday

The issue is whether Lawyer's joint representation of CEO and Company constitutes a consentable conflict of interest.

Professional conduct rules regarding conflicts of interest prohibit lawyers from representing parties in the same or a substantially-related matter concurrently. Such a representation would be a violation of the rules against conflicts of interest, as a lawyer would not be able to provide adequate legal representation to both parties. A lawyer may represent a director at a company and the company itself simultaneously if there is a full disclosure to the non-company party that the lawyer represents and will act in the best interest of the company, first and foremost, the lawyer gives the individual the opportunity to discuss the representation with outside counsel, and the lawyer gets written informed consent from both parties. However, it will be considered a nonconsentable conflict where lawyer would be representing both parties in the same or substantially-related matter where the parties have adverse interests.

Here, Lawyer has not yet violated the rules of professional conduct by discussing the issue with CEO, but Lawyer must inform CEO that she does not represent him personally at this time—her interests and loyalties lie with the best interests of the corporation as she is its in-house counsel, and she must inform him that she cannot in fact take on representation of him personally, as he has revealed that he has engaged in dealings that are adverse to the interests of the company, of which Lawyer has the company's best interests at heard. This is considered a nonconsentable conflict of interest, as the parties (CEO and Company) will now have adverse interests.

2. Tuesday

The issue is whether Lawyer should have disclosed to Employee that she does not represent him from the outset, and whether she may be able to reveal information obtained during their conversation.

When a lawyer knows or has reason to know someone is unrepresented and is coming to them to seek legal advice, the lawyer must provide a disclosure to that person if the lawyer represents a person or an entity and not that person individually. Here, employee has come into lawyer's office for the purpose of seeking legal advice, as he stated that it was about a personal legal matter and he closed the door. At that point, Lawyer had a duty to inform employee that she is the company's lawyer—not his lawyer—and that she cannot provide him with legal advice about this situation, as he is stating that he has engaged in activity that is adverse to the interests of the company.

As the company's lawyer, Lawyer has a duty to "report up" information discovered about dealings of employees or directors where such dealings would be adverse to the interests of the company. However, this specific instance might present an issue of attorney-client privilege. A lawyer-client relationship is deemed to be formed when the client believes it has been formed. It is the lawyer's duty to ensure the client or potential new client does not believe that they are entering into or engaged in an attorney-client relationship if they are in fact not engaged in such a relationship. Information revealed by a client for the purpose of seeking legal advice is protected by the attorney-client privilege, which is held by the client. However, one exception to the attorney-client privilege is called the crime-fraud exception, which allows a lawyer to reveal otherwise confidential information where their advice is being obtained for the purpose of furthering a crime or fraud.

Here, employee may have been under the belief that an attorney-client relationship was formed—as Lawyer did not say anything or inform employee that she was not his lawyer—which would potentially protect their conversation by the attorney client privilege. However, information obtained by Lawyer during that conversation is likely able to be revealed under the crime-fraud exception, as employee is telling Lawyer that he is using petty cash from the Company to pay for illegal drugs, of which he is an addict, so likely to continue doing so in the future.

3. Wednesday

The issue is whether Lawyer must inform CEO that they must associate outside counsel in order to respond to the IRS suit.

Lawyers owe clients a duty of competent and adequate legal representation. A lawyer is competent where they have experience with and are able to fully handle or adjudicate the matter at hand on behalf of a client. A lawyer may become competent in order to take the representation by a course of study on the type of representation discussed, or by associating outside counsel with experience in the area discussed to assist them in the representation.

Here, Lawyer has absolutely no experience with transactional, bankruptcy, or tax law, and CEO is telling Lawyer to handle the defense of the IRS suit against Company concerning "complex tax regulations" entirely by herself and on a tight deadline. Because of the complexity of the suit coupled with the tight deadline, Lawyer will likely not be able to become competent enough in this area to adequately and effectively represent Company with regard to defense of the suit. For that reason, Lawyer must inform CEO that she will need to associate outside counsel in order to effectively represent Company.

4. Thursday

The issue is what Lawyer should inform company with regard to its proposal to acquire a competing business, where she feels strongly against the idea.

Typically, a lawyer may seek permissive withdraw from a representation where they feel their objectives and their client's do not align. Here, Lawyer feels strongly that acquiring such a loan to acquire another business is not in the best interests of the company. However, because this is an in-house counsel situation, Lawyer is not simply able to decline the representation or withdraw from the representation. However, Lawyer has a duty to inform CEO and Company that in her professional opinion, the transaction is ill-advised. Although she may be required by the Company to assist (as she is in-house counsel) with the proposal anyway (should the company decide to go forward with it), Lawyer is in-house counsel for a reason, and one of those reasons is to provide her professional opinion on business and financial matters the company plans to engage in.

5. Friday

The issue is whether Lawyer must report the violation of the rules of professional conduct by her classmate as overheard at lunch.

Lawyers are required by the rules of professional conduct to keep personal and client funds separate. Client funds—obtained typically by a payment of retainer—must be retained in a separate Interest on Lawyer Trust Account, which is separate from the lawyer's funds and from the law firm's funds. Such funds may only be withdrawn when the lawyer has actually earned the funds by performing work or incurring costs related to their client's case. Such funds cannot simply be withdrawn, moved around, or comingled with personal or firm funds, even if the lawyer intends to replenish such funds in good faith.

In Georgia, attorneys *may*, but are not required to, notify the ethics board of known violations of professional conduct (this is a departure from the model rules). Here, Lawyer has certainly learned that Classmate is violating the rules of professional conduct that require attorneys to keep clients' funds separate. However, Lawyer herself is not under a mandatory obligation to report such information to the board. In my opinion, Lawyer should report such information to the ethics board, as the violation goes to one of the core pillars of attorney ethics.

Essay 3 – Sample Answer 3

The Lawyer owes or is required to complete the following duties depending on the day at issue...

Monday: Lawyer owes a legal duty to only the Company and may decline to represent the CEO in his individual capacity. At issue is whether the Lawyer may knwingly represent both the CEO and the Corporation in the same matter. In general most conflicts of interest are waivable so long as the parties both give signed and informed consent to be represented jointly or to allow the Lawyer to conduct simultaneous legal representation if separate matters. However, there are some matters that a conflict of interest cannot be waived. One of which is present in the facts presented on Monday.

Lawyers in Georgia are governed by the Georgia Rules of Professional Conduct. The GRPC holds that a Lawyer must not represent two parties in the same action if it is foreseeable and likely that a conflict of interest will arise in order to adequately represent both parties. Here there is a strong possibility that the Company's legal interest and the CEO's legal interest will be in contention either through some element of a claim or defense and for that reason the Lawyer must decline to represent the CEO personally as this would create a conflict of interest to his legal duty to defend the company from the law suit. Even in not representing the CEO, by seeking the Lawyer personally and engaging with the Lawyer about his "perspective" legal representation of the CEO the CEO's duty of confidentiality was invoked. The duty of confidentiality exists regarding any communication with any party relating to a perspective or actual representation of a client. This is a broad rule that applies even to prospective clients who may ultimately not be retained. Thus, lawyer may not disclose the information shared by the CEO to the Lawyer in confidence.

Tuesday: When the employee of the company accounting department reached out to the Lawyer regarding his illegal drug use the lawyer as was the situation with the CEO on Monday may not represent the Employee. Such a representation would be a non-waivable conflict of interest as his embezzlement of company funds would place the lawyer in a situiation where he represents both sides to the same litigation. Addiotnally, Lawyer had the duty to tell the employee he may not represent him in this matter and to decline representation which he did not do once lawyer knew of the conflict he was told by the employee. AAddiotnally, by the employee seeking the Lawyer personally and engaging with the Lawyer about his "perspective" legal representation of the Employee the Employees duty of confidentiality was invoked. The duty of confidentiality exists regarding any communication with any party relating to a perspective or actual representation of a client. This is a broad rule that applies even to prospective clients who may ultimately not be retained.

However, because the employee informed the Lawyer of his criminal embezzlement of company funds which would result in an immediate and irreparable harm and loss to the company, the lawyer does have a duty to report to the CEO his findings because the Lawyers duty is owed to the company. Additionally, although the Lawyer did not agree or state he would represent the employee, the attorney did need to inform the client that he is not able to represent the employee because he is the legal representative of the company itself. In doing so

the lawyer needed to tell the employee (1) he is not disinterested, (2) the lawyer need to address any misconception with that statement and his role for the company (3) he may not seek to give any legal advice to the employee other than to seek outside counsel.

Wednesday: When the IRS began auditing the companys federal income tax returns the first thing the lawyer needs to do is ensure that no spoilation of any key documents occurs. This is because in anticpation of litigation the company may not allow any resonably discoverable and necessary documentation or materials to be lost once on notice of a potential for litigation.

Additionally, because it is known that Lawyer only has experience in Tort cases and not in an area of expertise such as Tax and Bankruptcy the Lawyer needs to be clear and articulate to the CEO that he is presently incompetent on the matters of tax regulations. Because an Answer is due by Friday the Lawyer does not have time to addequatly learn or become competent on that matter in such a short time frame. Thus, the other two ways to address a competency issue is to either (1) seek outside counsel who is competent and have them handle the matter entirely or (2) the Lawyer may associate with a tax attorney and the two can work together on the detailed legal response to the IRS. The lawayer must address the competency issue quickly and without delay regardless of what the CEO states about their precocious financial situation.

Thursday: Regardless of the Lawyers beliefs as to whether the acquisition of another company is financially wise is not ultimately the decision of the Attorney. As the Corporations fiduciary the lawyer owes no duty other than to represent the clients interest. So long as that interest is not fraudulent or illegal in nature the client has the authority to employ the attorney to perform the legal production or documents the company seeks. Thus, if the company wants to purchase a competitor despite the inherent financial risk the lawyer must abide by the clients decisions. The lawyer may of course offer their general counsel and advice regarding the issues and concerns he may have from a legal perspective but ultimately the decision is the corporations. Ultimately, the client makes all substantive decisions regarding how the company is run as well as when to settle or puruse certain litigation or transactional options.

Friday: Finally, under the Georgia Rules of Professional Conduct the lawyer may and is encouraged to report instances where a lawyer is known to have violated the rules of professional conduct but the lawyer is not required to report the classmate he heard on the phone to the Georgia BAR. In general, Attorneys are never allowed to withdraw client funds to use in personal expenses even if they do or intend to pay the client back. Such an action is a violation of the GRPC. However, the attorney has no absoulte duty to report this conduct, but they are encouraged to do so if they feel inclined.

Essay 4 – Sample Answer 1

1. In determining whether temporary alimony is justified in a case, the court should examine the ability for each spouse to provide for their own needs, as well as the standard of living that they enjoyed during the marriage, as well as their ability to maintain said life style now that the marriage has been dissolved. During the divorce proceedings, a judge may award temporary alimony to help a spouse who is not currently able to provide for their standard of living until the court determines a final judgment regarding alimony. This is especially common in cases involving custody, where the judge may wish to allow the minor child to maintain their standard of living while in between family homes. Here, Waylon has effectively no ability to provide for the standard of living that he had become accustomed to while living with Tammy without temporary alimony. He is currently making around $2750 per month total, including both his income from the karaoke bar as well as his royalty checks, which is paltry compared to Tammy's $27,000 per month. Therefore, the court likely should grant Waylon temporary alimony to assist with living expenses and attorney's fees.

2. In determining permanent alimony, a court needs to consider the ability for the party requesting said alimony to make income in the future. This includes considering factors like age, education, marketable skills, physical health and condition, as well as mental condition. Permanent alimony is most common where one party has no ability to provide substantially for themselves and is unlikely to acquire the ability to substantially provide for themself in the future. Here, Waylon is around 42 years old, and there is nothing in the facts that states that he is in poor health physically or mentally. Although the facts do not state anything regarding his education or his marketable skills he may have outside of music production, he is still in a position in terms of age and presumably health to acquire skills that may help him later make a substantial income for himself. Therefore permanent alimony would likely not be appropriate for Waylon.
However, the court may consider a number of other forms of alimony. First, the court may consider temporary alimony, where alimony may be granted for a set period of time, after which the party seeking alimony would no longer receive anything. This is common where a party may not have the ability to provide for themselves, but may again after a period of time due to searching for a job or acquiring some new skill, but the time of the alimony is merely dependent on the decision of the court, and not whether the party has actually gained employment or employable skills.

The court may also consider rehabilitative alimony, where alimony is granted to help the party receiving alimony acquire sufficient skills, either from college or a trade, or gain a job that allows them to support themself. Once the party is self sufficient again, the alimony would end.
Here, the court should consider granting Waylon temporary alimony. Waylon has many years of experience in the music business and likely has the skills that would be necessary to find some career therein, even if it is not specifically for writing music as he had done previously. The court should grant him alimony for a period of time the court finds sufficient for him to begin a new career, be it in the music industry or elsewhere.

3. Equitable divisions of property in a marriage concerns the correct way to determine marital property and which property is rightfully owned by each party. Marital property is all property that the parties enter the marriage with jointly and all property that they receive jointly during the marriage with some exceptions, such as inter vivos gifts, bequeathments, and property that they receive via a will. However, property received prior to the marriage that remained the individual marital party's remains theirs and not marital property. Once property has become intermingled such that it would be impossible to ascertain which party was entitled to the property, it becomes marital property, which must then be equitably split between each party. Therefore, all of the property that the parties jointly owned at the time the marriage began became marital property, unless specifically separated, must be equitably split. Here, the bank account that is jointly owned by the parties should be dissolved and the contents of the account should be split between the parties. The royalty checks that each party receives will continue to be their own. Waylon's double wide trailer, that the parties never lived in together should be granted to Waylon, as there are no facts stating that Tammy had anything to do with the property. The $1 million diamond bracelet should be granted to Tammy was it was a gift to her. The mansion that both parties lived in should either be sold and the profits of that sale split between both parties, or Waylon should be entitled to half of the value of the property that Tammy could pay him for, should she wish to keep the property. This is because the Tuxedo Road mansion was the marital residence that they both lived at.

4. In determining the custody of a minor child, the court should observe the best interest standard for the child. This means that the court must take notice of all of the facts surrounding a case and must determine in light of all of these what the court believes will be the best option for the child in totality. Further, child custody is split between legal custody, the ability for a parent to make major life decisions for the child (such as their religion and what school they attend), and physical custody, where the child lives. Unless there is some defect with a parent, be it neglectfulness, drug addiction, purported abuse, or some other extenuating circumstances, most courts have observed that the best interest of the child typically means some division of custody between both of the parents, and not sole custody being granted to a single parent. Also, for minor children who are over the age of 14, courts should grant substantial weight to the preference of the minor child and they should observe what they would prefer very strongly. Further, while the ability of a parent to financial care for their child should be considered as a weighted factor in a court's calculation regarding custody, it should not be the court's primary focus, as child support can help equalize any gap between the parent's ability to financial provide. Here, there are no facts stating that either parent has engaged in any form of abuse or neglect in regards to Naomi, which points to some form of joint custody being proper. As Naomi is at or around 14 years of age, the court should weigh her preference for who she wishes to live with very highly, in this case Waylon. While Waylon would have a harder time supporting Naomi financially, if Waylon sought child support, this would equalize his ability to care for Naomi. Therefore, the court should grant both parents shared legal custody, and grant Waylon and Tammy split physical custody of Naomi, likely with Waylon having primary physical custody and Tammy having either every weekend or every other week.

5. Although the visitation rights of grandparents are not as strictly mandated as parental rights are, Tammy's mother is likely still entitled to visitation rights regarding Naomi. When a grandparent has been an active part of a minor child's life, for instance if the grandparent lived with the minor child, then a court would likely find that it was in the best interest of the child to maintain a relationship with the grandparent, often in the form of visitation. Here, Tammy's mother lived with the family since around the time that Naomi was born, meaning that Tammy's mother has always been in Naomi's life. Therefore, a court could find that mandating a certain level of visitation for Tammy's grandmother was reasonable for the best interest of Naomi.

Essay 4 – Sample Answer 2

1. Waylon should be granted alimony to cover living expenses and attorney's fees as, through no fault, his financial situation has declined.

Under Georgia law, alimony may be awarded based on factors such as income, assets, debts, whether both parties worked, reasons for one party not working, and potential future inheritance. Generally a court will not award alimony if the requesting party committed uncondoned adultery or abandonment.

Here, Waylon and Tammy are basing their divorce on a no-fault basis. While both parties began the marriage in fairly equal financial positions, Waylon's income and popularity has declined. Tammy does not claim that Waylon committed adultery, nor does she claim he has abandoned her.

Therefore, the court should grant Waylon alimony.

2. Waylon should not be granted permanent alimony as he has experience and historical success of being a high earning performer, but should be granted temporary or a one-time payment of alimony.

Under Georgia law, permanent alimony is granted in situations where the requesting party is in need of consistent support. This may be due to conditions such as the requesting party not working outside of the home due to caring for the children and lacking work experience, disability, lack of separate property, and the other party's ability to pay the continued amounts to support the requesting party.

Other types of alimony include temporary alimony, where the requesting party does not need long term support. Generally this occurs where a spouse stayed home to care for the children, but has work experience and the temporary support will assist in the requesting party in rejoining the workforce and improving their financial situation.

Some circumstances will provide for a one time alimony payment. Some instances where this may be applicable are when one party has substantial liquid assets at the moment, but may not in the future or where the court find the non-requesting party should pay the requesting party in the manner under the court's discretion.

Here, I would advise the court to award temporary alimony to Waylon. His experience and exposure in the music industry will likely lead to potential employment in the future, just not with singing. The facts do not support permanent alimony in my opinion. In the alternative, it is possible that a one time alimony payment from Tammy would help Waylon establish a stable home environment and so he would not need to sell any more of his assets.

Therefore, the court should either award temporary alimony or a one-time alimony payment to Waylon.

3. How Tammy and Waylon's property should be divided under Georgia's equitable property division theory.

Under Georgia law, when a divorce occurs, the court will distribute the marital property equitably. This does not necessarily mean equally. Any property obtain prior to the marriage will remain the separate property of the party who purchased it. Any property purchased during the marriage with separate funds will remain separate property. The court will attempt to equitably divide all marital property, including that which was commingled with separate property.

Here, the court should award Tammy the Tuxedo Rd home as it was purchased prior to their marriage and she has used $1 million of her own money to install a pool. She should also be awarded her Atlanta bank account which remained separate throughout the marriage. Additionally, Tammy should retain the gifted $1 million bracelet as she kept in her own safety deposit box. Waylon should be awarded his double wide. Both parties should continue to receive their monthly royalties. The court should consider the joint account as marital property to a certain extent. The money was used for family items and that should remain the case. Unless Waylon can show otherwise, it seems that Tammy contributed the majority of the money into that account. Thus, the court should take both of those facts into consideration when splitting the joint account.

Therefore the court should distribute the Tuxedo Rd home, the Atlanta bank account, and the $1 million bracelet to Tammy, the double wide trailer to Waylon and divide the joint account based on a balance the factors shown.

4. Waylon should be awarded primary physical custody, and in the alternate joint physical custody, as the 14 year old Naomi has elected to live with Waylon.

Under Georgia law, the court will divide custody among the parents based on many factors, but most importantly what is in the best interest of the child. The court will consider factors such as the health of the parents, the relationship of the child with each parent, any drug or alcohol use of the parent, any criminal history of the parent, the parent's involvement with the child's activities and others. The court will use these factors to determine custody for any children under the age of 14. A child who is 14 years or older may choose which parent they would like to reside with. This choice of parent is presumed to be the custodial parent.

Here, it is undisputed that Naomi has chosen to live with Waylon. There is no evidence that would weigh against this presumption. The only question for the court would be whether it should award primary or joint physical custody. Waylon is only requesting joint and it may be in the best interest of the child for the parents to have an equal right. This will help avoid any animosity on the part of Tammy and will likely result in better conditions for Naomi.

Therefore, Waylon should be awarded joint physical custody as has elected to live with Waylon and no facts rebut this is not in the best interest of Naomi.

5. Unless the court finds it is in Naomi's best interest, Tammy's mother's request for visitation with Naomi for two weekends a year should not be granted.

Under Georgia law, a grandparent's rights are generally determined by the custodial parent. However, if a custodial parent rejects the grandparent's ability to see the child and it is further shown to be in the best interest of the child for the grandparent to have visitation, the court may order it.

Here, the facts do not specifically show an issue that Tammy, Waylon, or Naomi have with Tammy's mother. The custodial parents, in this case Tammy and Waylon, will decide if Naomi should visit with Tammy's mother. If there is a reason they do not wish to allow this visitation, the court will not step in. If Tammy's mother is able to show that overruling the parent's decision is in Naomi's best interest, the court should allow visitation.

Therefore, unless Tammy's mother can provide evidence showing visitation is in the best interest of Naomi, the court should not order visitation.

Essay 4 – Sample Answer 3

1. When one party in a divorce has significantly less access to funds, and there would be a disparity in their ability to secure representation, or their standard of living may substantially be affected during the course of the divorce, it is appropriate to consider the difference between the parties in awarding temporary support, especially when there are marital funds or property that the party would reasonably be entitled to. Here is significant marital property to which Waylon has a strong claim. There are no allegations of fault in the divorce, but it does appear that Waylon may have access to sufficient separate funds in the form of his mobile home, but those funds are not liquid, and that access may be delayed and affect Waylon's ability to hire counsel. Because child custody is at stake, and parents have a constitutional right to raise their children and associate with them, Waylon's interest in retaining counsel is significant. Here, if Waylon shows his current financial condition is significantly burdening his ability to retain counsel for the divorce and custody proceedings, the Court should consider granting temporary support.

2. When considering permanent alimony, a Court will evaluate factors such as the length of the marriage, whether either party may be charged with fault, the separate property or wealth available to the party seeking alimony, the other party's assets and ability to pay the alimony, the relative earning capacities of the parties, the lifestyle enjoyed during the marriage. Here, there is no fault. The marriage was lengthy. Waylon enjoyed a very lavish lifestyle. It does not appear that Waylon gave up his career in order to raise Naomi, or suffered any other professional detriment in service to the marriage. Tammy has far greater assets and earning capacity. She certainly has the ability to pay alimony.

There are, however, other options. Instead of permanent, periodic payments, the court could award a lump sum. There could be rehabilitative support, awarded to Waylon while he retrains or goes to school in order to increase his earning capacity. No facts indicate that Waylon is owed any restitutionary support, as he did not pay for schooling or support Tammy during the marriage.

3. Under equitable division of property, property is first classified as either separate or marital. Then, marital property is divided in a manner that is fair and to accounts for the needs of the parties. Property that was owned prior to the marriage tends to remain separate, and property acquired with separate funds remains separate, unless it has been gifted, transmuted, or commingled in a manner that precludes tracing. Marital property consists of property acquired during the marriage. Here, Waylon's mobile home is his separate property. It is likely, though unclear, that the royalty streams from both Tammy and Waylon's songs are separate property. The facts don't tell us whether the songs were written during the marriage, but here we will assume the royalties come from separately owned copyright interests that each owned separately before the marriage. Tammy's separate property includes the the cash remaining in her ATL bank account, as it was never commingled and she had it before marriage. She also owned the Buckhead mansion prior to marriage. The facts don't indicate there was a mortgage paid with marital funds, or any improvements with marital funds, so we will assume the mansion and any increase in value were due to market forces. Waylon may attempt to argue the million

dollar pool was a gift, and that contributed to an increase in value in the mansion, but the funds came from Tammy's account, and were spent on the house she already owned. That argument will likely fail.

The 1M bracelet was earned during the marriage, making it marital property. While Tammy will claim it is a gift, and therefore should be separate, the gift came from her record company and should be viewed more as compensation from work rather than a true gift. All the funds in the true love bank account are marital property.

4. Because Naomi is 14, unless it is not in the best interests of the child (BIOC), the court must strongly consider Naomi's wishes to live with her father. Additionally, a parent's wishes regarding their child have special significance and the court must consider the parents wishes. The other factors the court considers are the relationship of the child to the parent, if a parent is considered the primary caretaker, the ability of a parent to care for the child, whether a parent has drug or alchohol or mental health problems, and any other factors that would be appropriate in evaluating BIOC.

Here, Naomi has expressed her desire to live with Waylon. Considering the relationships with the parents, and that there don't appear to be any significant problems with either parent, and that they both appear capable of caring for Naomi, it is probably advisable to award joint custody. It respects Naomi's desire, but it also protects the parent child relationship between child and mother.

5. Grandparents do not have any particular rights to visitation. Visitation with a nonparent may be awarded if to deny the visitation there would be harm to the health or welfare of the child. Factors to consider are whether the child lived with the nonparent for 6 or more months, whether the nonparent provided significant monetary support for one year or more, or any other factor that may show denial may harm the child. Here Tammy's mother lived in a separate part of the mansion. There are no facts showing an especially close bond. There are no facts regarding a significant relationship with grandmother. Additionally, if Tammy is granted partial custody, grandmother will be able to visit with Tammy during those times Naomi is in Tammy's custody. There does not appear there will be any harm to Naomi's health or welfare by denying visitation.

MPT-1 — Sample Answer 1

Foss & Associates LLP
3200 Lakefront Dr., Suite 700
Franklin City, Franklin 33012

MEMORANDUM

To: Zoe Foss

From: Examinee

Date: February 21, 2023

Re: Jasmine Hill Matter

I was asked to draft a memorandum analyzing whether Jasmine Hill has one or more claims against Reliant Boating ("**Reliant**") under the Franklin Deceptive Trade Practices Act ("**DTPA"**) and what specific relief Ms. Hill would be entitled to if she were to succeed in a DTPA action.

1. **Ms. Hill's has a viable claim against Reliant under the DTPA**

Gordon v. Valley Auto Repair, Inc. (Fr. Ct. App. 2009) outlines the elements of a DTPA claim:

(1) P is a consumer;

(2) D engaged in one or more of the false, misleading or deceptive acts enumerated in §204;

(3) the act(s) constituted a producing cause of the P'd damage and

(4) P relied on D's conduct to his or her detriment (citing *Diaz v. Ellis,* Fr. Sup. Ct. 1998).

i. Consumer

DTPA §203 defines a consumer as "an individual...who seeks or acquires any good or services." Ms. Hill was interested in purchasing a boat, after she and her family enjoyed their summer vacation renting boats on the lake. She decided to buy a used boat from Reliant as it is one of only a few boat stores in town. Therefore Ms. Hill is a consumer under the DTPA.

ii. False, Misleading or Deceptive Acts

DTPA §204 states that false misleading or other deceptive acts or practices in the conduct of any trade or conduct are unlawful; they include:

"(d) representing that goods or services i. have characteristics or uses they do not have or ii. are of a particular standard, qualify or grade if they are of another" [and]....

(g) failing to disclose information concerning goods or services that was known at the time of the transaction if such failure was intended to induce the consumer to enter into a transaction into which the consumer would not have entered had the information been disclosed."

According to Ms. Hill, Mr. Stevens (the owner of Reliant) encouraged her to buy the Envoy, the cheaper pontoon-style boat, after she came down to Reliant's store. He indicated in correspondence to Ms. Hill that the Envoy "is a real gem and would be a perfect fit for [Ms. Hill] because it has plenty of room for you and your family!" Ms. Hill also stated that he told her at the store that the boat was in great condition. The Bill of Sale from Reliant also indicated that "Seller has no knowledge of any defects in and to the Boat." The "real gem" comment may be considered mere puffery under *Gordon.*

Mere puffery is "exaggerated sales speak for promotional purposes and is not actionable under the DTPA" (*Gordon, Diaz*). Mere puffery factors include (1) the specificity of the alleged misrepresentation; (2) the comparative knowledge o the consumer and the seller; and (3) whether the representation relates to a past or current condition as opposed to a future event. "Real gem" doesn't say anything particular about the boat (like "new" or "four years old" etc.). But "great condition" may be considered a statement that "compares one product to another" (i.e. good, great, etc.). Further, because Ms. Hill only has been interested in boating and has only rented a boat a few times, it could be argued that Mr. Stevens (as a boat seller) has far greater knowledge and experience about the state of boats than Ms. Hill. He also recommended this specific boat to Ms. Hill. Mr. Steven's statements also speak to the current condition of the boat, not what it may do or be in the future.

Mr. Stevens should have also known that the boat had a cracked engine, which would be a violation of §204(g). Because the boat was in his possession, Mr. Stevens should have checked out the condition of the engine (a principal part of the boat) prior to making the representation that the boat had no defects. He had the requisite knowledge, experience and opportunity to know whether the engine was cracked. Reliant could argue that Mr. Stevens turned the engine on and it sounded fine, so he had no reason to know that there was a defect in the boat. But as the mechanic told Ms. Hill that it is not uncommon for a motor with a cracked engine block to run for a few minutes under test conditions. Plus the mechanic discovered epoxy glue in the cracks on the engine block which had been recently applied; this told the mechanic that the engine block was damaged when Ms. Hill purchased it from Mr. Stevens.

iii. **Act was Producing Cause of P's Damage**

Ms. Hill bought the Envoy on Mr. Steven's encouragement and had to repair the same. Mr. Stevens could argue that Ms. Hill should have had notice (even with limited knowledge of boats) that there may be some defects in a used boat. He even showed her another boat which was newer and bigger (2019 21-foot Wellington Mariner). But Ms. Hill indicated that she was looking for a good-quality used boat, which Mr. Stevens knew.

iv. Reliance

Because of Mr. Stevens encouragement and his representations, Ms. Hill can argue that she relied these assurances caused her to buy the boat which led to its repair of $3000.

2. Damages

i. Economic Damages

Because of the reasons outlined above, Ms. Stevens can argue for economic damages, because Mr. Stevens' misconduct was the producing cause (based on §205 DTPA). she can recoer $3000, which was the cost of the repair to the boat. Because Ms. Stevens provided no other circumstances of loss, it is unclear whether consequential damages (like the lost net profits resulting from the interruption of *Gordon*'s business) could be pleaded.

ii. Exemplary Damages.

Where D knowingly made false representations about its repairs, then the DTPA imposes treble damages. "Knowingly" includes "actual awareness of the falsity deception or unfairness of the act or practice giving rise to the consumer's claim. In *Abrams,* the defendant college represented in its catalogue (which the plaintiff relied on) that it would provide "qualified teachers, modern equipment and a low student-teacher ratio. However, the Franklin Court of Appeal ruled that the college knew that it had one qualified teacher in a room with 42 students, all taking different course with only two 10-key adding machines. The Court of Appeal agreed with the trial court in awarding treble damages because the DTPA provides that "it should be liberally construed so as to promote the purpose of protecting consumers against false, misleading or deceptive businesses practices."

In Ms. Hill's case, it could be argued that Mr. Stevens made false representations knowingly by stating that the boat had no defects in the Bill of Sale and that it was in great condition, but it had a cracked engine, with recently glue application. Since the boat was presumably in Mr. Steven's possession and the mechanic indicated that the glue had been applied recently, the Court could construe those facts to mean that Mr. Stevens knew that the engine was in disrepair and he made the false representations to induce Ms. Hill into a sale. On the other hand, Mr. Hill can argue that he didn't know that the engine was in disrepair and that he started the engine in front of Ms. Hill. However Ms. Hill can also bring the boat mechanic as a witness to state that it is not uncommon for a motor with a cracked engine block to run for a few minutes under test conditions and then fail to work when taken on the water.

All in all, Ms. Hill's evidence may support a finding of treble damages, which makes her potential damages about $9000.

Mental Anguish

Mental anguish award of damages implies" a relatively high degree of pain and distress beyond mere worry or anxiety, and includes pain resulting from grief, severe disappointment, indignation, wounded pride..." Although Ms. Hill was "disappointed" about her family's weekend getaway being ruined, her disappointment may not rise to the level of "mental anguish" under the DTPA. In *Abrams,* the plaintiff was disappointed that the defendant college did not meet its represented level of acumen for awarding business degrees. She spent about $5000 for the deposit and was severely disappointed with the College's academic program, indignant at its poor instruction, wounded pride at being "had" and had such severe despair that she dropped out of CBC. A college education may be considered a necessity for advancement; a boat for pleasure may not.

MPT-1 — Sample Answer 2

To: Zoe Foss

From: Applicant

Date: February 21, 2023

Re: Jasmine Hill Matter

You have asked me to determine if Ms. Hill have claims against reliance under the Franklin Deceptive Trade Practices Act (DTPA). Ms. Hill will have claims against Reliance and will have remedies available to her as explained and discussed below.

Whether Ms. Hill has one or more claims against Reliant under the Franklin Deceptive Trade Practices Act (DTPA).

Generally, the DTPA prohibits "false, misleading, or deceptive, acts or practices in the conduct of any trade or commerce." FR. Bus. Code. 204. Section 204 of the DTPA contains a list of prohibited acts. The relevant prohibited acts include: "representing that goods or services...are of a particular standard, quality, or grade if they are of another." Id. at 204d. The other relevant prohibited act includes: " Failing to disclose information concerning goods or services that was known (emphasis added) at the time of the transaction...to induce the consumer into the transaction... [and] the consumer would not have entered had the information been disclosed;" Id. According to Gordon v. Valley Auto Repair Inc., "[t]he elements of a DTPA claim are (1) the plaintiff is a consumer; (2) the defendant engaged in one or more of the false, misleading, or deceptive acts enumerated in [section] 204; (3) the act(s) [caused plaintiff's damages]; and (4) the plaintiff relied on defendants conduct to...her detriment." Gordon v. Valley Auto Repair Inc., Franklin Court of Appeals (2009) quoting Diaz v. Ellis (Fr. sup. Ct. 1998). The plaintiff has the burden of proof. Id.

Consumer

Under the DTPA act, a consumer is an individual who seeks any good or service. Here, Ms. Hill is a consumer of a boat because she sought a used boat, a good, from Reliant.

Reliant Engaging in Deception

Generally, the DTPA prohibits "false, misleading, or deceptive, acts or practices in the conduct of any trade or commerce." FR. Bus. Code. 204. Section 204 of the DTPA contains a list of prohibited acts. The relevant prohibited acts include: representing that goods have characteristics or uses they do not have or "representing that goods or services...are of a particular standard, quality, or grade if they are of another." Id. at 204d. In Gordon v. Valley Auto Repair Inc., Franklin Court of Appeals (2009)- Plaintiff purchased a used pickup truck in Franklin for hauling goods and plaintiff noticed the truck used too much oil. After two repair attempts, at

Valley repair shop, repairs totaling $4000 ($2000 each attempt at repair), the car still leaked oil. Plaintiff took the car to another mechanic and cost was $2000. Gordon. In Gordon, the plaintiff alleged that the repair company violated the DTPA by "representing that services were performed." Gordon. The repair company told the plaintiff, after unsuccessfully repairing the oil leak the second time that "We've got it fixed now," but there was still a leak after the repair. Gordon. Similarly, here, when Ms. Hill, went to purchase the boat, Mr. Greg Stevens, Reliant store owner, told Ms. Hill that the boat was "in great condition." (Transcript). He also told Ms. Hill in an email that the boat was in "excellent condition and runs just like new." (Email August 10, 2022). Here, Reliant made a representation that the boat was in excellent condition and running like new, noting the quality and standard of boat Ms. Hill was to receive but did not.

The other relevant prohibited act of the DTPA includes: " Failing to disclose information concerning goods or services that was known (emphasis added) at the time of the transaction. Id. Here, Ms. Hill got an example of the boat running at the time of purchase and stated that when she tried to take the boat out on a ride, 15 minutes after being on the water the motor died. Ms. Hill had to get the boat motor replaced because there was a crack in the engine block and it could not be repaired. (Transcript). When speaking to the mechanic Ms. Hill was told, although the boat ran for a few minutes, that is not uncommon for a cracked engine block. The bill of sale that Ms. Hill received also represented that the seller (Reliant) "has no knowledge of any defects in and to the boat." (Boat Bill of Sale).The mechanic also told Ms. Hill that he found epoxy glue in the cracks of the engine block that was recently applied and confirmed that the engine was damaged when she purchased it. From the above stated facts, it can be reasonably inferred, as allowed by the DTPA, that Reliant new of the cracked engine, due to the recent appliance of the glue and misrepresented that the boat could run when testing, although it was common for the boat to run for a few minutes even with a cracked engine. Reliant, on the bill of sale, stated they did not know of any defects, but the recent application of glue can be reasonably inferred that Reliant knew of the defect and failed to disclose it.

Caused Ms. Hill Damages

Economic damages- Ms. Hill has shown, with receipt, that she replaced the motor engine of the boat for $3000.

Ms. Hill relied on Reliant's conduct to her detriment

In Abrams v. Chesapeake Business College, Plaintiff relied on the misrepresentation in the catalogue were false and misleading and the plaintiff relied on the representation by continuing to pay tuition and not cancel her agreement. Similarly, Ms. Hill would not have purchase the boat if it were not for Mr. Stevens encouragement and if she had know it would need a new motor. (Transcript). The replacement cost set Ms. Hill back financially. (Transcript). Due to the statements Mr. Stevens made to Ms. Hill, she would not have been set back financially in having to purchase a replacement motor, had it not been for Mr. Stevens representations.

Thus, meeting all of the elements of a DTPA claim, Ms. Hill will have a claim under DTPA against Reliant after a showing that she was given false misrepresentations when she purchased the boat.

Claims defendant may make as a defense

Reliant may try and claim that say the boat was in "excellent condition" was puffing. Puffing is defined as mere opinions that are exaggerated for promotional purposes. Gordon. However, if representations are made by a service provider with more knowledge and experience than the consumer and the statements are about past or current conditions, these allegations are more actionable. Gordon. Here, Mr. Stevens is the store owner and more likely than not is a knowledgeable and experienced seller of boats, more than Ms. Hill. This defense will likely not succeed.

Relief Ms. Hill would be entitled to if she succeeds in a DTPA action.

If a violation of the DTPA is committed "knowingly, the plaintiff is entitled to receive three times...her actual economic damages...as well as damages for mental anguish." Gordon v. Valley Auto Repair Inc., Franklin Court of Appeals (2009). Knowingly is defined as "actual awareness, at the time of the act...of the falsity, deception, or unfairness and actual awareness can be inferred objectively to show a person acted with actual awareness. FR. Bus Code. 203. Section 203(f) of the code provides for economic damages to include repair and replacement cost. FR. Bus. Code. 203(f). Here, Ms. Hill would be entitled to the $3000 replacement cost. Mental anguish- Ms. Hill noted that she was infuriated when the motor engine died on her weekend getaway and that she has been put through a hassel. In order to recieve damages for mental anguish the plaintiff must prove that the defendant acted knowingly. As proved above, Ms. Hill will likely succeed in getting damages for mental anguish as well.

If Ms. Hill prevails, she will also be entitled to mandatory court cost and reasonable attorneys fees. Fr. Bus. Code. 205c.

MPT-1 — Sample Answer 3

MEMORANDUM

To: Zoe Foss

From: Examinee

Date: February 21, 2023

Re: Jasmine Hill matter

Issue: This memorandum will analyze whether Ms. Hill has one or more claims against Greg Stevens d/b/a Reliant Boating ("Reliant") under the Franklin Deceptive Trade Practice Act, Fr. Bus. Code, §§ 200 *et seq*. ("DTPA"), to include a discussion of what specific relief Ms. Hill will be entitled to if she were to succeed in a DTPA action. As discussed, this memorandum will not include a separate statement of facts or address any other potential claims Ms. Hill will have against Reliant, including any claims based on breach of express or implied warranties.

Statement of Facts: [Omitted]

Legal Authorities:

i. The DTPA

The DTPA is to be liberally construed to promote its underlying purpose, which is to protect consumers against false, misleading, and deceptive business practices. § 202. *See also Abrams v. Chesapeake* (Fr. Ct. App. 2012).

In relevant part, the DTPA makes certain false, misleading, or deceptive acts or practices in the conduct of any trade or commerce unlawful, to include but not limited to representing that goods or services have characteristics or uses that they do not have or are of a particular standard, quality, or grade if they are of another. § 204 (d)(i)-(ii). Further, the DTPA makes it unlawful to fail to disclose information concerning goods that was known at the time of the transaction if such failure was intended to induce the consumer to enter into a transaction into which the consumer would not have entered had the information been disclosed. § 204(g).
"Goods" includes tangible items purchased or leased for use. § 203(a). A "consumer" is an "individual . . . who seeks or acquires any goods or services . . . ." § 203(d). "Knowingly" means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness. § 203(k). A "trade" and "commerce" is defined as the "sale ... of any good or service . . ."§ 203(e).

The DTPA creates a private cause of action for a "consumer" against any "person" who engages in any one or more of the false, misleading, or deceptive acts or practices enumerated in § 204, if such act or practice is a "producing cause" of the consumer's damages and the consumer relied upon such act or practice to the consumer's detriment. § 205(a). A "person," includes "an individual, partnership, corporation, association, or other group, however organized." § 203(c).

In a suit under the DTPA, a consumer who prevails may obtain: (1) the amount of economic damages found by the trier of fact; or (2) if the trier of fact finds that the conduct of the defendant was committed knowingly: (i) exemplary damages of three times (treble) the amount of economic damages, and (ii) damages for mental anguish.§ 205(b)(1)-(2). In addition, each consumer who prevails shall be awarded court costs and reasonable and necessary attorney's fees.

"Economic damages" are defined under the DTPA as "compensatory damages for actual pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish."§ 203(f).

ii. Applicable case law

In *Gordon v. Valley Auto Repair, Inc.,* (Fr. Ct. App. 2009), the court considered claims against an auto-repair shot under the DTPA arising from repairs to the plaintiff's truck. The defendant was not a seller, but a mechanic who failed to perform adequate repairs on multiple occasions resulting in the plaintiff having to secure additional alternative repairs and spending additional money on those repairs.

As part of its analysis the court noted that under the DTPA actionable representations may be "oral or written." *Id.* (citing *Diaz v. Ellis,* (Fr. Sup. Ct. 1998). In relevant part, the court set forth the required "elements" for a claim under the DTPA: (1) the plaintiff is a consumer; (2) the defendant engaged in one or more of the false, misleading, or deceptive acts enumerated in § 204; (3) the acts constituted a "producing cause" of the plaintiff's damages; and (4) the plaintiff relied on the defendant's conduct to his or her detriment. *Id.* The plaintiff consumer has the burden of proof as to each element. *Diaz.*

A "producing cause" is a substantial factor that brings about the injury, without which the injury would not have occurred. *Diaz.* The court in *Gordon* held that the plaintiff was a "consumer" because she asked the defendant to perform repairs on her truck. In relevant part the court also addressed whether the defendant violated the DTPA by making representations about the standard, quality or grade of service. The court distinguished between mere "puffing" and sales speak that are not actionable. These "puffing" statements are vague or indefinite, or mere opinions. *Id.* (citing *Diaz*). Statements by a seller or provider with more knowledge than a consumer are also more likely to be actionable. *Id.* And statements about past or current conditions are more likely to be actionable than about the future. *Id.* The court set forth several examples where statements were not actionable, which include scenarios where there was "no

guarantee" of condition. Other cases held that describing a car as "luxurious" or "rugged" were mere opinion or puffery. *Id.* (citing *Salas v. Carworld*.). On the other hand, were representations are expressed in terms of "guaranteed' or quality would be "great" they may be actionable. *d.* (citing *Chapman v. Acme Constr.).*

The court also clarified that "economic damages" under DTPA include "total loss sustained by the consumer as a result of the deceptive trade practice" which includes related and reasonably necessary expenses. *Id.* Further, knowing requires the person know that what he is doing is false, deceptive or unfair. *Id.* (citing *Diaz*). The court in *Gordon* held that even where a mechanic represented it completed repaired and had not that did not constitute "knowing" under DTPA because there was no evidence that they knew what they were doing was deceptive or misleading. Finally, an award of attorney's fees is mandatory under the DTPA to a prevailing plaintiff. *Id.*

Next, in *Abrams v. Chesapeake Business College,* (Fr. Ct. App. 2012), the court affirmed an award under the DTPA including exemplary damages. The case focused on statements in a college's catalogue to a student prior to enrollment including qualifications of teachers. These included specific representations about their "thorough" training and modern "state of the art equipment" and "no more than 10 students per room." These representations were proven false in fact. The court held this violated DTPA by making misrepresentations as to characteristics standard and quality and failure to disclose information. In relevant part, the court was careful to distinguish situations where the buyer has actual notice of information, and under those circumstances a seller cannot be liable for failure to disclose. *Id. (citing Ling v. Thompson*, Fr. Ct. App 2008). The court held the school knew of the representations and their falsity, and were not innocently withheld. The court also affirmed the award of mental anguish on the basis there was sufficient evidence the school "knowingly" made those representations or omissions. But "mental anguish" implies high degree of pain and distress beyond mere worry or anxiety, includes grief, severe disappointment, indignation and wounded pride." *Id.* The plaintiff's testimony that she suffered "severe disappointment" in the instruction received was sufficient.

Analysis:

i. Application of the DTPA to the transaction

(a) Whether Ms. Hill qualifies as a "consumer" purchasing a "good" from a "person" engaged in "trade" or "commerce" under the DTPA

Here, as set forth in *Diaz,* the first element of DTPA requires the plaintiff to be a "consumer." Therefore, the first issue to address is whether Ms. Hill qualifies as a "consumer" protected under the DTPA. As part of this analysis, we should also determine whether her transaction falls within the scope of the DTPA for the sale or lease of goods as set forth by the DTPA. Ms. Hill most likely qualifies as a "consumer" because she is an "individual" who sought or acquired goods. *See also Gordon.* The boat constitutes a "good" because it is a "tangible item" that was purchased from Reliant.

We must also examine whether Reliant constitutes a "person" engaged in "trade" or "commerce" against whom Ms. Hill may bring a cause of action under the DTPA. Reliant is effectively a sole proprietorship because the Bill of Sale lists the seller as "Greg Stevens d/b/a Reliant Boating" which indicates Mr. Stevens individually operates as the business "Reliant," which is his sole proprietorship. Mr. Stevens, d/b/a Reliant, would qualify as an "person" for purposes of DTPA liability because he is an "individual" or "other group" however organized. § 203(c). Further, Reliant was engaged in "trade" or "commerce" because they were selling a good. § 203(e).

(b) Whether Reliant committed one or more "unlawful" acts under the DTPA through representations or omissions

The second element of a DTPA claim is whether the defendant engaged in one or more of the false, misleading, or deceptive acts set forth in § 204. *Diaz.* Thus, the next issue to address is whether Reliant committed one or more expressly defined "unlawful" acts under the DTPA. To be sure, Reliant's representations include both oral and written statements. *Gordon.*

Here, Reliant most likely committed one or more "unlawful" acts expressly defined under the DTPA to include making "representations" *that goods have characteristics that they do not or of particular grade or quality* because Reliant expressly represented to Ms. Hill: (a) in its email prior to sale that the Envoy was in "excellent condition and runs just like new"; (b) his verbal statements to Ms. Hill prior to sale that the boat was "a real gem and that it was in great condition"; and (c) the representation in the Bill of Sale that the Seller "has no knowledge of any defects in and to the Boat." The boat was in fact not in "excellent condition" and did not "run just like new" because the engine was cracked, glued back together, and would not operate for more than 15 minutes on the water. The first two representations most likely qualify under this "unlawful" act provision of the DTPA. The third is an omission which will be discussed below.

Reliant may argue these statements or representations were "mere puffery." Reliant will argue that like *Gordon* the representations of "excellent condition" is vague and indefinite (*Diaz*) or that "great condition" is not specific enough to rise to the level of puffery. However, while these statements may be somewhat vague, "runs like new" is likely specific enough to make a reasonable consumer believe an engine would not fail upon first use. Unlike *Gordon,* here there were not generalized statements and there were no representations that qualified Reliant's representations, as the mechanic did in *Gordon* ("might have some problems that would take longer"), instead Reliant made affirmative representations that were unqualified as to the quality of the boat.

Further, under *Diaz* the superior knowledge of the seller in this instance compared to Ms. Hill who has never purchased a boat before likely weigh in favor of an actionable representation. *Diaz.* Further, these representations relate to a current condition of the quality of the boat, not future conditions, and are also more likely actionable for that reason as well. *Diaz.* Ms. Hill would argue these representations are definite enough to fall in line with other cases or "guarantees" like *Chapman*. Further, Ms. Hill should argue these facts are more in

line with *Abrams* based on the specific nature of the representations compared to the falsity in fact of those representations. Like the school catalogue, saying a boat is "like new" or "excellent condition" is directly contrary to a boat with a cracked engine that cannot run on water.

In addition, Reliant also *failed to disclose* information concerning the boat that was, or should be inferred to be known by objective manifestations of knowledge, including the fact that the engine was cracked and would not run on the water when operating. Ms. Hill would have to prove both that the cracked engine was known to Reliant and that Reliant intended to induce Ms. Hill to purchase the boat, and that Ms. Hill would not have entered the transaction had the information been disclosed. This issue may be more difficult to prove given the Seller disclaimed knowledge of any defects in the Bill of Sale. However, given the mechanic who repaired the engine noted the engine was recently glued together, and that he understood it was not "uncommon" for a motor to run for a few minutes under test conditions but fail on the water, the facts indicate that the engine was recently glued and Reliant knew or can be inferred to know that the engine was cracked and not in working order when he sold it to Ms. Hill. Further, the repeated representations to Ms. Hill of the quality of the boat are strong evidence that Reliant intended to induce Ms. Hill to purchase the boat based on these representations. It is also evident from Ms. Hill's statement in her interview that she would not have purchased the boat had she known about the cracked engine.

Ms. Hill should argue these facts are closely analogous to *Abrams* where there were specific representations to quality that were in fact false as demonstrated by the buyer's later acquired knowledge. Like *Abrams,* the buyer here did not know about these defects when she purchased the goods (or service in *Abrams*), and the seller was in a better or superior position to know of the falsity of those representations or omissions.

Therefore, Ms. Hill likely has a strong claim against Reliant that it both made unlawful representations and made unlawful omissions by failing to disclose information that it knew to induce her to purchase the boat under the DTPA.

(c) Whether Reliant's acts constitute a producing cause of the plaintiff's damages.
The third element of a DTPA claim is whether the defendant's act constitute a producing cause of the plaintiff's damages. *Diaz. A "producing cause" is a substantial factor that brings about the injury, without which the injury would not have occurred. Diaz.*

Here, the evidence establishes that Ms. Hill would not have purchased the boat absent or "but for," Reliant's representations that it was like new or in excellent condition. Therefore, Reliant's acts most likely were a substantial factor that caused Ms. Hill to buy the boat and also were the producing cause of her expenses in repairing the boat after it was purchased. Ms. Hill stated in her interview that absent those representations and had she knew about the cracked engine she would not have made this purchase.

Based on the case law discussed above, including *Diaz,* these facts most likely satisfy the requirement that Reliant's conduct including representations and omissions was a "producing" cause of Ms. Hill's damages.

(d) Whether Ms. Hill relied on the defendant's conduct to her detriment.

The fourth element of a claim under the DTPA is to establish that the plaintiff relied on the defendant's conduct to her detriment. *Diaz.* Here, like *Abrams,* Ms. Hill would not have made the purchase but for or absent Reliant's representations as to quality of the boat and its failure to disclose the cracked engine. Therefore, Ms. Hill relied on Reliant's conduct to her detriment because she (a) purchased the boat; (b) expended time and resources taking it to a Lake for vacation with her family; and (c) had to make repairs to the engine.

Thus, these elements including Ms. Hill's "detriment" would be satisfied based on these three factors and they are all tied to Reliant's initial representations and omissions in the sale.

(e) Potential Remedies

Economic damages

As discussed above, the DTPA allows Ms. Hill to recover economic damages which include actual pecuniary losses under section 203, including costs of repair and replacement. Ms. Hill suffered costs of repair to the engine that would be recoverable, which includes the $3,000 to repair the engine. Further, case law construed the economic damages under DTPA include "total loss sustained by the consumer as a result of the deceptive trade practice" *Gordon.* This may include loss profits. *Id.* Here, Ms. Hill did not suffer other expenses to repair or replace the boat or lost profits, therefore, her economic damages are likely limited to $3,000 in repair costs.

Exemplary damages for knowingly violations

Ms. Hill can only recover exemplary damages or mental anguish damages if she proves Reliant's conduct was "knowing." As discussed in *Gordon,* this requires proof that the defendant actually knew the statements were false, deceptive and unfair. The evidence discussed above may satisfy this burden given Reliant likely glued the engine together recently before selling it to Ms. Hill and was in superior position to know about running the engine in testing conditions compared to on the water. The mechanic may be able to provide sufficient evidence to satisfy Reliant knew or can be inferred based on objective evidence of recent "cover up" repairs that they acted "knowingly" when they specifically told Ms. Hill that the boat was in excellent condition *and* when they falsely misrepresented in the Bill of Sale that they had No knowledge of any defects in the Boat.

Therefore, Ms. Hill can likely recover exemplary, or treble, damages in the amount of three times her economic damages, or $9,000.

Mental anguish

Ms. Hill can only recover "mental anguish" if she shows severe disappointment, not just mere anxiety or stress. Ms. Hill's statement expresses some aspect of severe disappointment base d on feeling taken advantage of and had to lose a weekend getaway with her family, but her testimony does not indicate heightened disappointment that is typically required to recover for mental anguish. However, *Abrams* instructs us that if she adds to her testimony additional factors or statements of "severe disappointment," as opposed to just mere "disappointment" she may be able to recover for mental anguish.

At this stage, it appears unlikely that these damages are recoverable based on facts presented to date.

Attorney's fees and costs

As a prevailing party under DTPA, Ms. Hill will be entitled to recover her attorney's fees and court costs. This is a mandatory award. *Abrams.* Therefore, if Ms. Hill prevails under her DTPA claims she will be awarded her attorney's fees and court costs. These fees are limited to "reasonable and necessary" fees.

MPT-2 — Sample Answer 1

AZIZ & SHAPIRO LLP

MEMORANDUM

To: Hamid Aziz

Re: Happy Frocks Inc. Liability for profits

Date: 2/21/23

I. Legal Argument

In a trademark infringement action, the defendant's profits that are attributable to the infringement are recoverable by the plaintiff. An award of profits is justified by three rationales: (1) to deter wrongdoing, (2) to prevent defendant's unjust enrichment, and (3) to compensate the plaintiff for the harm. *Spindrift Automotive Accessories, Inc. v. Holt Enterprises, Ltd.* (2021). To determine whether to award an infringer's profits to the plaintiff, the court applies a balancing test, but the factors are not weighted equally--rather, the court will exercise discretion in assessing each factor's importance and decide if the equities weigh in favor of awarding defendant's profits to the plaintiff. *Id.* The factors to be considered are as follows: (1) the infringer's mental state, (2) the connection between infringer's profits and the infringement, (3) the adequacy of other remedies, (4) equitable defenses, and (5) the public interest. *Id.*

a. The infringer's mental state weighs against profits because at most, Happy Frocks acted with negligence.

The more culpable the defendant's actions, the more likely they are to be subject to an award of profits. The mental states that weigh in favor of awarding profits are: willfulness, recklessness, callous disregard for the plaintiff's rights, willful blindness, and a specific intent to deceive. On the other hand, the mental states that weigh against an award of profits are: mere negligence or an innocent nature to the infringement. Here, Happy Frocks did not willfully, recklessly, or otherwise sell the infringing products. Rather, Happy Frocks actions in selling the infringing products were with mere negligence. Happy Frocks's manufacturer, Quality Clothes, was the one using the infringing buttons and deceived Happy Frocks by asking for enough money to buy B&B's buttons when it really was using cheap copies. In addition, as soon as Happy Frocks became aware of the infringement, it recalled all Quality Clothes's products and terminated business with them. Even though Happy Frocks was supposed to do quality inspections that would have caught the infringement, this can at most be attributed to negligence. Therefore, this factor weighs against profits.

b. The connection between infringer's profits and the infringement weighs against profits because the trademark owner was not harmed, Happy Frocks profits did not flow from the infringement, consumers were unaware, and Happy Frocks actually was harmed.

The connections considered for this factor are whether the trademark owner was harmed by lost or diverted sales, whether the infringer's profits flow from the infringement, whether consumers were confused by the infringement, and whether the benefit to the infringer is certain or not. Here, B&B was not harmed by the infringement because they testified their sales increased. Also, the infringer's profits did not flow from the infringement because they were still sending Quality Clothes the amount it would cost to buy B&B's buttons; only Quality Clothes profited from this. Next, the consumers were likely not confused by the infringement because the expert testimony of Tiffany Chen proves that only 3% of consumers look at logos on buttons and care where they come from. Finally, there is no benefit to the infringer because not only did they not benefit from buying cheaper buttons, but also they had to pull all their items from the stores, and lost a lot of money because of that. Therefore, this factor weighs against profits.

c. The adequacy of other remedies weighs against profits because they fully cover the losses and do not overreach.

The adequacy factor looks at whether other remedies are sufficient to make the plaintiff whole without an award of profits; if the plaintiff is made whole by other remedies, then awarding profits is not appropriate. Here, since an injunction and money damages are being sought, Happy Frocks terminated its relationship with Quality Clothes, and stopped using infringing buttons, it seems like profits are unnecessary. An injunction will prevent it from happening again and since Happy Frocks did not profit from this, the loss of the button sales to B&B, which would be the actual damages, would be adequate to remedy B&B.

d. Equitable defenses weigh against profits because Happy Frocks can prove that the plaintiff failed to act timely.

If the defendant has a claim of equitable defenses such as laches, plaintiff's failure to timely act, plaintiff's acquiescence, or unclean hands, then this would weigh in against an award of profits. Here, defendant likely has a claim for plaintiff's failure to timely act. While B&B testified that they did immediately send a cease and desist letter, on cross-examination it was discovered that it actually took them 9 months to send the letter. In addition, the letter was vague and required Happy Frocks to investigate on their own to determine which manufacturer was responsible. In combination, this delay on B&B's part weighs against awarding profits.

e. The public interest weighs against profits because there is no public danger from use of the buttons and the infringement already stopped.

If there is a public interest in preserving public safety or deterring other infringements, then the public interest weighs in favor of awarding profits. Here, B&B testified that the copy buttons

were neither dangerous, poisonous, nor pose a choking hazard. Also, Happy Frocks as already stopped infringing and even terminated its relationship with Quality Clothes, which was the manufacturer that was actually responsible for the infringement--thus, risk of future infringements is low. Therefore, there is not a significant public interest in awarding B&B profits in this case.

II. Conclusion

In conclusion, it is unlikely that Happy Frocks will have to pay profit damages to B&B because when each factor is weighed, the result is that none of them weigh in favor of awarding profits. Unlike the defendant's case in *Spindrift*, profits should not be awarded because here, there was no culpable mental state, the connection between the infringement and the profits is weak, other remedies are available and adequate, an equitable defense is available, and the public interest in safety and deterrence low--thus, Happy Frocks should not be responsible for profit damages.

MPT-2 — Sample Answer 2

B&B Inc is Not Entitled to Profit Damages From Happy Frocks, Inc.

I. Caption [Omitted per instructions]

II. Statement of Facts [Omitted per instructions]

III. Legal Argument

Introduction:

This portion of this brief will explain why Happy Frocks ought not to be held liable for profits as a result of trademark infringement. When deciding issues of lost profits Courts typically rely on three rationale, as articulated by the District Court of Franklin in the Spindrift case (2012), when awarding lost profits. (1) Deter wrongdoer from doing it again, (2) prevent defendant's unjust enrichment and (3) to compensate the plaintiff for harms caused by the infringement. Courts also look at the following factors (1) infringer's mental state, (2) the connection between the infringer's profits and the infringement, (3) the adequacy of other remedies, (4) equitable defenses and (5) the public interest. The factors are not equally and the court must apply its discretion when weighing them. The Supreme Court in Romag (2020) stated that "the defendant's mental state is a highly important consideration." Willfulness is is a very important factor but not, as the infringers in both Romag and Spindrift argued, a prerequisite for recovering profits.

A. Happy Frock's mental state does not support an award of profit damages as Happy Frock's infringement was not willful as it was done by an overseas manufacturer without Happy Frock's knowledge and Happy Frock ceased the behavior once notified by B&B.

Happy Frocks ought not be liable for profit damages here due to the lack of a willfull or knowing mental state in relation to the infringement. In Spindrift (2021) the Franklin District Court awarded profit damages partially due to the defendant's mental state. The Romag (2020) case suggests that the defendant's mental state is the most important, but not dispositive, factor in determining whether to award profit damages in a trademark action. In Spindrift the defendant knowingly and deliberately sold the infringing parts themselves. The same defendant continued to do so after being told of the infringement, "this conduct by Holt was hardly innocent." This is distinguishable from our present case where Happy Frock's actions are neither knowing nor deliberate. The infringing here was done by a sub manufacturer, not by Happy Frock. The infringement was done by the named defendant directly in Spindrift. Happy Frock did not receive notice of the infringment until the fourth shipment of goods came from the infringing sub manufacturer Quality Clothes. Quality Clothes is an overseas company distinct from Happy Frocks. Upon learning of the infringement Happy Frocks, after a brief investigation to confirm the allegation, instructed Quality Clothes to stop the infringement, terminated the relationship with them, and stopped selling items from that manufacturer. That sufficiently distinguishes us from

the defendant in Spindrift. Happy Frocks did not know the infringement was going on, they stopped it once told about it, and they stopped selling the infringing products. Happy Frocks themselves were damaged by the infringement as Mr. Harris said in his direct examination; "they were still billing us and we were still paying them for the cost of the buttons from B&B." It cannot be said that Happy Frocks acted knowingly or willfully here in terms of selling trademark infringing products thus an award of profit damages would not be proper here.

B&B will try and counter this argument by saying that Happy Frock must have known of the infringement due to the fact they received four shipments of faulty goods.Further, they will argue, Happy Frock inspected each shipment. Finally, they will say, Happy Frock actually ordered an increase in production to meet new demand. We can counter this by stating, as Mr. Harris said, that the issue wasn't discovered until the fourth shipment. Yes this may illustrate negligent quality control methods but that does not establish the sort of willful or knowing mental state that is sufficient to support an award of profits damages. Happy Frock was only negligent, if anything, here and thus profit damages should not be awarded. Profits were awarded in both Romag and Spindrift, however we are told in those cases those defendants knowingly infringed and continued the wrongful acts after recieving notice. Thus our case is distinguishable as Happy Frock did not do the infringing themselves, they instructed their sub-manufacturer to cease the infringement upon learning of it, and at most were negligent in their application of their own quality control methods. This court itself in its February 17th, 2023 post-trial hearing stated that "I realize defendant did not initiate the infringement." Happy Frock did not act with the type of mental state shown in Spindrift justifying an award of profits damages. Given that this is the most important of the five factors articulated here, Happy Frocks ought not be liable for profit damages. B&B may point to the fact that Happy Frock did not do a recall of all products. Happy Frock explained why this would be difficult for them to do. It was simply not practical to initiate a full product recall, and the cessation of their relationship with Quality Clothes in addition to them telling Quality to stop immediately should show their mental state does not arise to knowing or willful.

B. The connection between the infringer's profits and the infringement do not support an award of profits damages as B&B's sales increased during the applicable period, Happy Frock lost money as a result of the infringement and it cannot be said that the trademark owner was harmed by diverted sales or that Happy Frock's profits flowed directly from the infringement.

In Spindrift, the Franklin District court explained this factor as measuring the trademark owner's harm from lost or diverted sales resulting from the infringement and measuring the profits gained by the infringer as a result of the infringement. In that case the defendant charged the public full price while actually using counterfeit infringing products that cost him significantly less. Thus profits from the breach were shown. Our case can be distinguished from these facts such that a similar award of profits damages is not appropriate here.

Mr. Garcia, of B&B, could not say for certain whether consumers purchase items due to the B&B logo being on the button. Happy Frock's expert witness testified that only 3% of consumers noticed the buttons and thought that the B&B logo made that item more desirable.

This was a survey of actual Happy Frocks customers. A different survey of consumers of children's clothes generally found that 6% of customers said that the presence of a brand name on buttons was one of many factors that went into their decision to buy something. Less than 1% said it was the reason for buying something. Thus, at worst 6% of the people buying Happy Frock's products were tricked or induced to purchase the product as a result of the infringement. This is not a substantial enough connection to justify an award of profit damages here.

B&B will attempt to counter this by arguing that the $450,000 made by Happy Frock as a result of selling the infringing products shows an adequate connection between profit and infringement such that profits should be awarded. Happy Frock actually accelerate their processing of shipments from Quality due to demand.This argument should fail as they will not be able to show that the sales were a result of the infringement. Happy Frock's own evidence, articulated above, shows that 97% of consumers do not notice the logo on the button of their products. Thus it seems impossible to say that the profits enjoyed by Happy Frock were actually due to the infringement. People simply do not care what buttons are on a product. Further, Happy Frock actually lost money as a result of the infringement. They were still being billed for the full price of B&B buttons by Quality Clothing. They have also lost their on hand inventory and thus will not be able to profit from that. This factor thus does not support an award of profits damages and such a claim for that relief should be denied.

C. Injunctive relief and an award of economic damages is sufficient to compensate B&B and ensure that no further infringement takes place, thus Happy Frocks should not be held liable for profit damages as deterrence and making the plaintiff whole are achieved through other remedies.

In Spindrift, the court said there are three remedies for trademark infringement; (1) actual damages, (2) injunctive relief, and (3) the portion of the defendant's profits attributable to the infringement. In Spindrift, the plaintiff failed to illustrate the necessary evidence to support an award of the defendants profits. An injunction was sufficient.

Similarly, B&B can, and likely will, get actual damages here as well as an injunction blocking future infringement. Given that B&B will be unable to show real harm to their reputation due to lack of evidence, injunctive relief and actual damages are sufficient awards here. The injunction will ensure the infringement does not continue. Happy Frock has already voluntarily ceased selling the products. Only 6% at most of consumers consider the button when making a purchasing decision thus there is not significant harm to the B&B brand that they can quantify or point to. Actual damages will be sufficient to compensate B&B for the actual economic damages suffered as a result of the infringement and injunctive relief will ensure it does not continue. B&B will counter this by saying their brand has been harmed and the behavior could continue later. They do not have evidence to support either of those claims thus this factor does not support an award of the defendant's profits in addition to actual damages and injunctive relief.

D. B&B should not be awarded profit damages as Happy Frock has the equitable defense of laches available as B&B waited nine months to bring this action after knowing of the infringement.

In Spindrift, the court noted that Spindrift brought suit immediately upon learning of the infringement and thus no equitable defenses were available to the defendant. This is distinguishable from our case as B&B waited nine months to bring this action after learning of the facts giving rise to is. Thus, the equitable defense of laches is available to Happy Frocks and no award should be made based on Happy Frock's profits. B&B also failed to immediately move for an injunction blocking the infringement as the plaintiff in Spindrift did. B&B did send a cease and desist letter immediately and they will raise this in rebuttable to our argument here. Laches concerns when a plaintiff actually brings an action. The cease and desist letter is not enough action to overcome the fact that they waited nine months to bring suit and seek an injunction. Equity thus does not support an award of the defendant's profits here as the plaintiff, B&B, inappropriately waited nine months to bring this action. There is nothing in the record justifying such a delay. Equity does not support a plaintiff waiting to bring an action in order to maximize recovery. The existence of laches here as a viable defenses means this factor does not support an award of the defendant's profits in addition to actual damages and injunctive relief.

E. The public interest here is not served by an award of profit damages as the infringing buttons do not pose any additional harm to the public at large.

In Spindrift, the court articulated this factor as "is there a public interest in making an award of profits, such as preserving public safety or deterring other infringements" They found that this factor did not support an award of the defendant's profits due to the existence of an injunction and lack of evidence showing that the parts caused danger to the public. Similarly, we can show both of those things here and thus the public interest is not served by an award of the Defendant's profits.

Happy Frocks has voluntarily stopped the infringing practices here and there is no evidence of any intent to resume that behavior. In addition, if the court were to issue permanent injunctive relief here that would further block the behavior from starting again. Either of these things , or both, illustrate that the public interest wouldn't really be served by an award of defendant's profits. Happy Frock isn't planning on doing this again, they didn't knowingly do it to begin with and an injunction is perfectly adequate to ensure that it does not happen again. Further, trial testimony shows that the infringing product is not a danger to the public. B&B's CEO admitted during direct examination that the infringing buttons are not toxic and do not present any greater chocking hazard as genuine B&B buttons. Thus they are not a danger to the public, and the public interest would not be served by an award of the defendant's profits here.

Conclusion

Weighing these factors as the court in Spindrif did, we can see that none of the five factors truly support an award of the defendant's profits. Further the first factor is the most important

one according to the Supreme Court's decision in Romag and we have sufficiently argued and illustrated above that Happy Frock did not infringe willingly or knowingly here. Given the lack of support for an award of defendant's profits as a result of analyzing the five factors articulated in Spindrift, this court ought not make an award of Happy Frock's profits to B&B as a result of trademark infringement. Happy frock did not act knowingly. There is little to no evidence of harm to the B&B logo as a result of the infringement, nor is there evidence that Happy Frock's profits resulted from the infringement. Injunctive relief and actual damages are sufficient to fully compensate B&B. Happy Frock has laches as an available equitable remedy, and the public interest would not be served by an award of Happy Frock's profits. For all of these reasons, this court should not award B&B Happy Frock's profits as additional damages.

MPT-2 — Sample Answer 3

I. Caption

II. Statement of Facts

III. Legal Argument

There are three remedies for trademark infringement: (1) the actual damages suffered by the plaintiff; (2) injunctive relief, barring future infringements; and (3) that portion of the defendant's profits that are attributable to the infringement. In this matter, a portion of the defendant's profits are not appropriate because the Happy Frocks did not have a harmful mental state, there was no connection between the infringer's profits and the infringement, there are other adequate remedies, Happy Frocks has equitable defenses and there is no harm to the public interest at this time.

Generally, an award of profits is justified by three rationales: (1) to deter a wrongdoer from doing so again, (2) to prevent the defendant's unjust enrichment, and (3) to compensate the plaintiff for harms caused by the infringement. Spendthrift Automotive Accessories.
In determining whether to award profits to the Plaintiff the court must further weigh the infringer's mental state, the connection between the infringer's profits and the infringement, the adequacy of other remedies, equitable defenses and the public interest. Id. These factors are not assigned equal weight, as the district court's discretion lies in assessing the relative importance of these factors in a particular factual situation and determining whether, on the whole, the equities weigh in favor of granting profits.

1. Profits should not be awarded to the Plaintiff as Happy Frocks did not have a harmful mental state, as they were defrauded by their manufacturer and did not intend to infringe on the trademark.

A defendant's state of mind has a bearing on what relief a plaintiff should receive. An innocent trademark violator often stands in very different shoes than an intentional one. Some courts have held that a plaintiff can win a profits remedy only on the showing that the defendant willfully infringed on the it trademark. However, the court in Romag, found that although willfulness is a highly important consideration in awarding profits under the Lanham Act (provides the remedies for trademark infringement) it is not an absolute precondition. The court held that willfullness is not "an inflexible precondition to recover" of a defendant's profits under the Act but rather "a defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate."

The Defendant's mental state should be considered in light of the harm to the trademark owner and to consumers. In addition to willfullness, factors such as recklessness, callous disregard for the plaintiff's rights, willful blindness, and a specific intent to deceive should be

taken into account. However, mere negligence of an innocent nature to the infringement, would be contrary to the award of profits.

Here, although Happy Frocks did not immediately respond to the cease and desist letter this was not due to ill intentions but rather they had to investigate the allegations contained in the letter as the letter did not indicate which manufacturer was using the incorrect buttons. It took Happy Frocks several weeks to get correct samples from all the overseas manufacturers. As soon as they found out it was Quality Clothes who was manufacturing with the wrong buttons Happy Frocks immediately stopped their production. Not only did Happy Frocks stop production they terminated their relationship with Quality Clothes and stopped selling their inventory of clothing that Quality Clothes had manufactured. Aside from this, Happy Frocks was truly unaware of the use of the wrong buttons as Quality Clothes was supposed to buy the buttons directly from Plaintiff and then invoice Happy Frocks. However, although Quality Clothes was using the wrong buttons they were still invoicing Happy Frocks. Happy Frocks was still paying the invoices and this caused them a severe financial loss.

Further, Happy Frocks had procedures in place to ensure the quality of the clothes produced by their manufacturers. They received 4 shipments from Quality Clothes in the time period the wrong buttons were used. Happy Frocks however, did not notice the use of the wrong buttons until the last shipment came in. Although demand was high for the product during the time of the shipment and employees were told to work quickly, there is no evidence that Happy Frocks worked in a manner that cut corners or harm the consumers. There was no negligent action much less intentional action on the part ofHappy Frocks.

Therefore, Happy Frocks did not have bad intentions and did not intend to infringe the trademark.

2. Happy Frocks does not owe profits to the Plaintiff as there was not a connection between their profits and the infringement because a majority of the customers did not notice the difference in the buttons and the profits of the trademark holder was not hindered as their profits increased.

The court must also weigh whether there was a connection between the infringer's profits and the infringement. To do so the court must consider whether the trademark owner was harmed by lost or diverted sales due to the infringement. These losses and sales must beyond those sales lost by the infringement itself, which would be accounted for by actual damages. Further, the court must analyze whether the infringer's profits flow directly from or were caused by infringement. If they were, then an award of profits is justified. The court must also consider whether the customers were confused by the infringement, in thinking that the trademark owner authorized the infringing acts. Lastly, the court will decipher with what certainty the infringer benefited from the infringement.

Here, the Plaintiff's overall sales were unaffected with sales actually increasing. The only loss suffered was from the sale of the buttons to the offending manufacturer of Happy Frocks,

Quality Clothes. Further, although customers may see the B&B logo on the buttons used on the clothing produced, Plaintiff provided no evidence that customers can tell a difference between their buttons and the ones used. Further, Happy Frocks profits do not flow directly from the infringed product as they are buttons and a mere addition to the complete product. Additionally, customers were not confused by the infringement. A survey of 839 customers of Happy Frocks clothes manufactured by Quality Clothes indicated that the use of B&b'S logo on the buttons played a minimal role in the clothing purchase with 3% of the respondents saying that they noticed the logo and thought it added to the desirability of the clothes. Further, another survey of 997 customers of children's clothes indicated that only 6% stated that whether there was a brand name printed on the buttons of clothes was a reason, for purchasing one item of clothing instead of another and less than 1% said that the appearance of a brand name on a button was the only reason for purchasing a particular item of clothing over another.

3. Plaintiff should not be awarded profits as there are other available remedies such as an injunction.

The court must also consider whether the trademark owner would be made whole by other available remedies. Here, the plaintiff would be.

Here, Plaintiff has the opportunity to be granted an injunction which would stop the use of hthe wrong buttons which has already been ceased by Happy Frocks.

4. The Plaintiff should not be granted profits as they waited 9 months before filing their action even though they were aware of their claim and they came with unclean hands by trying to get Happy Frocks to settle on their terms.

The court must further consider whether the defendant has a claim of equitable defenses such as laches or failure to timely act on the part of the plaintiff, acquienseces by the plaintiff in the infringement, or unclean hands.

Here, although Plaintiff sent a letter to their lawyer requesting she write a cease and desist letter to happy Frocks within a week or two, plaintiff waited to file their complaint in this action, seeking an immediate injunction until nine months later, which was a week before the so-called "Black-Friday" sales. This sale is the largest one in retail goods like clothing. As such, the defendant likely has a defense of laches. This would also constitute unclean hands by the plaintiff as they waited to file when they knew that Happy Frocks would suffer the most damage from and injunction, bolstering plaintiff's case. This tactic was also used to try and get happy Frocks to settle the case on their terms.

5. Profits should not be awarded because there is no concern for the public interest due to the infringement sense many consumers do not buy the product due to buttons and there was no increased danger in using the wrong buttons.

Lastly, the court must consider whether a public interest is served by making an award of profits, such as preserving public safety or deterring other infringements. Here, the facts are dissimilar from an infringing medication containing an ingredient that would cause harm to the consumer. The buttons used by Happy Frocks are not poisonous and do not cause concern that children are more likely to swallow them. Further, as in Spendthrift Automotives, here an injunction was granted and therefore there is unlikely a concern for a danger to the public.

Conclusion

Weighing the above factors, the Plaintiff should not be awarded profits from Happy Frocks as the factors clearly weigh in favor of Happy Frocks.