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VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia - February 26, 2013

You MUST write your answer to Questions 1 and 2 in WHITE Answer Booklet A

1. Sam Seller owned a house (the "House Tract") located on a half-acre lot in Franklin County, Virginia, and an adjacent 10-acre tract with a glass greenhouse on it (the "Greenhouse Tract"). Paul Purchaser offered to buy the House Tract, and, on November 12, 2012, they signed a real estate contract (the "Contract") by which Purchaser agreed to pay \$250,000 on the closing date, January 15, 2013. Purchaser gave Seller a \$2,000 deposit. The Contract provided that, on the closing date, Seller was to convey to Purchaser "marketable title to the house in its present condition."

As an afterthought, Purchaser expressed interest in buying the Greenhouse Tract, and, orally, Seller agreed to sell the Greenhouse Tract to Purchaser for \$100,000, with the closing also scheduled for January 15, 2013. It was obvious to both parties that the glass greenhouse needed extensive repairs, but Purchaser agreed to take it as is and do the repairs at his own expense. Seller and Purchaser shook hands to seal the deal, and Purchaser paid Seller a \$1,000 deposit on the basis of their handshake.

A few weeks before the closing date, Purchaser, with Seller's knowledge and consent, expended \$10,000 to replace numerous glass panels in the greenhouse.

At the end of December, during a title search, an employee of the title company discovered in the land records in the Clerk's Office of the Circuit Court of Franklin County a land sale contract duly recorded in 1995 that was neither canceled nor satisfied of record, whereby Seller had agreed to sell the House Tract to Travis. When asked about it, Seller insisted that Travis had defaulted on the contract, giving up his rights thereunder, and left town and cannot be found. Before it will insure title to the House Tract, the title company requires that Travis sign a document releasing any and all rights to the House Tract.

On January 10, 2013, an unknown person entered the house on the House Tract and ripped out all of the copper plumbing. The cost to replace the copper plumbing is \$12,500. Purchaser did not find out about the missing plumbing until the final walk through on January 14, 2013, the day before the closing.

At closing on January 15, 2013, Purchaser asserted that under the circumstances he would not close the deal unless Seller agreed to the following conditions: Seller must agree to hold Purchaser harmless if Travis or anyone claiming under him were ever to assert an adverse claim and Seller must deduct \$12,500 from the purchase price, due to the missing plumbing. Seller refused to agree to these conditions and also refused to return Purchaser's \$2,000 deposit.

Purchaser nevertheless agreed to go forward with the purchase of the Greenhouse Tract and tendered the purchase price. Seller refused to close on the Greenhouse Tract unless Purchaser first closed on the House Tract.

Seller sued Purchaser for specific performance of the agreement on the House Tract. Purchaser counterclaimed for specific performance of Seller's agreement to sell him the Greenhouse Tract.

What is the likely outcome of each claim? Discuss fully.

Reminder: You MUST answer Question #1 above in the WHITE Booklet A

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2. Jackson Homes, Inc., (“Jackson”), a Delaware Corporation with its principal offices in Charleston, South Carolina, is a national developer of upscale residential communities. Jackson has recently encountered problems with two of its planned residential developments in Virginia, one located in Loudoun County and the other in Fairfax County, two of the nation’s most affluent counties.

In Loudoun County, Jackson submitted its application, including its site and subdivision plans for a 75-acre development to be known as “Lee’s Corner,” along with all required fees, to the proper county official for review and action. The Lee’s Corner application complied with all existing ordinances and regulations, required no changes in zoning classification, and sought no special exceptions. In the real estate development industry, Lee’s Corner was known as a “by right” project. Even though Jackson’s submissions for Lee’s Corner were complete as of August 1, 2012, Jackson has been unsuccessful in its efforts to secure any action on the Lee’s Corner application or even an indication as to when the director of residential planning might act. Jackson’s management team is understandably frustrated by the non-responsiveness of the Loudoun County director and concerned that its option rights to the Lee’s Corner property will expire and its substantial option fee will be lost.

In Fairfax County, Jackson submitted an application and fees for the development of a 22-acre residential community to be known as “Cameron Crest.” Once again, Jackson’s application sought no rezoning or special exceptions. Within 20 days after submission of the application, Fairfax County’s director of residential planning issued the following ruling: “The Cameron Crest application is hereby rejected for the following significant deficiencies: the application fails to coordinate streets within the proposed subdivision with existing streets and to dedicate a portion of the tract and commit to payment for construction of an extension of the County’s adjacent Old Dominion Parkway.”

Jackson’s management believes the real reason for the director’s rejection of the Cameron Crest application is to compel Jackson to reserve, dedicate, and build a portion of Old Dominion Parkway, at an estimated cost of \$1,000,000. Jackson’s traffic studies show that the Old Dominion Parkway is used by 35,000 vehicles per day and that Cameron Crest, once built, will add only negligible traffic to that roadway. Also, a County official told Jackson’s vice president that the “dedication and construction requirements were not imposed because of any particular problem to be generated by Cameron Crest, but because of general conditions prevailing and the County’s need to extend the Old Dominion Parkway.”

In both Loudoun and Fairfax counties, the applicable County development ordinances were identical and required review and action (acceptance or rejection) within 30 days after receipt of the application by the respective County’s director of residential planning.

Jackson’s general counsel wants to file litigation against each of the two counties in Virginia circuit court and consults you as to Virginia law, asking the following questions:

- (a) Is there a judicial remedy that Jackson can pursue to require Loudoun County’s residential planning director to approve the Lee’s Corner application, and if so, what would be the legal rationale for Jackson’s request for such relief? Explain fully.**

(Continued on next page)

- (b) What judicial remedy, if any, can Jackson pursue to test whether or not Fairfax County's residential planning director properly rejected the application for the Cameron Crest development, and what argument would Jackson make in support of its position that the rejection was improper? Explain fully.
- (c) Should Jackson be dissatisfied with the final order of the circuit court in either the Loudoun County or Fairfax County case, provide the following information regarding an appeal:
- i. Is there an appeal as of right or on some other basis? Explain fully.
 - ii. Which court would consider such an appeal?
 - iii. In which court is the notice of appeal filed, and what is the applicable time period for such filing?
 - iv. In what filing and within what time period would Jackson first be required to state its assignments of errors?

Reminder: You MUST answer Question #2 above in the WHITE Booklet A

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→→ Now MOVE to the YELLOW Answer Booklet B ←←

You MUST write your answer to Questions 3 and 4 in YELLOW Answer Booklet B

3. Joe and Mable, residents of Roanoke, Virginia, met and married in 2008. Both of them had experienced long and happy prior marriages that ended with the death of their first spouses. Joe had two children by his first marriage: a son, Bert, whom he had not seen since 1995 when Bert moved to Costa Rica to become a surfer, and Sally with whom he had a very close and loving relationship. Mable had a son, Rob, by her first husband. According to Mable, Rob was the perfect son.

Several months after their marriage, Joe and Mable engaged Larry Lawyer to prepare their estate plan. Larry had been recommended to them by a friend in their community and had not represented either of them before. They told Larry that they both wanted their combined estate to be available for the surviving spouse, then upon the death of the surviving spouse, everything remaining was to be divided with half going to Sally and half to Rob. Joe said that he wanted nothing to be left to Bert, who he believed to be financially irresponsible.

In 2008, Larry prepared separate wills for Joe and Mable, each of which was the mirror image of the other, leaving everything to the surviving spouse, then, upon the death of the survivor, the remaining estate was to be divided equally between Sally and Rob. Neither will mentioned Bert. Mable was convinced that for the estate plan to work, all their property had to be jointly titled. To satisfy Mable's concern, Joe told Larry to prepare a deed to convey title to his lot near Roanoke to the joint names of Joe and Mable as tenants by the entirety. However, to satisfy his need for some independence, Joe maintained his separate brokerage account as well as a separate bank account. The wills and deed were duly executed, and the deed was recorded.

In December 2009, Joe was killed in a tragic automobile accident. In January 2010, Mable returned to Larry's office and asked him to prepare a new will leaving her entire estate to her son, Rob. Larry prepared the will, which was duly executed. Mable died within the month, and a few weeks later Rob probated Mable's January 2010 will. Rob identified a probate estate in excess of \$3,000,000, consisting primarily of the value of Joe's brokerage account and bank account, neither of which Mable had touched after his death.

Angry that Rob was claiming all her dad's property, Sally engaged Anna Attorney to file suit challenging Mable's 2010 will and to take necessary action to fulfill her dad's wishes as expressed in the 2008 will. Upon learning of Mable's death from Sally, Bert returned to Virginia and intervened in Sally's suit, asking the court to find that he is entitled to share in Joe's estate because he is a pretermitted heir. All claims and suits were consolidated for a hearing.

- (a) **How should the court rule on Sally's challenge to Mable's 2010 will? Explain Fully.**
- (b) **How should the court rule on Bert's claim that he is a pretermitted heir? Explain fully.**
- (c) **How should the assets remaining at Mable's death be distributed? Explain fully.**
- (d) **Did Larry Lawyer violate any ethical responsibility in preparing Mable's 2010 will? Explain fully.**

Reminder: You MUST answer Question #3 above in YELLOW Booklet B

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4. In February 2012, River Road Boutique, of Richmond, Virginia ("River Road"), placed a written order for a fall line of clothing from Couture Manufacturing, Inc., of Roanoke, Virginia ("Couture"). The order explicitly stated that the deliveries to River Road must be made "during the June-August 2012 delivery cycle." Couture accepted the order, including the delivery term, by an email confirmation to River Road, with the final price and agreed upon payment terms of one-half within 30 days and the balance due upon final delivery. River Road promptly paid one-half of the contract price by wire transfer to Couture.

Couture did not deliver any of the order to River Road during the months of June or July 2012 even though Couture had promised to commence delivery "soon" each time River Road called to complain about the lack of deliveries. The first delivery, consisting of approximately 70% of the order, arrived at River Road's store on August 15, 2012.

The president of River Road immediately consulted his attorney with the foregoing facts and explained that while it was the store's first time ordering clothing from Couture, he was aware that Couture routinely supplied fall clothing lines to several Richmond area retailers. Although he was not familiar with the practices in Roanoke, the president said that the term "during the June-August delivery cycle" has a definite meaning in the Richmond clothing trade – that is, approximately 40% of the total order is delivered in June, approximately 40% in July and approximately 20% in August. The rationale is that during these months customers are buying clothes prior to the start of the school year and the fall season. The president said he knew from trade publications that larger retailers in the Richmond area that had placed orders with Couture had received their deliveries on the 40%-40%-

20% schedule. The problem for River Road is that that because the clothes were received so late in the selling season, it would be necessary to mark them down at least one-half off the usual retail price in order to sell them.

- (a) **Has Couture breached the contract for the clothing order? Explain fully.**
- (b) **Can River Road reject the clothing delivered and/or the remaining undelivered portion of the order, and if so, does River Road Boutique have a claim for damages? Explain fully.**
- (c) **If River Road Boutique decides to retain the August shipment and sells the clothes, would it have any legal claim against Couture? Explain fully.**

Reminder: You MUST answer Question #4 above in YELLOW Booklet B

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→→ Now MOVE to Tan Answer Booklet C ←←

You MUST write your answer to Question 5 in Tan Answer Booklet C

5. Red Oak Lumber Company was incorporated in Virginia 40 years ago by three brothers: Bob, Fred, and Tom. Each of them was an officer and director, Bob was president and chairman of the Board of Directors, and each owned 3,000 shares of stock. They were each employees, and they shared equally in the profits of the company.

In 2005, Fred died and left his shares in Red Oak equally, 1,000 each, to his three sons. One of his sons, Ned, became a director and an employee of the company. Fred's other two sons had no desire to retain any interest in Red Oak, so they sold their shares to Bob, who by virtue of the transaction became the majority shareholder, holding 5,000 shares.

Over the next few years, Bob took an increasingly dominant leadership position to the exclusion and over the objections of Tom and Ned. The company experienced phenomenal growth, and profits soared. However, relationships among the shareholders deteriorated to the point where, at a properly called and noticed shareholders' meeting in 2010, Bob voted his shares in favor of a motion to remove Tom and Ned as directors; Tom and Ned voted their shares against the motion. The Articles of Incorporation of Red Oak are silent on the election or removal of directors. Bob thereupon installed two close friends to replace Tom and Ned as directors and hired his two children to replace Tom and Ned as employees.

Subsequently, the Board of Directors approved all decisions made by Bob, including the decision to suspend payment of dividends to shareholders. Bob also tripled his salary and those of his children and paid out all year-end profits as bonuses to himself and his children.

Tom and Ned offered to sell their shares either to Red Oak or Bob. Bob says he will buy their shares but claims that Tom and Ned are asking an inflated price. The parties have been unable to agree on the price.

- (a) Can Tom and Ned successfully challenge their removal as directors? Explain fully.
- (b) What judicial remedy can Tom and Ned seek that will allow them to obtain a distribution equivalent to the portion of the value of Red Oak that their shares represent? Explain fully.
- (c) If Tom and Ned pursue a judicial remedy seeking a distribution as described in (b) above, is there an election that Bob can make to acquire all the shares owned by Tom and Ned? Explain fully.

Reminder: You MUST answer Question #5 above in Tan Booklet C

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END OF SECTION ONE