July 2016

New York State
Bar Examination

MEE & MPT Questions

MEE 1

Two siblings, a brother and a sister, decided to start a bike shop with their cousin. They filed a certificate of organization to form a limited liability company. The brother and the sister paid for their LLC member interests by each contributing $100,000 in cash to the LLC. Their cousin paid for his LLC member interest by conveying to the LLC five acres of farmland valued at $100,000; the LLC then recorded the deed.

Neither the certificate of organization nor the members' operating agreement specifies whether the LLC is member-managed or manager-managed. However, the operating agreement provides that the LLC's farmland may not be sold without the approval of all three members.

Following formation of the LLC, the company rented a storefront commercial space for the bike shop and opened for business.

Three months ago, purporting to act on behalf of the LLC, the brother entered into a written and signed contract to purchase 100 bike tires for $6,000 from a tire manufacturer. When the tires were delivered, the sister said that they were too expensive and told her brother to return the tires. The brother was surprised by his sister's objection because twice before he had purchased tires for the LLC at the same price from this manufacturer, and neither his sister nor their cousin had objected. The brother refused to return the tires, pointing out that the tires "are perfect for the bikes we sell." The sister responded, "Well, pay the bill with your own money; you bought them without my permission." The brother responded, "No way. I bought these for the store, I didn't need your permission, and the company will pay for them." To date, however, the $6,000 has not been paid.

One month ago, purporting to act on behalf of the LLC, the cousin sold the LLC's farmland to a third-party buyer. The buyer paid $120,000, which was well above the land's fair market value. Only after the cousin deposited the sale proceeds into the LLC bank account did the brother and sister learn of the sale. Both of them objected.

One week ago, the brother wrote in an email to his sister, "I want out of our business. I don't want to have anything to do with the bike shop anymore. Please send me a check for my share."

1. What type of LLC was created—member-managed or manager-managed? Explain.

2. Is the LLC bound under the tire contract? Explain.

3. Is the LLC bound by the sale of the farmland? Explain.

4. What is the legal effect of the brother's email? Explain.

MEE 2

A defendant was tried before a jury for a robbery that had occurred at Jo-Jo's Bar on November 30. At trial, the prosecutor called the police officer who had investigated the crime. Over defense counsel's objection, the officer testified as follows:

> Officer: I arrived at the defendant's home on the morning of December 1, the day after the robbery. He invited me inside, and I asked him, "Did you rob Jo-Jo's Bar last night?" The defendant immediately started crying. I decided to take him to the station. Before we left for the station, I read him Miranda warnings, and he said, "Get me a lawyer," so I stopped talking to him.
>
> Prosecutor: Did the defendant say anything to you at the station?
>
> Officer: I think he did, but I don't remember exactly what he said.

Immediately after this testimony, the prosecutor showed the officer a handwritten document. The officer identified the document as notes she had made on December 2 concerning her interaction with the defendant on December 1. The prosecutor provided a copy of the document to defense counsel. The document, which was dated December 2, stated in its entirety:

> The defendant burst into tears when asked if he had committed the robbery. He then received and invoked Miranda rights. I stopped the interrogation and didn't ask him any more questions, but as soon as we arrived at the station the defendant said, "I want to make a deal; I think I can help you." I reread Miranda warnings, and this time the defendant waived his rights and said, "I have some information

that can really help you with this case." When I asked him how he could help, the defendant said, "Forget it—I want my lawyer." When the defendant's lawyer arrived 30 minutes later, the defendant was released.

The officer then testified as follows:

Prosecutor: After reviewing your notes, do you remember the events of December 1?

Officer: No, but I do remember making these notes the day after I spoke with the defendant. At that time, I remembered the conversation clearly, and I was careful to write it down accurately.

Over defense counsel's objection, the officer was permitted to read the document to the jury. The prosecutor also asked that the notes be received as an exhibit, and the court granted that request, again over defense counsel's objection. The testimony then continued:

Prosecutor: Did you speak to the defendant any time after December 1?

Officer: Following my discovery of additional evidence implicating the defendant in the robbery, I arrested him on December 20. Again, I read the defendant his Miranda rights. The defendant said that he would waive his Miranda rights. I then asked him if he was involved in the robbery of Jo-Jo's Bar, and he said, "I was there on November 30 and saw the robbery, but I had nothing to do with it."

Defense counsel objected to the admission of this testimony as well. The court overruled the objection.

The defendant's trial for robbery was held in a jurisdiction that has adopted all of the Federal Rules of Evidence.

Were the following decisions by the trial court proper?

1. Admitting the officer's testimony that the defendant started crying. Explain.

2. Permitting the officer to read her handwritten notes to the jury. Explain.
3. Admitting the officer's handwritten notes into evidence as an exhibit. Explain.

4. Admitting the officer's testimony recounting the defendant's statement, "I have some information that can really help you with this case." Explain.

5. Admitting the officer's testimony recounting the defendant's statement, "I was there on November 30 and saw the robbery, but I had nothing to do with it." Explain.

MEE 3

Six months ago, a man visited his family physician, a general practitioner, for a routine examination. Based on blood tests, the physician told the man that his cholesterol level was somewhat elevated. The physician offered to prescribe a drug that lowers cholesterol, but the man stated that he did not want to start taking drugs because he preferred to try dietary change and "natural remedies" first. The physician told the man that natural remedies are not as reliable as prescription drugs and urged the man to come back in three months for another blood test. The physician also told the man about a recent research report showing that an herbal tea made from a particular herb can reduce cholesterol levels.

The man purchased the herbal tea at a health-food store and began to drink it. The man also began a cholesterol-lowering diet.

Three months ago, the man returned to his physician and underwent another blood test; the test showed that the man's cholesterol level had declined considerably. However, the test also showed that the man had an elevated white blood cell count. The man's test results were consistent with several different infections and some types of cancer. Over the next two weeks, the physician had the man undergo more tests. These tests showed that the man's liver was inflamed but did not reveal the reason. The physician then referred the man to a medical specialist who had expertise in liver diseases. In the meantime, the man continued to drink the herbal tea.

Two weeks ago, just before the man's scheduled consultation with the specialist, the man heard a news bulletin announcing that government investigators had found that the type of herbal tea that the man had been drinking was contaminated with a highly toxic pesticide. The investigation took place after liver specialists at a major medical center realized that several patients with inflamed livers and elevated white blood cell counts,

like the man, were all drinking the same type of herbal tea and the specialists reported this fact to the local health department.

All commercially grown herbs used for this tea come from Country X, and are tested for pesticide residues at harvest by exporters that sell the herb in bulk to the five U.S. companies that process, package, and sell the herbal tea to retailers. U.S. investigators believe that the pesticide contamination occurred in one or more export warehouses in Country X where bulk herbs are briefly stored before sale by exporters, but they cannot determine how the contamination occurred or what bulk shipments were sent to the five U.S. companies. The companies that purchase the bulk herbs do not have any control over these warehouses, and there have been no prior incidents of pesticide contamination. The investigators have concluded that the U.S. companies that process, package, and sell the herbal tea were not negligent in failing to discover the contamination.

Packages of tea sold by different companies varied substantially in pesticide concentration and toxicity, and some packages had no contaminants. Further investigation has established that the levels of contamination and toxicity in the herbal tea marketed by the five different U.S. companies were not consistent.

The man purchased all his herbal tea from the same health-food store. The man is sure that he purchased several different brands of the herbal tea at the store, but he cannot establish which brands. The store sells all five brands of the herbal tea currently marketed in the United States.
The man has suffered permanent liver damage and has sued to recover damages for his injuries. It is undisputed that the man's liver damage was caused by his herbal tea consumption. The man's action is not preempted by any federal statute or regulation.

1. Is the physician liable to the man under tort law? Explain.

2. Are any or all of the five U.S. companies that processed, packaged, and sold the herbal tea to the health-food store liable to the man under tort law? Explain.

3. Is the health-food store liable to the man under tort law? Explain.

MEE 4

Two years ago, PT Treatment Inc. (PTT), incorporated in State A, decided to build a new $90 million proton-therapy cancer treatment center in State A. The total cost to PTT for purchasing the land and constructing the building to house the treatment facility was $30 million. PTT financed the purchase and construction with $10 million of its own money and $20 million that it borrowed from Bank. To secure its obligation to Bank, PTT granted Bank a mortgage on the land and all structures erected on the land. The mortgage was properly recorded in the county real estate records office, but it was not identified as a construction mortgage.

Two months after the mortgage was recorded, PTT finalized an agreement for the purchase of proton-therapy equipment from Ion Medical Systems (Ion) for $60 million. PTT made a down payment of $14 million and signed a purchase agreement promising to pay the remaining $46 million in semi-annual payments over a 10-year period. The purchase agreement provided that Ion has a security interest in the proton-therapy equipment to secure PTT's obligation to pay the remaining purchase price. On the same day, Ion filed a properly completed financing statement with the office of the Secretary of State of State A (the central statewide filing office designated by statute), listing "PT Treatment Inc." as debtor and indicating the proton-therapy equipment as collateral.

Shortly thereafter, Ion delivered the equipment to PTT and PTT's employees installed it. The equipment was attached to the building in such a manner that, under State A law, it is considered a fixture and an interest in the equipment exists in favor of anyone with an interest in the building.

The new PTT Cancer Treatment Center opened for business last year. Unfortunately, it has not been an economic success. For a short period, PTT contracted with State A Oncology Associates (Oncology) for the latter's use of the proton-therapy equipment pursuant to a lease agreement, but Oncology failed to pay the agreed fee for the use of the equipment, so PTT terminated that arrangement. To date, PTT has been unsuccessful in its efforts to collect the amounts that Oncology still owes it. PTT's own doctors and technicians have not attracted enough business to fully utilize the cancer treatment center or generate sufficient billings to meet PTT's financial obligations. PTT currently owes Ion more than $30 million and is in default under the security agreement. Ion is concerned that PTT will soon declare bankruptcy.

In a few days, Ion will be sending a technician to the PTT facility to perform regular maintenance on the equipment. Ion is considering instructing the technician to complete the maintenance and then disable the equipment so that it cannot be used by PTT until PTT pays what it owes.

1. In view of PTT's default, if Ion disables the proton-therapy equipment, will it incur any liability to PTT? Explain.

2. If PTT does not pay its debts to either Bank or Ion, which of them has a superior claim to the proton-therapy equipment? Explain.

3. Does Ion have an enforceable and perfected security interest in any of PTT's assets other than the proton-therapy equipment? Explain.

MEE 5

A homeowner and his neighbor live in houses that were built at the same time. The two houses have identical exteriors and are next to each other. The homeowner and his neighbor have not painted their houses in a long time, and the exterior paint on both houses is cracked and peeling. A retiree, who lives across the street from the homeowner and the neighbor, has complained to both of them that the peeling paint on their houses reduces property values in the neighborhood.

Last week, the homeowner contacted a professional housepainter. After some discussion, the painter and the homeowner entered into a written contract, signed by both of them, pursuant to which the painter agreed to paint the homeowner's house within 14 days and the homeowner agreed to pay the painter $6,000 no later than three days after completion of painting. The price was advantageous for the homeowner because, to paint a house of that size, most professional housepainters would have charged at least $8,000.

The day after the homeowner entered into the contract with the painter, he told his neighbor about the great deal he had made. The neighbor then stated that her parents wanted to come to town for a short visit the following month, but that she was reluctant to invite them. "This would be the first time my parents would see my house, but I can't invite them to my house with its peeling paint; I'd be too embarrassed. I'd paint the house now, but I can't afford the going rate for a good paint job."

The homeowner, who was facing cash-flow problems of his own, decided to offer the neighbor a deal that would help them both. The homeowner said that, for $500, the homeowner would allow the neighbor to take over the homeowner's rights under the contract. The homeowner said, "You'll pay me $500 and take the contract from me; the painter will paint your house instead of mine, and when he's done, you'll pay him the $6,000." The neighbor happily agreed to this idea.

The following day, the neighbor paid the homeowner $500 and the homeowner said to her, "The paint deal is now yours." The neighbor then invited her parents for the visit that had been discussed. The neighbor also remembered how annoyed the retiree had been about the condition of her house. Accordingly, she called the retiree and told him about the plans to have her house painted. The retiree responded that it was "about time."

Later that day, the homeowner and the neighbor told the painter about the deal pursuant to which the neighbor had taken over the contract from the homeowner. The painter was unhappy with the news and stated, "You can't change my deal without my consent. I will honor my commitment to paint the house I promised to paint, but I won't paint someone else's house."

There is no difference in magnitude or difficulty between the work required to paint the homeowner's house and the work required to paint the neighbor's house.

1. If the painter refuses to paint the neighbor's house, would the neighbor succeed in a breach of contract action against the painter? Explain.

2. Assuming that the neighbor would succeed in the breach of contract action against the painter, would the retiree succeed in a breach of contract action? Explain.

3. If the painter paints the neighbor's house and the neighbor does not pay the $6,000 contract price, would the painter succeed in a contract claim against the neighbor? Against the homeowner? Explain.

MEE 6

A woman and a man have both lived their entire lives in State A. The man once went to a gun show in State B where he bought a gun. Otherwise, neither the woman nor the man had ever left State A until the following events occurred.

The woman and the man went hunting for wild turkey at a State A game preserve. The man was carrying the gun he had purchased in State B. The man had permanently disabled the gun's safety features to be able to react more quickly to a turkey sighting. The man dropped the gun and it accidentally fired, inflicting a serious chest wound on the woman. The woman was immediately flown to a hospital in neighboring State C, where she underwent surgery.

One week after the shooting accident, the man traveled to State C for business and took the opportunity to visit the woman in the hospital. During the visit, the woman's attorney handed the man the summons and complaint in a suit the woman had initiated against the man in the United States District Court for the District of State C. Two days later, the woman was released from the hospital and returned home to State A where she spent weeks recovering.

The woman's complaint alleges separate claims against the man: 1) a state-law negligence claim and 2) a federal claim under the Federal Gun Safety Act (Safety Act). The Safety Act provides a cause of action for individuals harmed by gun owners who alter the safety features of a gun that has traveled in interstate commerce. The Safety Act caps damages at $100,000 per incident, but does not preempt state causes of action. The woman's complaint seeks damages of $100,000 on the Safety Act claim and $120,000 on the state-law negligence claim. Both sets of damages are sought as compensation for the physical suffering the woman experienced and the medical costs the woman incurred as a result of the shooting.

The man has moved to dismiss the complaint, asserting (a) lack of personal jurisdiction, (b) lack of subject-matter jurisdiction, and (c) improper venue. State C's jurisdictional statutes provide that state courts may exercise personal jurisdiction "to the limits allowed by the United States Constitution."

With respect to each asserted basis for dismissal, should the man's motion to dismiss be granted? Explain.

MPT 1 – *In re Whirley* (Synopsis)

In this performance test item, examinees are associates at a law firm representing Barbara Whirley. In January, Whirley began renting a house from Sean Spears. In the last few months, Whirley has had some problems with the house—a leaking toilet, a broken automatic sprinkler system, and a defective sliding door in the guest bedroom, which has allowed water to enter and cause the carpet to get mildewed and moldy. In addition, Whirley's dog has chewed on the baseboard in the laundry room. She has told Spears about the problems with the toilet, sprinkler system, and door, but he has failed to make any repairs. Whirley seeks the firm's advice regarding her options as a tenant. Examinees' task is to draft an objective memorandum identifying the options Whirley has under Franklin's landlord/tenant law to address each condition in the house and recommending which options are best, keeping in mind that Whirley prefers to continue living in the house. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, the lease agreement, an email exchange between Whirley and Spears, and a repair estimate. The Library contains excerpts from the Franklin Civil Code and two Franklin cases that discuss what conditions may constitute breaches of the warranty of tenantability and the tenant's potential remedies.

MPT 2 – *Nash v. Franklin Department of Revenue* (Synopsis)

Examinees' law firm represents Joseph and Ellen Nash, a married couple who own land in Knox Hollow, Franklin, on which they raise Christmas trees for sale. While initially selling the trees was a casual endeavor, five years ago they made it a commercial tree-farming operation and began claiming tax deductions for expenses from a trade or business. The Franklin Department of Revenue recently reviewed the Nashes' income tax returns and has disallowed the Nashes' deductions for the last five years' farm expenses, as well as their claim for a home-office deduction. The Nashes appealed the new tax assessment, and the firm represented the Nashes at a hearing before the Franklin Tax Court. Examinees' task is to draft the legal argument for the post-hearing brief requested by the Tax Court, making the case that the Nashes are entitled to the full deductions that they claimed under Franklin law. [Franklin law uses the federal Internal Revenue Code and Regulations to calculate Franklin tax liability.] The File contains the instructional memorandum, the firm's guidelines for drafting briefs, the decision by the Franklin Department of Revenue, and a transcript of Joseph Nash's testimony before the Franklin Tax Court. The Library contains relevant excerpts from Internal Revenue Code §§ 162,

183, and 280A, and Internal Revenue regulations (26 C.F.R. § 1.183–2). The Library also contains two cases from the Franklin Tax Court addressing what it means for a taxpayer to be engaged in an "activity for profit," and the standard for whether a taxpayer has used a portion of his or her home "exclusively" as the principal place of business of a business.

July 2016

New York State
Bar Examination

Sample Answers

JULY 2016 NEW YORK STATE BAR EXAMINATION

SAMPLE CANDIDATE ANSWERS

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

ANSWER TO MEE 1

1. The LLC is Member-Managed.

The issue is whether Brother Sister and Cousin are running the LLC as members, or if they are acting as managers. Where an LLC certificate of organization and operating agreement are silent as to whether the LLC is managed by members or managers, the default is that the members are managing the LLC because otherwise they would need to appoint managers. An LLC is a business organization that takes qualities of a partnership for tax purposes and has limited liability like corporations. Members are designated by their contributions in return for an interest in the LLC. Contributions can either be in cash, property, or past-services.

Here the members are Brother Sister and Cousin, because Brother and Sister contributed each $100,000 cash, and Cousin contributed five acres of farmland valued at $100,000. Thus in return they were members of the LLC, and as such ran the company. Here the Operating Agreement and Articles of Organization are silent as to whether the LLC is member-managed or manager-managed, thus they did not designate themselves or others as managers, and are now running a Member-Managed LLC.

2. The LLC is bound under the tire contract.

The issue is whether Brother had the authority to enter into and bind the LLC to the tire contract. Members of an LLC owe each other and the LLC fiduciary duties similar to that of a partnership, and thus owe each other and the LLC the utmost duty of care. With that they also have similar powers of partners in a partnership, in which partners have the authority to enter into business contracts on behalf of the company. Authority to enter into contracts can be actual express authority, actual implied authority, or apparent authority. Actual express authority is that authority that is expressly granted in a writing or oral. Actual Implied Authority is authority that ordinary runs with people with the same title or position. Apparent authority is that which the company holds out/cloaks its agents as their own with the authority to act, and a third party relying on the cloaking of the company and enter into the contract.

Here brother, Sister, and Cousin have the actual implied authority as members of an LLC to enter into ordinary business contracts on behalf of the LLC because while the Operating Agreement and Articles of Organization are silent as to whether they are members or managers of the LLC, they will have the implied authority as members of an LLC to enter into ordinary business contracts. The contract in question here is for tires from a manufacturer, and the LLC runs a bike shop, thus it would be in the ordinary course of business to order tires for the bike shop. Because this contract falls into the ordinary course of business then Brother had the actual implied authority as a member to enter into this contract. Even in the event that this was not actual implied authority, it

would arguably be apparent authority because the manufacturer and brother have entered into two other contracts for tires without any objection from sister and cousin/the LLC, thus the LLC held out Brother as able to enter into the contract, by taking the benefit of the contract. Then the manufacturer relied on this apparent authority and entered into a third contract with brother.

Thus brother has the actual implied authority, and if not, then apparent authority to enter into the tire contract and bind the LLC.

3. The LLC is NOT bound by the sale of the farmland.

The issue is whether Cousin had the authority to sell the land on his own. LLC property is not transferable without the written consent of all of the members. LLC property includes anything that the LLC paid for with its own money. Additionally, contributions become LLC property when they are transferred over to the LLC in return for an interest in the LLC. However where there is apparent authority, which is when the company holds out/cloaks its agents as their own with the authority to act on behalf of the LLC, and a third party relying on the cloaking of the company and enter into the contract.

Here, Cousin conveyed to the LLC Five acres of farmland valued at $100,000 in return for his membership interest in the LLC. The farmland then became LLC property when they completed the transfer and recorded the deed. At that point the land is the LLC's and is not able to be transferred without the written consent of all of the members. A land sale contract is also not in the ordinary course of business of the LLC since it is a bike shop, thus it would not be considered implied authority. It may be argued that cousin had the apparent authority to enter into the land sale contract since he was purporting to act on behalf of the LLC, however the LLC is not cloaking Cousin with the authority to enter into land sale K's since this is a bike shop, thus a third party should not reasonably rely on an agent having that authority. Thus because it would be unreasonable for a third party to believe that Cousin could enter into a land sale contract for a bike shop, there was no apparent authority. The contract was outside the scope of Cousin's authority, was LLC property, and thus not transferrable without the written consent of all of the members.

4. The legal effect of Brother's email is that he is a dissociating member.

The issue is whether Brother is unequivocally giving up his interest in the membership. A member will be dissociating when they unequivocally express their intent to end their interest in the LLC. A dissociating member will remain liable on the debts and obligations of the LLC until notice is given to all creditors of the dissociating member, OR until 90 days after filing with the secretary of state the intent to dissociate. Here brother is unequivocally expressing his intent to end his interest in the LLC because he has clearly stated that he wants out of the business, does not want to have anything to

do with the bike shop anymore and wants to be paid out for his share of the LLC. This is clearly expressed intent of dissociation, thus he will remain liable on the debts and obligations of the LLC until notice is given to all creditors of his dissociation or until after 90 days from the filing with the secretary of state.

ANSWER TO MEE 1

The first issue is whether the LLC is member-managed or manager-managed in the absence of a specification stated in the certificate of organization or operating agreement. The rule is that unless stated otherwise, LLCs will be presumed to be managed by members. In this case, there was never an appointment of managers to manage the LLC, so by default the members would manage the LLC.

The second issue is when an LLC will be bound on a contract made in the ordinary course of business. Assuming the LLC is member-managed, the members will operate as agents of the LLC, and can act to bind the LLC in contracts in the ordinary course of business unless the operating agreement or certificate of organization specify otherwise. A principal is bound on the authorized contracts of its agents. Authorization can be express actual authority, implied actual authority, apparent authority, or based on ratification. In this case, the brother's contract to purchase 100 bike tires for $6000 is within the ordinary course of business, because the LLC is a bike shop. Thus, he has actual authority as an agent to bind the LLC to this contract. This can be implied from the fact that he has entered into the same contract with the same manufacturer twice before, and neither his sister nor cousin objected. Therefore, based on his prior dealings with the LLC, he has actual authority to enter into this contract. He would also have apparent authority to enter into this contract. Apparent authority comes from the principal's cloaking a person with the appearance of authority and a third party reasonably relying on that. Here, the LLC cloaked the brother with the appearance of authority by having him enter into a contract with a manufacturer that he had entered into twice before, and the manufacturer reasonably relied on it in making the contract. Therefore, the LLC is bound by the contract, and will have to pay for the tires.

The third issue is whether the LLC will be bound on a contract made outside the ordinary course of business. The sale of farmland is outside the ordinary course of business for a bike shop. Therefore, the members must agree to enter into such a contract. This would normally require majority consent. Here, the LLC's operating agreement expressly states that the LLC's farmland may not be sold without approval of all three members, so sale of the farmland would require unanimous consent. Thus, the cousin's sale of the farmland was not done with actual authority, because the brother and the sister did not approve of it, and they objected once they found out. The sale was to a third party buyer, and the facts indicate that the cousin entered into the sale purporting to act on the

LLC's behalf. However, nothing the LLC did would have given the cousin the appearance of authority to sell the farmland from the third-party's perspective, so there is no apparent authority here. If there were apparent authority (if the third-party buyer reasonably relied on the LLC's purported cloaking the cousin with authority by virtue of the fact that he was an LLC member), then the LLC would be bound by the sale of the farmland.

The fourth issue is what effect of a dissociating member will be on the LLC. The brother's email has the effect of causing his dissociation. When a member dissociates, the LLC can choose to continue and buy out the dissociating member. The LLC may terminate upon his dissociation, in which case the members would have to wind up the business.

ANSWER TO MEE 2

1. Admitting the officer's testimony that the defendant started crying was proper. At issue is whether this is a statement and therefore whether it is subject to possible suppression on 5th Amendment grounds or hearsay grounds. Hearsay is defined as an out of court statement offered for the truth of the matter asserted. Under the Federal Rules of Evidence, all hearsay must be excluded unless it falls within an exception found in FRE 803. However, excluded from the definition of hearsay is a statement by a party opponent (a statement made by the party not seeking to introduce it). Here, if this were found to be a statement, the defendant made it and therefore its admission would not be barred on hearsay grounds. However, bodily responses like crying are not likely to be deemed statements anyway as crying under ordinary circumstances would not be meant to convey an idea or express something but rather a reaction that is physical and can be observed by anyone within sight.

The 5th Amendment protects defendants from self-incrimination by excluding from evidence statements made without proper Miranda warnings while subject to custodial interrogation. However, this only applies to statements. As stated above, the involuntary response of crying is unlikely to be deemed a statement and therefore its introduction cannot violate the defendant's 5th Amendment rights.

Even if the crying was found to be a statement, it was still properly admitted. At issue is whether the defendant was in custody when he began crying. Miranda warnings warn a suspect or defendant that anything they say can be used against them in a court and that they have a right to an attorney and that one will be provided for them if they cannot afford it. Miranda warnings must be given prior to custodial interrogation for the resulting statements to be admissible in court. For a statement to be suppressed because it was Miranda deficient, it must have been made as a result of custodial interrogation. A person will be found to be in custody if a reasonable innocent person in their situation

would not feel free to leave. Here, the defendant invited the officer into his home. Unless the officer was there pursuant to a warrant or entered with some sort of force or intimidation, it is unlikely that a person will be found to be in custody within the confines of their home absent some additional facts like handcuffing. Interrogation is found when a question is asked that is likely to elicit an incriminating response. Here, the question "Did you rob Jo-Jo's Bar last night?" is likely to elicit an incriminating response and is therefore likely interrogation. However, without the custodial element, the statement of crying could not be suppressed due to a lack of prior Miranda warnings.

2. Permitting the officer to read her handwritten notes was proper. At issue is whether it was permissible to read these notes to the jury or if this constituted hearsay. If a witness takes the stand and cannot remember something, they are permitted to look at anything that may refresh their recollection provided that the opposing side has access to the item used to refresh the witnesses' recollection. If a witness's own notes or writing is used to refresh the witness's recollection but it is unable to successfully do so, it may be read to the jury under the hearsay exception of past recollection recorded. A witness is able to read their prior notes or writing if it was written contemporaneously or soon after the event in question and if it was accurate. Here, the officer testified that he knew the defendant said something but couldn't remember what. He testified that the notes did not refresh his recollection but he knew that he wrote them only two days after the incident and that he was careful to write everything down accurately. This is enough to satisfy the requirements for a past recollection recorded and therefore was properly admitted.

3. It was improper to admit the handwritten notes into evidence. At issue is whether a document read as past recollection recorded may be introduced into evidence as an exhibit. Generally, a document used to refresh a witness' recollection that is subsequently read as past recollection recorded may only be introduced into evidence by the opposing side. Here, the prosecution's witness testified regarding the contents of the notes and then the prosecution asked for the notes to be received into evidence. This was improper procedure as only the defense could introduce this into evidence should they choose to do so.

4. It was proper to admit the testimony regarding the defendant's statement, "I have some information that can really help you with this case." At issue is whether admission violates defendant's Miranda rights. As discussed above, statements made in violation of a defendant's Miranda rights should be suppressed. However, as discussed above statements are only suppressed if they are the product of custodial interrogation. This means that if a defendant voluntarily says something not in response to questioning or actions by the police, that statement is not going to be suppressed under Miranda because it was a voluntary statement not made in response to interrogation. Police must scrupulously honor invocations of Miranda, but after voluntarily reinitiating discussions with the police suspects may waive Miranda after having previously waived it. Here, even though the defendant had invoked Miranda, he spontaneously stated as he arrived at

the police station that he had information the police wanted. He was then re-read Miranda and at that point waived his rights and made the statement in question. The defendant was aware of his rights and waived them voluntarily. Conversation was reinitiated by the defendant and not the police - the police scrupulously honored his invocation by reminding him of his rights before he continued. This knowing and voluntary waiver was valid and therefore the statement is admissible

5. It was proper to admit the defendant's statement "I was there on November 30 and saw the robbery, but I had nothing to do with it. After a cooling off period, police are allowed to reinitiate interrogation and reissue Miranda warnings prior to formal charges being brought, despite a previous invocation of Miranda. Here, the defendant invoked his right under Miranda to a lawyer on December 2. Then over two weeks later he was arrested and reread Miranda. The defendant knowingly waived his rights at that point and therefore the interrogation that followed was not Miranda deficient.

ANSWER TO MEE 2

1) The decision by the trial court to admit the officer's testimony that the defendant started crying was proper. At issue is whether the testimony violates the bar against hearsay, or the defendant's Miranda Rights.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. The statement does not have to be verbal, non-verbal acts can also qualify by statements if they are intended to be an assertion of fact (for example, nodding one's head in response to a question). However, statements by a party are not hearsay when offered against that party at trial. In this case, the defendant bursting into tears in response to the question "Did you rob Jo-Jo's Bar last night?" is likely not a statement, and thus not hearsay, because it was not intended to be an assertion of fact in response to the question, but rather was a spontaneous physical act. This point is highlighted by the defendant's continued denial of involvement in the robbery, it was not intended to be an affirmative statement in response to the question. Thus the crying is not hearsay but is rather is a physical observation of the officer that constitutes circumstantial evidence of the defendant's guilty mind. Even if the crying was held to be a statement asserting the defendant's guilt, it still would be admissible, as it is a statement by the defendant offered against the defendant at trial and thus is not hearsay as defined by federal rule 801(d)(2).

The defendant's Miranda Rights were also not violated because the defendant was not yet in custody. Miranda warnings need only be given to a defendant during a custodial interrogation, and an individual is not in custody for the purposes of interrogation when a reasonable person would feel free to leave and end questioning at any time under the circumstances. While the officer was asking the defendant about his

potential involvement in the robbery, the questioning was conducted in the defendant's home. The defendant himself invited the officer inside. The defendant would not reasonably feel that he was not free to leave or end questioning in these circumstances, as the defendant himself invited the officer in and could easily ask him to leave. Therefore the defendant was not in custody at the time and the questioning was permissible without Miranda warnings.

2) The decision by the trial court to allow the officer to read her handwritten notes to the jury was proper. At issue is whether the officer could not remember the events of December 1st. When a witness has trouble remembering a previously known fact, the attorney may refresh the witness's recollection by allowing the witness to view some document or object to jog their memory. The document itself does not need to be admissible, only an aid to the witness's memory. After reviewing the document, if the witness can now recall the forgotten events, the attorney would then instruct the witness to set the document aside and to testify to the fact from her own memory. However, if after reviewing the document, the officer still cannot recall the previously known fact, the attorney may then read to the jury a previously recorded recollection of the events made by the witness at a time when she could accurately recall the events in question. Here, the witness testified that she could not remember what was said by the defendant at the police station. Even after being shown a copy of her notes, the officer still could not recall the events, but testified that the notes were an accurate reflection of the events written at a time when she could recall them. As a result, the notes are a recorded recollection, an exception to the bar against hearsay, and may be read to the jury.

3) The court erred in admitting the officer's handwritten notes as an exhibit in evidence. At issue is when a document admissible as a recorded recollection may be entered as an exhibit itself. While it is permissible to read a recorded recollection to the jury under the circumstances described in question 2, entering the exhibit itself is not allowed by the proponent of the evidence. The document may be admitted on cross examination, but only on cross examination. Here, the document was entered by the prosecution, the proponent of the evidence, over the objection of the defense. This makes the exhibit improper and the judge's ruling erroneous.

4) The court was proper in admitting the defendant's statement "I have some information that can really help you with this case." At issue is whether the statement violates the bar against hearsay or the defendant's Miranda Rights. As previously discussed, hearsay is an out of court statement offered to prove the truth of the matter asserted, however statements made by a party offered against that party at trial are not hearsay under rule 801(d)(2). Here, the statement is made by the defendant and offered against the defendant at trial, therefore it is not hearsay.

The defendant's Miranda Rights also were not violated because the defendant himself reinitiated questioning. After a successful invocation of one's Miranda Rights, the

police must cease questioning and may not reinitiate questioning to try to get a waiver out of the defendant until a sufficient amount of time has passed. Here, the defendant did successfully invoke Miranda at his home and the officer ceased questioning. However, at the station, the officer did not attempt to reinitiate questioning. Instead, the defendant himself offered information to the officer unprompted. At that point, the officer was free to reread the Miranda Rights and obtain a waiver, which she did. The statement in question came after this waiver, and does not violate the defendant's rights by being admitted at trial.

5) The court was proper in admitting the defendant's statement "I was there on November 30 and saw the robbery, but I had nothing to do with it." At issue is whether the statement violates the bar against hearsay or the defendant's Miranda Rights. For the same reasons discussed in question 4, the statement here is made by the defendant and offered against the defendant at trial, therefore is a statement by a party opponent and not hearsay.

The defendant's Miranda Rights were also not violated because a sufficient time had elapsed between the conclusion of his last invocation of his rights to reinitiate questioning. After a defendant invokes his Miranda Rights, officers may not attempt to reinitiate questioning until after 14 days, as ruled by the Supreme Court. After that time elapses, officers may again try to question the defendant, and if a new waiver of Miranda is granted, the evidence of that conversation will not be barred as a violation of the defendant's rights. In this case, the defendant asked for and received a lawyer on December 1st. The police ceased questioning at that time. Questioning was reinitiated on December 20th, more than 14 days later. At that time, the defendant waived his rights and as a result his statement is admissible against him. It should also be noted that the questioning does not violate the defendant's sixth amendment right to counsel, despite being provided with a lawyer previously, as no formal charges were yet brought against the defendant.

ANSWER TO MEE 3

1. The physician is not liable to the man under tort law. At issue is whether the physician breached any duty to the man. In order to be liable in negligence, four things are required: (1) the defendant must have had a duty to the plaintiff, (2) the defendant must have breached that duty, (3) the defendant's act must have caused the plaintiff's harm, and (4) the plaintiff must have suffered damages. A doctor owes to his patients the duty to act as a state-of-the-art practitioner would, and is liable for breach of that duty. Here, however, the physician's behavior did not breach that duty. His comment to the patient that herbal tea had been seen to have a beneficial impact on cholesterol was in keeping with a research report he had heard of, and there is no sign that he was wrong to

rely on that report. Moreover, his treatment of the man's inflamed liver with tests and referral to a specialist is in keeping with standard medical practice. It does not appear that he negligently failed to diagnose the illness's source: even liver specialists were only able to discover the pesticide contamination as a result of seeing several patients suffering from the same ailment. Even had the physician negligently failed to diagnose the illness, the man would need to show that earlier diagnosis would have prevented the liver damage in order to recover, because otherwise the physician's failure to diagnose did not cause the injuries he complains of. Therefore, the physician is not liable to the man under tort law.

2. None of the five U.S. companies that processed, packaged, and sold the herbal tea to the health food store will be liable to the man under tort law. At issue is whether a product that varies from batch to batch is susceptible to suit on a theory of market share liability.

Market share liability is a doctrine that arises in the context of strict products liability. Under the doctrine of strict products liability, a commercial seller of products is liable for harm caused by a defective product that leaves its hands in an unreasonably dangerous condition. Here, contaminated food products are unreasonably dangerous by manufacture, in that they deviate from the expected form of a product in a way that (1) cannot be prevented by the exercise of reasonable care, and (2) is likely to cause harm to consumers of the food. Strict liability replaces the requirements of breach and duty from the world of negligence, but a plaintiff suing under a theory of strict liability still must establish causation and damages. While the man will be able to show that he was harmed by tea, he will not be able to show causation against any one of the tea companies, because he will not be able to show which tea company's tea caused his injury.

When there is a line of products that is uniformly dangerously defective, market share liability is a theory that permits consumers to hold the companies that produced that product strictly liable, even in the absence of causation. Market share liability is appropriate only when the product in question is truly fungible: that is, that each sample of the product is equally dangerous to each other sample. Here, that is not the case, because the tea was contaminated in different amounts, according to how contaminated it was, what percentage of each package sold was made up of contaminated tea, and other factors. Therefore, the man will be able to recover in tort only if he can prove, of a particular company, that it caused his harm. Here, that will be impossible, because he is unable to determine which brands of the herbal tea he bought, and which of the brands of herbal tea were contaminated. Therefore, none of the processing companies are liable to the man under tort law.

3. The health-food store is liable to the man under tort law. At issue is whether a consumer must identify particular products sold by a commercial seller in order to recover. Like the processing companies, the health-food store sold contaminated herbal

tea. Unlike the processing companies, it is certain that the health-food store sold the defective tea that caused the man harm. The man will have no trouble showing that the store caused his harm, because he can prove that that store was the only source from which he purchased herbal tea. There is no requirement that the man identify the particular product in question; he need only show that (1) the store sold a dangerously defective product, and (2) that product caused him harm. Therefore, the store sold a dangerously defective product, which caused the man's harm. Therefore, the health-food store is liable to the man under strict products liability.

ANSWER TO MEE 3

(1) ***Man v. Physician***

The physician is probably not liable to the man under a theory of negligence. The issue is whether it was foreseeable that the herbal tea that the doctor told the patient about would be contaminated.

A showing of negligence requires: (1) a duty: (2) that was breached; (3) and that the breach was the actual and proximate cause of; (4) damages. Duty imposes on every individual a responsibility to conform to a specified standard of care in order to avoid unreasonable risk of harm to potential plaintiffs. Here, the doctor has a duty to act as an average professional doctor in the country would--since there is a tendency to look at the national standard rather than at a local standard. He did conform to this duty by telling the man that his cholesterol was high and that he should take a drug that lowers cholesterol, but since the man insisted on trying "natural remedies" first, the physician, after much insistence that prescription drugs are much more effective, referred the man to a report that an herbal tea has been shown to reduce cholesterol levels in a recent research report. He could be considered to have breached his duty by relying on alternative medicine since he is a licensed physician. Though this argument is weak considering the fact that alternative remedies such as teas can be recommended even by physicians. However, three months later, the man had an increased white blood cell count as well as an inflamed liver. At this point, it could be argued that the doctor breached a duty by failing to tell the man to stop drinking the herbal tea. Although, generally, there is not duty to act affirmatively, such a duty can arise when the actor is the one that caused the peril to begin with (here, the doctor showed the man the report about the herbal tea) or when there is a special legal relationship (doctor-patient). He had a blood test just three months prior and did not have any of the results that he had in the second blood test. The only change that the man made, besides a healthier diet, was drinking that herbal tea. Therefore, it could be argued that the doctor breached his duty to conform to the national standard of care of a physician by failing to tell the man to stop drinking the tea.

The man must also proof, in addition to a breach of duty, that the breach was the actual and proximate cause of his injuries. Actual cause requires a showing that but for the breach, the injury would not have occurred. Proximate cause requires a showing that the injury was within the increased risk and natural incidents of the defendant's conduct. Although but for the doctor referring him to the herbal tea and failing to prevent him from continuing to drink the tea and thereby exacerbating his injuries, the man would not have been injured, it is not likely that the man could demonstrate that his injuries were foreseeable. Herbal tea is used all the time by ordinary people. The result that occurred, liver damage, is highly unusual and therefore would probably be considered by any court to be unforeseeable.

Therefore, a court will probably not find the doctor liable under a theory of negligence due to a lack of proximate cause.

(2) ***Man v. Five US Companies***

The companies are not liable to the man under any tort theory. The issue turns on whether he can hold them liable under strict liability since they have been found to be not negligent by investigators.

In order to find a distributor liable under a strict liability theory of products liability, there must be: (1) a commercial seller; (2) a defective product; (3) that was defective when it left the hands of the defendant; (4) that was foreseeably used; (4) that caused; (5) damages. Here, the five companies are commercial sellers of the herbal tea. The product would be considered to be a manufacturing defect since some of the teas had contaminants and some did not. The product was defective when it left the companies' hands since research shows that the contamination occurred in the export warehouses of Country X, already by the time it reached the US distributors. The product was used foreseeable, to drink. The product actually caused the man's liver damage since this is undisputed. However, the man will be unable to prove which of the US distributors were responsible for the herbal tea that he drank. Therefore, though he actually suffered damages, he will be unable to hold them liable unless he could prove which of the US companies supplied him his herbal tea. However under one theory of causation from *Summers v. Tyce*, when all defendants are culpable, the burden would shift to them to show that each was not culpable for that particular product. However, that theory was used in a negligence case, and here, it's a strict liability theory. Moreover, the investigators concluded that the companies were not negligent. In addition, some packages had no contaminants whatsoever. Therefore, given the inability to pinpoint which of the companies supplied the man his tea, he will unlikely be able to find them liable as a group.

(3) ***Man v. Health-Food Store***

The health food store is likely liable under a theory of strict liability.

The elements for a strict liability for a product defect are the same as above. The store is a commercial seller that sold a defective product that was defective when it left its hands. The tea was foreseeably used since it was consumed by drinking and the tea caused the man's liver damage. Here, although the man is not sure which brand he purchased, he knows that the tea he purchased from was from this one health food store. Therefore, there is no causation issue as there was for the five US companies.

The health food store is therefore liable under a theory of strict products liability to the man. As a side note, it should be noted that the health-food store not likely be found liable under a theory of negligence. Those further down the chain of distribution can escape negligence liability usually through cursory inspection of the item. A cursory inspection of the herbal tea would not reveal the contamination.

ANSWER TO MEE 4

1) The issue is whether disabling PTT's proton-therapy equipment would be a viable remedy for Ion to pursue.

When a debtor defaults on a security agreement, a secured creditor may pursue a variety of remedies. The creditor may initiate a replevin action to acquire the property, or it may use self-help to repossess the property provided that this does not lead to a breach of the peace. In many jurisdictions, the debtor's mere presence and objection to a self-help repossession is enough to compel the creditor to use legal process. In line with the general disfavoring of self-help methods, a creditor may not extra-legally destroy or deactivate its collateral, particularly when such actions are likely to lead to large consequential damages for the debtor, and may forfeit important rights in any subsequent sale of the property.

In this case, Ion would propose to surreptitiously disable (what could be life-saving) cancer equipment under the guise of performing a routine maintenance. This action is not reasonably calculated to allowing Ion to recoup its security interest; on the contrary, it is likely to cause severe and unforeseen consequential damages to PTT and may even be tortious. As such, Ion would quite possibly be held liable to PTT for such actions, and should use legal process to recover its security interest in the collateral.

2) The issue is whether Bank or Ion has a superior claim to the proton- therapy equipment.

a) Ion's Interest in the Proton-Therapy machines

In order for a security interest to attach, a debtor must (1) have paid value; (2) have rights in the collateral; and (3) there must be a security agreement describing the collateral or the creditor must have possession or control over the collateral. A valid security agreement must be a record authenticated by the debtor that "reasonably describes" the collateral. A transaction in which a seller transfers property to a buyer and retains a security interest in that property as collateral is called a seller "purchase money security interest" (seller PMSI). Tangible property in machinery or other products used for the ordinary functioning of a business is called "equipment". A PMSI in equipment can be perfected by filing a financing statement which gives describes the collateral and gives the name of the debtor in the appropriate state office. PMSIs in equipment will take priority over all other security interests if a financing statement is filed within 20 days of the debtor taking possession of the property.

In this case, Ion sold proton therapy equipment to PTT and retained a security interest in the equipment as collateral, thus creating a seller PMSI in equipment. Its interest attached upon the execution of the security agreement, and perfected when it filed financing statement with the state office, giving the proper name of the debtor and adequately describing the collateral.

b) Ion's Interest in the Equipment After it Became a Fixture v. the Bank's Interest in the Facility

After property becomes a fixture, an interest in the property exists in favor of anyone with an interest in the real property. A holder of a PMSI in the fixture may retain priority over a mortgage holder by a filing a fixture financing statement in the proper real estate records office within 20 days of the property being incorporated as a fixture. If it fails to do so, it retains its security interest, but it is subordinated to the interest of the property's mortgage holder.

In this case, though Ion had a PMSI in the equipment, it knew that the equipment was going to be installed as a fixture in the facility and yet failed to file a fixture financing statement in the real estate records office. Therefore, the Bank has priority over Ion in the equipment, which is now a part of the greater facility. Of course, the Bank's interest in the equipment only goes to the extent of the facility's outstanding obligation, and any surplus would still go to Ion.

3) The issue is whether Ion has an enforced and perfected security interest in any other PTT assets.

A secured creditor's interest automatically attaches in the proceeds of the collateral. While an interest in cash proceeds also perfects automatically, perfection can be maintained in non-cash proceeds via the "same office rule" - if a financing statement for the proceeds can be filed in the same office where the financing statement for the initial collateral was filed, then perfection is maintained throughout. Proceeds can be the product of a sale or a lease of the collateral, and can be either tangible or intangible, the latter including accounts and rights to payment.

In this case, PTT contracted with Oncology for its use of the equipment for a period of time, and on the latter's default acquired an interest in a right to payment from Oncology. This right to payment could be characterized as a "proceed" of the equipment in which Ion had a PMSI. Therefore, provided that an interest in PTT's right to receive payment from Oncology could be perfected by filing in the same office as the equipment, Ion would have an enforceable and perfected security interest in any recovery that PTT may receive from Oncology on the lease.

ANSWER TO MEE 4

1. Ion can disable the proton-therapy equipment.

When a debtor defaults on his payments under an attached security agreement, the secured creditor can repossess the collateral using self-help methods as long as he does not breach the peace. For equipment that is too bulky to be removed for repossession, the secured creditor may render the collateral unusable. A security agreement attaches when (1) the secured party gives value; (2) a security agreement is authenticated by the debtor; and (3) the debtor has rights in the collateral. Here, Ion (the secured creditor) provided PTT (the debtor) with the proton-therapy equipment, PTT signed a purchase agreement that provided for a security interest, and shortly thereafter Ion delivered the equipment. Therefore, the security interest attached when the equipment was delivered. It is undisputed that PTT is in default. Therefore, as long as Ion does not breach the peace, it can render the equipment unusable in order to protect its security interest.

2. Bank has a superior claim to the proton-therapy equipment.

The issue is whether Bank's purchase money mortgage has a superior claim to Ion's PMSI in equipment that is a fixture. Generally, security interests in fixtures are considered junior to a security interest in real property unless the security interest in the fixture was a purchase-money security interest (PMSI) and that interest was perfected

within 20 days of installation. In order to perfect a security interest in a fixture, the interest must be recorded in the county real estate records office. Generally, PMSIs in equipment have priority over other security interests so long as the security interest was perfected before delivery AND the PMSI secured creditor sent notice to the other secured creditors. Here, state law states the equipment is a fixture and in favor of anyone with an interest in the building.

Perfection is required to put other secured creditors on notice that there is a security interest. Without perfection, a secured creditor cannot assert .Bank's mortgage interest is properly recorded and therefore perfected. Ion did not file a statement for the fixture in the county real estate records office, so therefore it is not perfected against Bank's mortgage interest. Ion also did not send notice to Bank of its security interest. Therefore, Bank's interest in the equipment is superior.

3. **Ion has an enforceable and perfected security interest in Oncology's lease payments.**

The issue is whether the amount due on the Oncology lease can be considered proceeds of Ion's equipment. Generally, a security interest automatically attaches to proceeds. This interest must be perfected. Under the same-office rule, if a security interest in the type of proceed can be perfected by filing a statement in the same office as the original collateral, that proceed is automatically perfected. The right to receive payments for a lease is considered an account. An account can be perfected by filing a statement in the statewide filing system. Since Ion has filed a statement for the equipment in the statewide filing system, its interest in the payments due on the Oncology lease is perfected.

ANSWER TO MEE 5

1. Neighbor v. Painter

The neighbor would succeed in a breach of contract action against the painter. At issue is whether contracts are assignable absent any provision to the contrary. In general, contracts are assignable unless the contract itself provides otherwise, or the assignment or delegation creates a material change in the duties of the promisor. Once the contract has been assigned, the assignee may sue either the assignor or the promisor upon a breach. Here, the contract does not provide that assignments are not permitted, or are void. Therefore, the homeowner, who has promised to pay $6,000 in exchange for having his house painted, can delegate his rights and duties under the contract to his neighbor, as long as there is no material change in the duties of the painter. There is no material change in the duties of the painter because the houses' exteriors are identical, have the

same level of wear, and there is no difference in magnitude or difficulty between the work required to paint the two houses. Therefore, because there is no material change in duties, and the contract does not provide otherwise, the neighbor will succeed in a breach of contract action against the painter.

2. Retiree v. Painter

The retiree would not succeed in a breach of contract action against the painter. At issue is whether he is an intended or incidental third party beneficiary. Third party beneficiaries may have causes of action for breach of contract, but only if they are intended beneficiaries, and their rights under the contract vest. An intended beneficiary is one specifically for whose benefit the contract is made and, generally, an intended beneficiary is named in the contract. Here, the contract was not made for the retiree's benefit - it was made first for the homeowner's benefit, and then for the neighbor's. Furthermore, the retiree is not named in the contract. Therefore, the retiree is an incidental beneficiary and will not have a cause of action against the painter.

3. Painter v. Neighbor and Homeowner

The painter would succeed against both the homeowner and the neighbor. At issue is whether a novation has occurred. When a contract has been assigned, generally the assignor remains liable on the contract until there has been a novation - or an agreement between the assignor and the promisor to entirely replace the assignor with the assignee, essentially creating a new contract. However, the assignee also becomes liable on the contract when he accepts the assignment. Here, there has been no novation - in fact, the painter has specifically objected to the substitution of the neighbor for the homeowner in the contract. However, the neighbor has accepted the assignment, so he is also liable. Because there has been no novation, both the homeowner and the neighbor could be liable to the painter.

ANSWER TO MEE 5

Painter Refuses:

The neighbor would likely not succeed against the painter, though it is a close call. At issue is what duties may rightfully be delegated.

A contract is formed by mutual assent, exchange of legally bargained for detriment or benefit, i.e. consideration, and promised performance. Here, the painter and the homeowner had a valid contract because they both assented to the terms, the price,

the conditions, and the schedule. This is a contract for services and so the common law governs.

A party to contract is generally free to assign either the rights of the contract or to delegate the duties, or both, without further consideration or consent from the other party. Assignees can enforce a contract, especially if they have paid consideration for it. But rights and duties must not be delegated if they would substantially change the nature of the contract. Courts will usually hold the nature of the contract to not be substantially changed if the person receiving payment has changed, but usually will find substantial change if the performance has been altered, even if substantially similar. Here, the principle is tested: if a court is harsh and views the above rule strictly, the right to have a house painted will not be able to change to a new, if almost identical house (nearby location, similar appearance, similar magnitude and difficulty); if a court is more lenient, it will allow the neighbor to transfer the right to an extremely similar house, as the painter's duties would not seem to differ much or at all from the change. So while the neighbor-assignee would have a right to succeed in a breach action generally, the outcome here will differ based on how stringently a court enforced the substantial change rule for the nature of performance.

Alternatively, if it is deemed a modification, it is also invalid. Common law modifications require new consideration and agreement between the original parties. Here, there is consideration between the new party and one of the original parties only. And there is no agreement with the painter. Thus, the change is invalid as a modification.

Some courts hold now that common law modifications are allowed if the deal is still fair and equitable in light of unanticipated circumstances. Notwithstanding the above problem, there appear to be no truly unanticipated circumstances. The law contemplates a natural disaster, not a conversation with a neighbor, as the type of event in mind to trigger this trend.

Based on the discussion just below, the neighbor was also never a third party beneficiary and thus does not have that avenue of enforceability either.

<u>Retiree:</u>

The retiree will not succeed in a breach action. At issue is what constitutes a third party beneficiary.

Third party beneficiaries are those who are intended by the parties to benefit at the outset of the contract. They can then enforce the contract once they assent to the contract, detrimentally rely on it, or seek to enforce their rights under it. Here, the retiree, while he has a general neighborhood interest in the paint job, was not explicitly mentioned in the contract or negotiations with the painter as an intended beneficiary. Though he does stand

to benefit from better property values, that general benefit is insufficient for official 3P status. Nor was the retiree specifically in the mind of the neighbor when he paid the consideration for his house to be painted. The neighbor was thinking mainly of his relatives and only remembered the retiree later, after the contract was made. That the retiree was likely part of the reason for the motivation is similarly insufficient for official status--he must have been mentioned during the contract or at least negotiations, and here, he was not.

His statement of "about time" may have been minimally sufficient for assent and thus enforcement had he been an intended beneficiary, but it is a moot point because he was not specifically designed to be benefited by either the neighbor's nor homeowner's contract and thus cannot succeed in a breach action.

Painter Paints:

The painter could succeed against either party. At issue is who a wronged obligor can sue.

When assignees are given full rights and duties under a contract, they must fulfill their duties to receive their rights. Being assigned "the contract" means taking both rights and duties. Here, the assignee accepted "the contract", and for consideration, and thus took both rights and duties. If he does not fulfill the duty of payment, the painter must sue him to enforce his right to be paid against the neighbor.

Assignors generally remain liable for contracts that they assign. Here, the home owner assigned the contract but remains liable.

Novations remove liability from an original party. Novations require agreement of both parties, the end of the old contract and the formation of a new one. Assignment is not novation. Here, the parties talked about the neighbor taking the contract, meaning the existing contract. There was no talk of a new contract, and anyway the painter never agreed. Thus, there was no novation that would remove original party liability, only assignment. Therefore, the home owner remains liable in addition to the assignee neighbor.

ANSWER TO MEE 6

The State C court has personal jurisdiction over the man. The issue here is whether serving someone with a summons and complaint in the state in which personal jurisdiction is sought is sufficient to confer personal jurisdiction over that person. States may exercise personal jurisdiction over defendants if they are authorized to do so by

statute and such exercise comports with the constitutional requirements for personal jurisdiction. The Constitution requires that the defendant have sufficient contacts with the state so that exercise of personal jurisdiction over him is fair and reasonable. Specific jurisdiction involves a connection between the defendant and the particular claim at issue. General jurisdiction requires that the defendant be at home in the state at issue, meaning that he is domiciled there. However, personal jurisdiction is always proper in a state in which the defendant voluntarily appears and is served with a complaint and summons. There is an exception for visits to the state which are done to testify at a court proceeding.

Here, the man deliberately visited State C, where he was served with a complaint and summons. The District Court in State C is trying to exercise personal jurisdiction over him. State C has a long-arm statute, so we consider only the constitutional aspect of the personal jurisdiction inquiry. State C does not have general jurisdiction over the man, since his domicile is State A, which is the only state with general jurisdiction over him. Turning to specific personal jurisdiction, although the man's visiting state C is unrelated to the woman's claim (after all, the events giving rise to the claim occurred in State A; he was merely visiting her at the hospital to which she was airlifted in State C), personal jurisdiction is clearly satisfied here because the man voluntarily visited State C and was served with a complaint and summons there. When a defendant voluntarily visits a state and is served in that manner, the courts of that state automatically have personal jurisdiction over him. Therefore, the court in State C may exercise personal jurisdiction over the man.

Next, the State C court does have subject-matter jurisdiction over the woman's case. The issue here is whether the woman's state-law claim can be brought into the case under supplemental jurisdiction given that the court already has jurisdiction over the woman's federal law claim. Federal courts have limited subject-matter jurisdiction. There must be either diversity jurisdiction, meaning that no plaintiff is from the same state as any defendant, and the amount in controversy exceeds $75,000, or federal question jurisdiction, meaning that the plaintiff's well-pleaded complaint states a claim arising under federal law. However, if a case contains a claim under federal question jurisdiction and another claim that fails to meet diversity jurisdiction, the latter claim may be brought into the case under supplemental jurisdiction. Supplemental jurisdiction exists where the claim, which fails diversity or federal question jurisdiction, arises from the same nucleus of operative fact as the claim that is properly subject to federal-court jurisdiction. A court may refuse to entertain the state-law claim if it deems it inappropriate to do so, because the state-law claim is very complex or for other reasons. The only exceptions to supplemental jurisdiction apply in cases of diversity jurisdiction, which is not applicable here.

Here, the State C court clearly has federal question jurisdiction over the woman's federal claim under the Safety Act. That claim involves the woman attempting to assert a federal right against the man for harming her as a result of an alteration of the safety

features of a gun that has traveled in interstate commerce. The claim therefore arises under federal law, and it can be brought in the State C District Court. However, the man's state-law negligence claim is neither a federal question claim nor a diversity claim. It asserts no federal rights, and it fails to satisfy diversity because, while the amount in controversy is $120,000, both the man and the woman are citizens of state A. There is thus no diversity here, and so the claim can come in only as a matter of supplemental jurisdiction. Crucially, the state-law claim arises from the same transaction or occurrence as the federal claim which is already able to get into federal court, because the negligence claim is based on the same event, namely the man's alteration of the safety feature and the ensuing injury during the hunt. Moreover, there is no reason to not try the two claims together, since this seems like a standard negligence claim. Moreover, the exceptions to supplemental jurisdiction are inapplicable, because the other claim is a federal question claim, not a diversity claim. Therefore, the State C court as subject-matter jurisdiction over the woman's entire case.

Finally, venue is not proper in State C District Court. The issue here is whether venue is proper in a state where the victim of an accident receives treatment for injuries suffered in another state. Venue is proper in those districts where a substantial part of the events giving rise to a claim occurred, or in any district where all defendants reside. Here, the man resides in State A, so venue in State C would not be proper on that basis. The only way in which the State C court could be the proper venue would be if a substantial part of the events giving rise to the claim occurred in State C. However, that is simply not the case. After all, the event giving rise to woman's claim was the injury she suffered from the man's alleged negligence. That happened in State A. It is the injury itself that creates liability, not the treatment. The claim would've accrued even if the woman had been treated in some other state. Therefore, since a substantial part of the events giving rise to the claim did not occur in State C (they only occurred in State A, or possibly State B), State C cannot be the proper venue for this action.

ANSWER TO MEE 6

Lack of Personal Jurisdiction

The State C court can properly assert personal jurisdiction over the man. The issue is whether service of process in State C, without other sufficient contacts, is enough for the court to exert personal jurisdiction over the defendant.

Personal jurisdiction describes a court's power over parties to a litigation. For personal jurisdiction to be proper, a court's exercise of jurisdiction must both:
1) Be proper under the state's long-arm statute, and 2) Comport with the constitutional requirements of the Due Process Clause, which only allows courts to assert jurisdiction

over a defendant if the defendant has such minimum contacts with the state such that the exercise of jurisdiction would not offend traditional notions of fair play and substantial justice. Under the due process clause, if a defendant is "at home" in the forum state, usually meaning the forum state is the state of domicile if the defendant is an individual or the state of incorporation or principal place of business if the defendant is a corporation, the court may assert general jurisdiction, i.e. jurisdiction over claims against the defendant arising from anywhere. If a defendant is not at home in the forum state, but his contacts with the state demonstrate purposeful availment of the privileges and benefits of the state's laws such that the defendant could reasonably foresee being hauled into court in the forum state, the court may assert specific jurisdiction, i.e. jurisdiction over claims arising from the defendant's activity in the forum state (the exercise of specific jurisdiction must also be "fair," examining factors such as whether the exercise of jurisdiction would be so grossly inconvenient for the defendant as to deny him due process, the forum state's interest in the litigation, the interstate judicial system's interest in the efficient resolution of controversies, and the plaintiff's interest in litigating in a convenient forum). Ordinarily, service of process on the defendant within the state is, in itself, sufficient to confer personal jurisdiction, even if the above tests are not met, though states usually grant immunity from this rule for defendants who are in a state solely to testify in another judicial proceeding.

Here, the state's long-arm statute specifies that a court may assert personal jurisdiction so long as the exercise of jurisdiction is allowed under the U.S. Constitution, so the only question is whether the court's exercise of jurisdiction complies with Due Process. The defendant's contacts with State C would clearly not be sufficient to confer jurisdiction under the ordinary minimum contacts analysis. He is not "at home" in State C, as he has never visited there until the visit in which he was served process, so general jurisdiction would not be appropriate. Furthermore, specific jurisdiction would be inappropriate, as his only contact in State C is the trip in which he went to State C to conduct business and visited the woman in the hospital, and none of the events giving rise to the litigation arose out of that visit (in fact, they happened well before). However, because the man was served process by the woman's attorney while visiting her in the hospital in State C, the court may properly exercise personal jurisdiction. Note that, even if this state grants immunity to defendants who are in the state solely for judicial proceedings, this immunity does not apply here because the defendant was in State C for business, not to testify in a proceeding.

Therefore, the exercise of personal jurisdiction is proper.

Subject-Matter Jurisdiction

A court can properly exercise subject-matter jurisdiction over the claims at issue. The issue is whether the requirements for federal question, diversity, or supplemental jurisdiction are met for both claims.

Federal courts are courts of limited jurisdiction, meaning they generally may only hear cases for which they have been granted subject-matter jurisdiction by statute. By statute, federal courts have been granted jurisdiction in two main types of cases: 1) Federal question cases, and 2) Diversity cases. In addition, a court may exercise supplemental jurisdiction over claims arising from the same core nucleus of operative facts as a case over which it has subject matter jurisdiction.

Federal Question

A court may exercise federal question jurisdiction if the plaintiff's claim arises under the Constitution, laws, or treaties of the United States. Under the well- pleaded complaint rule, a federal cause of action must be clear on the face of the plaintiff's complaint, i.e. the plaintiff must be asserting a federal right. A federal defense, or an argument based on federal law in anticipation of a defense in plaintiff's complaint, is not sufficient to confer jurisdiction.

Here, the plaintiff's federal claim under the Federal Gun Safety Act clearly arises under a federal statute, while her state law claim for negligence clearly arises only under state law. Therefore, the court has federal question jurisdiction over the FGSA claim, but not the state-law negligence claim.

Diversity

Diversity jurisdiction is proper when: 1) There is complete diversity, i.e. each plaintiff is from a different state from each defendant, and 2) The amount in controversy exceeds $75,000, exclusive of interests and costs. A plaintiff may aggregate her claims against a single defendant to meet the amount in controversy requirement, and a case will only be dismissed on amount in controversy grounds when it is clear to a legal certainty that the plaintiff cannot meet the requirement.

Here, the amount in controversy requirement is clearly met, as the plaintiff seeks $220,000 in damages when both causes of action are combined (in fact, each action individually would be sufficient to meet this requirement), and there is no suggestion that these sets of damages are not pled in good faith. However, complete diversity is lacking. Individuals' "citizenship" for diversity purposes is determined by the individuals' domicile, and here, both the plaintiff and the defendant are domiciled in State A.

Therefore, the court cannot properly exert diversity jurisdiction here.

Supplemental Jurisdiction

As stated above, a court may exercise supplemental jurisdiction over claims arising from the same core nucleus of operative facts as a case over which it has subject

matter jurisdiction. A claim arises from the "same core nucleus of operative facts" when it arises from the same transaction or occurrence as a claim over which the court has jurisdiction.

Here, the state-law negligence claim arises from the exact same incident as the Federal Gun Safety Act claims, and the FCSA does not preempt the state law cause of action. Additionally, while there are limits on supplemental jurisdiction when a plaintiff whose claim is in federal court based solely on diversity attempts to defeat the requirements of complete diversity by using supplemental jurisdiction to assert a claim against impleaded or mandatorily joined third parties who are not diverse, these limits are not applicable here, as the case is in federal court due to federal question jurisdiction, and the court can thus assert supplemental jurisdiction over the plaintiff's state-law claims against the defendant that are sufficiently related to the federal claim.

Conclusion

Therefore, the court has federal question jurisdiction over the federal law claim, and supplemental jurisdiction over the state law claim.

Venue

Venue is improper here, and the court should transfer the case to a proper venue. The issue is whether the court's exercise of jurisdiction meets the requirements of the federal venue statute.

Under the federal venue statute, venue is proper in the judicial district where: 1) Any defendant resides (i.e. is domiciled if an individual or subject to personal jurisdiction if a corporation), if all defendants are from the same state, 2) A substantial part of the acts or omissions giving rise to the claim occurred, or 3) If no district exists that meets one of the above requirements, where any defendant is subject to personal jurisdiction. If venue is improper, a court may dismiss for lack of venue, or transfer to a court where venue is proper in the interests of justice (usually, transfer is preferable).

Here, venue would be proper either in the district where the defendant resides in State A, the district where the accident giving rise to the claim occurred in State A, or, arguably, the district where the defendant bought the gun in State B (though this is debatable, as the claim really arises from the accident and the defendant's alteration of the safety features, both of which occurred in State A). State C does not meet either of the tests laid out above; it is merely the state where the woman went to the hospital after being injured in State A. This activity alone did not give rise to the cause of action at issue in the case, and no defendant resides there, so it is improper.

Accordingly, venue is improper in the District of State C; however, rather than dismiss the case, the court should most likely transfer the case to a district in State A where it could have been brought, so that the plaintiff can continue to pursue her claim in the proper forum with a legitimate interest in the litigation.

ANSWER TO MPT 1

Dear Ms. Gregson,

I the forthcoming memo I have analyzed the options available to our client, Ms. Barbara Whirley, with regards to the issues she is having with her landlord. I have analyzed each instance for which she was seeking repair separately.

A. Leaking Toilet

Ms. Whirley has complained that the toilet in her second bathroom of the house she is renting has been leaking. The leak at first revealed itself with some water on the bathroom floor, but over time the leak continued to get worse. She then had to place a bucket by the toilet to catch the leaking water and after around two months of no repair, the leak got to the point where Ms. Whirley had to empty the plastic bucket twice a day and sometimes the toilet never flushed. Ms. Whirley first contacted her landlord, Mr. Sean Spears about the leak on February 19, 2016, and continued to notify him about the leak for the next three months. After, her landlord did nothing about it she finally called a handyman to fix it, for which she paid $200.

Under Franklin Civil Code §541, a dwelling is deemed untenantable if it lacks (2) "plumbing or as facilities…maintained in good working order". A leaky toilet would thus fall under this provision and render a dwelling untenantable. Under §540 of the Code, a landlord of a building intended for residential purposes must maintain the building in a way that it is fit for human occupation and must repair all subsequent conditions that render the building untenantable. Similarly, in *Burk v. Harris* (Fr. 2002), the court found that a dwelling was untenantable if a substantial breach of the warranty of tenantability has occurred. The court cited §541 of the Franklin Code in its determination of what is considered a substantial breach. Therefore, it is unquestionable, from both the statutory law and the case law that the landlord breached his warranty of tenantability to Ms. Whirley and thus was required to make the necessary repairs resulting from the breach. With regards to the remedies available to Ms. Whirley, Franklin Code §542 has presented four possible options available to tenants, whose landlords have neglected to repair conditions, warranting the premises untenantable. With regards to the repairs to the toilet, the first option is most appropriate. Option one states that if the cost of such repairs does not exceed one "month's rent of the premises, make repairs and deduct the cost of repairs

from the rent when due". Here, the cost of fixing the toilet was #200 and her monthly rent was $1,200. Therefore, one option for Ms. Whirley is for paying only $1,000 on her next month's rent, deducting the $200 cost. Furthermore, Ms. Whirley could vacate the premises and be discharged from paying further payment, but she expressly stated that she does not want to leave her house, so that option would not suit her. She could withhold the rent entirely on subsection four if the conditions resulting from the lack of repairs substantially threaten the tenant's health and safety. It is unlikely that a leaky toilet, although untenantable, will not reach the level of threatening Ms. Whirley's health and safety. Therefore, option one as noted, would be best for her. It should be noted that the remedies available to tenants under §542 are only available if the tenant has given the landlord reasonable amount of time to make the repairs after receiving notice of the condition. This pre-requisite Ms. Whirley has clearly met as three months would be considered more than reasonable time to repair a leaky toilet.

Additionally, in order for a tenant to recover for conditions in her dwelling, the tenant must also prove that she was not at fault in causing the defective condition and must provide documentation proving that the expenses were in fact covered by the tenant. In *Shea v. Willowbrook* (Fr. 2012), the court denied a tenant's claim for reimbursement of rent payments when his apartment was infested with bed bugs and the tenant vacated the premises as a result of those bed bugs. The court denied an award to the tenant because he failed to demonstrate that the bed bug infestation was solely the fault of the landlord and resulted from no fault of his own. The tenant in that case also failed to give the landlord proper notice of the issue for the landlord to have an opportunity to resolve the problem. Therefore, the court denied him reimbursement for rent payments, after he unjustifiably vacated the premises. Furthermore, the court in that case only awarded damages if the tenant provides proper documentation of his expenses resulting from the unseemly condition. Therefore, he only provided $400 worth of receipts. The court only awarded the tenant $400 for his expenses. Here, Ms. Whirley did give the landlord notice of the need for repairs, with reasonable time for the landlord to repair and she provided an invoice of her $200 expense for fixing the toilet. Furthermore, although no direct proof exists that she did not contribute to the leakiness of the toilet condition, it is likely that no reasonable tenant, which Ms. Whirley has not proven that she isn't, would commit acts that break their own toilet. Therefore, in summation Ms. Whirley's best option is to recover the $200 on her next month's rent.

B. Outdoor Sprinkler System

Next, Ms. Whirley has requested payment for her outdoor sprinkling system that she has paid $300 to repair. Ms. Shirley first notified her landlord about the condition on March 31 and complained that because it does not work. She now must water her flowers by hand 2-3 times a week, taking up about 15-20 minutes of her time. By the end of May, the landlord had still not repaired the condition, two months later. Although she gave the landlord a reasonable amount time to repair the condition after giving him notice, Ms.

Whirley will unlikely be able to recover the $300 cost in repairing the condition. A faulty sprinkling system is not included under any of the conditions put forth in §541 of the Code and cannot be interpreted as a substantial breach of the implied warranty of tenantability as discussed in *Burk* because the condition does not make the house itself unfit for human occupation nor does it pose any substantial risk to Ms. Whirley's health or safety. Although it may be annoying and now require extra time on her part to repair, it is insufficient to recover any amount under either the relevant statutory or case law.

C. Sliding Glass Door And New Carpet

Ms. Whirley next complained that the sliding door in one of her bedrooms does not close properly and has left a gap between the bottom of the door and the door frame, which allows water to get into the house and dampen the carpet when it rains. Due to the carpet's wet conditions, mold has started to grow and a smell has resulted that is so bad that she can no longer make any use of that bedroom. Ms. Whirley has tried to close the door but it has not budged and has placed plastic along the door frame to try to keep the moisture out but to no avail. This activity would satisfy her duty to try to mitigate damages as is necessary under a tenant's duties set forth by the court in *Shea*. Ms. Whirley first notified her landlord of this condition on May 26, 2016. She then paid to fix the condition less than a month later on June 23rd. Under §541 of the Code subsection (1), this condition would likely deem her dwelling untenantable as it lack "effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors". Additionally, the condition has caused mold to grow which is not safe and healthy, satisfying the requirements of a substantial breach as set forth in *Burk*. The issue though is less than one month a reasonable amount of time for the landlord to repair the condition. Given the danger to her health and safety resulting from this condition, the landlord should still be responsible to pay. Under §542(c) of the Code, if the tenant has acted more than 30 days after giving the landlord notice, she has acted after a reasonable time and the landlord would be liable for the damages. However here, the tenant made repairs less than 30 days after giving notice. The Code states that a tenant may make repairs after shorter notice if the circumstances require shorter notice. Having mold growing in your house would satisfy the circumstances requiring shorter notice because it affects Ms. Whirley's health and safety every day it remains. Therefore, her landlord can still be held accountable to pay for this condition. The repair cost her $1,800 which exceeds her monthly rent of $1,200. Under §542(2), if the cost of repairs exceeds one month's rent, the tenant can make repairs and sue the landlord for cost of repairs, or under subsection (4) the tenant may withhold all the rent until the landlord makes the repairs if the conditions substantially threaten the tenant's health and safety, which the condition here does. However, Ms. Whirley already repaired the condition herself. Option 2 would best suit her and thus she should sue the landlord for the $1,800.

D. Damage To Wall And Baseboard In Laundry Room

Finally, Ms. Whirley alleges that her dog has chewed away a two foot strip of the baseboard in her laundry room and damaged the wall in the process and has asked if the landlord can recover the repairs to those as well. Ms. Whirley will likely not be able to recover for these damages. First of all, she never notified the landlord about the need to make these repairs. Second, because it's her dog, Ms. Whirley has a duty to make sure her own dog does not damage any parts to her house. Her failure to do so would be partly her fault which bars recovery under the court in *Shea*. She also violated Fr. Code §543 by allowing her dog to destroy or damage part of the dwelling unit and its equipment, which a landlord has no duty to repair. The fact that her landlord allowed to keep a dog in the house is no defense. Therefore, Ms. Whirley will not be able to recover the $300 for repairs that her dog caused the damage.

ANSWER TO MPT 1

MEMORANDUM

To: Della Gregson
From: Examinee
Date: July 26, 2016
Re: Barbara Whirley matter

As you noted in your earlier memo, our client, Barbara Whirley ("Whirley"), would like to know what her options are in seeking to have several issues with her rental house repaired. I have reviewed the relevant Franklin law, and have commented on her various options below.

Toilet Leak

Whirley likely has several options with regards to the toilet leak; likely her best option is to contract with JB Handyman Services to repair the toilet, and deduct the $200 cost from her rent. The Franklin Supreme Court has held that an implied warranty of tenant ability exists in each residential lease. *Gordon v. Centralia Properties Inc.* (Fr. Sup. Ct. 1975). This warranty has been codified, and Lessors such as Whirley's Landlord Sean Spears ("Spears") are required to put the rental building "into a condition fit for such occupation and repair all subsequent conditions that render it untenantable." Franklin Civil Code §540. One way in which a dwelling is deemed untenantable is if the plumbing is not maintained in good working order. Franklin Civil Code §541(2). A landlord should repair any such conditions within a reasonable amount of time, or the tenant may seek a variety of remedies. Here, Whirley can show that Spears failed to maintain the plumbing in good working order. Barbara's toilet began leaking in early February. She originally put a towel down on the area and made affirmative efforts to

keep it dry. The leak got worse, and she put a bucket behind the toilet to catch dripping water sometime in early March. By March 31, she had to empty the plastic bucket twice a day and the toilet sometimes doesn't flush. Spears might argue that a mere leak in the toilet is not indicative of a plumbing issue, but once the toilet stopped consistently flushing, Whirley has a stronger argument that her plumbing was not in good working order. Additionally, Whirley can show that Spears did not repair the plumbing condition within a reasonable time after receiving Whirley's written notice as required under Franklin Civil Code §542. Whirley first notified Spears, in a written e-mail, of the leaking toilet on February 19. She notified him that the toilet had stopped flushing on March 31. As of July 25, over 5 months after receiving written e-mail notice of the leak, and almost 3 months after receiving written e-mail notice of the flushing issue, Spears had still not repaired the plumbing condition.

Under Franklin Civil Code §542, because the estimated cost of the repairs ($200) does not exceed her monthly rent of the premises ($1200), she may make the repairs herself and deduct the $200 from her subsequent rental payment. Franklin Civil Code §542(a)(1). Because she has given notice more than 30 days ago, she is presumed to have waited an appropriate amount of time for Spears to repair the condition himself. Franklin Civil Code §542(c). She doesn't wish to vacate the premises (Franklin Civil Code §542(a)(3)) and it is unlikely that she will be able to withhold a portion of all of the rent until Spears repairs the issue, under Franklin Civil Code §542(a)(4), because in order to withhold a portion of the rent under this provision, the impaired condition must threaten the tenant's health and safety. It's unlikely that the conditions of the toilet leak alone "substantially threaten the tenant's health and safety." However, the court in *Burk v. Harris* found that a shower leak, when combined with the fact that the thermostat didn't work, and that the roof and windows leaked, together were conditions that affected Tenant's health and safety. *Burk v. Harris* (Fr. Ct. of App. 2002). Thus, when combined with the insulation problems with the sliding door, the leaking toilet could be an additional factor that could allow Whirley to withhold the rent for all of the conditions combined, until Spears makes all of the necessary repairs. Because he hasn't made any repairs yet, despite her repeated demands, I'd recommend having Whirley do the repairs herself and withhold $200 from rent.

Sprinkler System

It is unlikely that Whirley will be able to force Spears to repair the sprinkler system, or to seek any reimbursement from him if she decides to make repairs herself. While Spears has a duty to keep her rental house from having any untenantable conditions, and a broken sprinkler system is inconvenient, it does not relate to any of the untenantable categories enumerated in Franklin Civil Code §541, unless it is indicative or related to a deeper plumbing issue, and not just the sprinkler box malfunctioning as Whirley predicts. In fact, the lease also specifies that she must maintain the yard at her

own expense, in the Residential Lease Agreement in Section 14(B), so absent statutory authority, the repair costs will fall onto Whirley as designated under the contract.

Guest Bedroom Sliding Door and Carpet

Whirley may have many options with regards to the guest bedroom sliding door and carpet, depending on what caused the creation of the half-inch gap between the bottom of the door and the door frame. As stated above, Spears is required to repair any subsequent conditions that render the premises untenantable. Franklin Civil Code §540. A house is deemed untenantable if it lacks "effective waterproofing and weather protection of roofs and exterior walls, including unbroken windows and doors." Id. Here, there is a half-inch gap between the door and the door frame of a sliding glass door that leads to the outside of the house. The gap is allowing outside moisture in the house; evidence of ineffective waterproofing of an exterior unbroken door. Again, Spears received written notice from Whirley and failed to repair the door in a reasonable amount of time. He received a written e-mail about the problem on May 26, and after 2 months, has made no repairs. Thus, because this is more than 30 days after the Landlord received notice, Whirley may make the repairs herself. However, because the estimated cost of the repairs ($1800) is more than her monthly rent ($1200) she will have to sue the landlord for the cost of repairs, rather than deduct the cost from rent. Franklin Civil Code §542(a)(2). Again, she could also vacate the premises under Franklin Civil Code §542(a)(3), and be discharged from further payment of rent, as such statutory authority would supersede Section 16 of her Residential Lease Agreement claiming that she'd be responsible for rent payments (Section 11 of her Rental Lease Agreement also gives her this right - she could argue that her use of the Premises is seriously impaired because she cannot use the guest room at all, and she could terminate the agreement upon three days' written notice to Spears) but she would like to remain in the house, so this is not the best option for her. Additionally, she could withhold some of her rent until Spears makes the repairs, because she can argue that the condition substantially threatens her health and safety, because of the mold that has been created. Franklin Civil Code §542(a)(4). The mold growing around the door and the odor is so problematic that the guest room that attaches to the door is unusable. In *Burk v. Harris,* the court noted that the appropriate reduction in rent may be the "difference between the fair rental value of the premises if they had been as warranted and the fair rental value as they were during occupancy in unsafe or unsanitary condition." *Burk v. Harris* (Fr. Ct. of App. 2002). Under this formula, she can likely withhold $200 per month, which is the difference the fair rental value of a 3 bedroom house ($1200) and the fair rental value of the house with one room rendered unusable- $1000, the average cost of a comparable two bedroom house. The court may also reduce the tenant's rental obligation by a "percentage corresponding to the relative reduction of use of the leased premises caused by the landlord's breach," which wouldn't be as helpful to Whirley, since the guest room that is unusable is actually only used once or twice a month when family and friends visit her. This would be a smaller reduction.

Additionally, it is important to note that a Landlord has no duty to repair any untenantable condition that is caused by the Tenant's violation of an affirmative obligation, if such violation materially contributed to the creation of the untenantable condition. Franklin Civil code §543. One of a tenant's obligations is not to permit any person to destroy any part of the dwelling unit. Franklin Civil Code §543(3). If somehow Spears can show that a guest caused the gap in the door (Whirley isn't sure if any of the houseguests used the door, and potentially one of them could have put the door off its track), rather than the door itself being defective, then Spears may have no duty to repair the door. Additionally, the burden may even be on Whirley to show that the damage to the door is through the fault of Spears, and not the fault of herself or a guest. In *Shea v. Willowbrook Properties LP* (Fr. Ct. of App. 2012), the court found that Shea could not recover damages where Shea received a bedbug infestation at his rental apartment, but he had just come back from abroad, and he "failed to demonstrate that the 2011 prolonged bedbug infestation occurred through Willowbrook's fault and through no fault of his own." Thus, in order to recover damages for the damage caused by the gap in the door, Whirley will have to show that the gap is not through any fault of her own or her guests. If, for example, the door is in fact a different size than the door frame, she will be successfully able to show that's not through the fault of her own.

Repairs to the Walls and Baseboard

Whirley will likely not be able to force Spears to repair the baseboards, and will not be able to seek reimbursement from Spears for any repairs she does to the baseboards herself. Again, as noted above, Spears must keep the house tentantable. Whirley could make an argument that the baseboard destruction is evidence that the dwelling is untenantable because the "floors" are not "maintained in good repair" under Franklin Civil Code §541. However, as also noted above, a Landlord has no duty to repair any untenantable condition that is caused by the Tenant's violation of an affirmative obligation, if such violation materially contributed to the creation of the untenantable condition. Franklin Civil Code §543(3) applies to destruction or damage caused by animals as well as persons, even if their persons or pets are authorized on the premises, as Whirley's dog is authorized by the Pet Addendum. Because Whirley permitted the dog Bentley to chew on the baseboard and the walls, her allowance of the dog's destruction was a significant cause of the damage to the wall and baseboards, and she will not be able to recover for it.

ANSWER TO MPT 2

Franklin Tax Court

Nash v. Franklin Department of Revenue

Post-Hearing Brief [Other sections omitted] III. Legal Argument

1. Under the Internal Revenue Code (IRC) § 162 and Franklin Tax Court case law, the Nash's are entitled to a deduction for their expenses paid or incurred during each of the taxable years 2011-2015 in carrying on a trade or business.

The Franklin Department of Revenue (FDR) incorrectly denied the Nash's claim for a deduction for their business expenses. The FDR asserts, wrongly, that the tree-farming business is not engaged as a "business for profit, due to the lack of a profit motive". Although, as the Stone case notes, "orders of the [FDR] are presumed correct and valid", this conclusion by the FDR is clearly erroneous based on the facts, and the Nash's will meet their burden of proving the error of the FDR's order. Though § 183 disallows deductions for activities not engaged in for profit, under the nine elements of § 1.183-2, the Nash tree-farming operation is a for-profit business, and a going concern that is on track to turn a profit, and as such is entitled to all applicable business deductions. The Nash's situation is distinguishable from the Stone case, and the facts in Mr. Nash's testimony support this. Each factor is examined below.

1. Manner in which the taxpayer carries on the activity.

The Nash's carry on their tree-farming in a business-like manner. They have placed a sign on the public road each November (see Testimony of Joseph Nash) and have fixed prices for each of their products. Further, they have set aside a dedicated room in their house just for the business. The room keeps all business records, catalogues, and has a computer used for the business. Additionally, the Nash's altered their farming methods, Mr. Nash took classes on forest management, and spent time on another Christmas tree farm to gain expertise in new methods to improve profitability. This is consistent with the IRC section's desire to see an “intent to improve profitability" that "indicate(s) a profit motive". Contrast this to the Stone case, where the owners did not know much about horses or their buying, selling, or trading, and made little effort to improve their profitability. The manner that the Nash's have carried on their enterprise clearly evidences an intent to become profitable. In just 5 years they have made substantial progress, as opposed to the Stone case, where 20 years passed without any progress towards profitability.

2. The expertise of the taxpayer or his advisors.

As noted above, Mr. Nash has taken classes on forest management and spent time on another tree-farm to learn new methods. He also read books on raising Christmas trees and researched the subject in an orderly way. This clearly indicates a profit motive, and shows more initiative than in the Stone case, where the Stones had only recreational experience and only "consulted" with others on some issues not related to profitability.

3. The time and effort expended by the taxpayer in carrying on the activity.

Mrs. Nash has completely left her previous occupation and devoted her full time to the tree-farm. Additionally, Mr. Nash spends his weekends and summers devoted to the tree-farm. This is significantly greater than simply "personal or recreational aspects" by any standard, and Mrs. Nash's retirement from her former occupation especially evidences their devotion of most of their energies to the tree-farm business. This is contrasted with the Stone case, where both owners kept full-time jobs separate from their horse farm. The significant time and effort spent by the Nash's on the tree-farm weighs strongly in their favor.

4. Expectation that assets used in activity may appreciate in value.

Mr. Nash testified that they intend to make a profit from increased sales and value produced by the acreage of the farm. The Nash's have invested significantly in new equipment and methods. This can only create an inference that they intend for the trees that they farm to generate additional value. They have made significant alterations to the land, cutting down forest for additional planting space and replanting in organized rows. This is distinguishable from Stone, as there the Stones stipulated that they had made no alterations or expected any appreciation.

5. The success of the taxpayer in carrying on other similar or dissimilar activities.

Though the Nash's have not run a successful tree-farm before, that should not preclude them from doing so now. They have demonstrated an intent and a viable path to profitability, and this factor should not be held against them.

6. The taxpayer's history of income or losses with respect to the activity.

As the statute notes, a "series of losses during the initial or start-up stage of an activity may not necessarily be an indication that the activity is not engaged in for profit". The Nash's have only run their tree-farm for five years, and incurred significant start-up costs. As an annual business, that relies on a planting, growing, and selling cycle that takes time, this period is not unreasonably long for a concern to continue without turning a profit. Additionally, income has steadily increased from 2011-2015, showing that there is a viable path to profitability. This is contrasted with the Stone case, which saw only losses over a 20 year period.

7. The amount of occasional profits, if any, which are earned.

The tree-farm recently had income of $5,000 for the 2015 year. While there were large start-up costs, annual costs since then have only been $9,000 - $12,000. Contrasting to Stone, which the court held never had a path to profit, the Nash's here are well on their way to profitability.

8. The financial status of the taxpayer.

As noted above, Mrs. Nash is working on the tree-farm full time, and Mr. Nash expends significant time on the farming activities. Though they have not yet derived substantial income from the farm, they intend to do so in the future. This is contrasted with Stone, where both of the Stones had full-time jobs not related to the horse farming. And, again, the Nash's tree-farm is in the start- up stage, and this factor should not be held against them.

9. Elements of pleasure or recreation.

As the statute notes, "it is not, however, necessary that an activity be engaged with the exclusive intention of deriving a profit..." or that the taxpayer has motivations other than profit or that they derive pleasure from the activity. Here, clearly the Nash's enjoy tree-farming and gain substantial personal enjoyment from it. The statute does not require, as the FDR would no doubt prefer, that profitable business activities be dull and thankless tasks. The Stone case was much more applicable to the FDR's position, Mr. Stone engaged in rodeos and rode for personal recreational enjoyment. The Nash's case, while showing pleasure and enjoyment, simply corresponds with individuals who enjoy what they do and have found a way to earn money doing it.

Based on the foregoing factors, the FDR's order is clearly erroneous in denying the Nash's deductions for business expenses and should be reversed by this court.

2. Under the Internal Revenue Code § 280A and Franklin Tax Court case law, the Nash's are entitled to a deduction for their expenses paid or incurred during each of the taxable years 2011-2015 for the business use of a portion of their home.

The IRC contains a notable exception under § 280A(c) for certain business use, that allows a deduction for a "portion of the dwelling unit which is exclusively used on a regular basis". Under Lynn v. FDR, a portion of a dwelling used thusly is judged under an "all-or-nothing" standard from the earlier case McBride v. FDR. These references to a report in the Code's legislative history which dictates that "exclusive use of a portion of a taxpayer's dwelling unit means that the taxpayer must use a specific part of a dwelling unit solely for the purpose of carrying on his trade or business". And further notes that

dual-use for personal and business purposes does not meet that standard. In the Lynn case, two dwellings were considered. One, which had an area physically separated from the living area of the home, was held to be for business use and subject to the deduction. The other, which was a "computer office room" that had both personal and business use, was not. In the Nash's situation, they have moved all of the bedroom furniture out of the room in question. In its place, they have placed a desk, chairs, a business computer, and a TV tuned to the weather channel (consistent with what a tree-farmer would need to know about weather patterns). The details offered by Mr. Nash in his testimony about the contents and use of the room clearly indicate that this room is the principal place of business of the Nash tree-farming operation, and is separate from the rest of the house. This evidences its business purpose and shows that the FDR's determination that it is not exclusively for business use is clearly erroneous and should be reversed by this court.

ANSWER TO MPT 2

APPELLATE BRIEF

III. Legal Argument

Under the Internal Revenue Code and the Code of Federal Regulations, in order to obtain income tax deductions, the activities must be "for profit." The FDR has denied Mr. and Mrs. Nash full tax deductions for their Christmas Tree Farm because they have determined that it was an activity not engaged for profit, and therefore they could only deduct the income which they had made. The FDR also denied their deductions for the home-office in their residence. The FDR erred on both counts.

A. THE NASH'S CHRISTMAS TREE FARM IS A FOR-PROFIT VENTURE AS OUTLINED IN THE CODE OF FEDERAL REGULATIONS, AND AS SUCH THE NASH'S HAVE A RIGHT TO FULL TAX DEDUCTIONS UNDER THE INTERNAL REVENUE CODE

The CFR and the court in *Stone v. FDR* have laid out a nine factor test, which when balanced make a determination of whether a venture constitute as for profit or as an activity engaged not for profit. 26 CFR § 1.183-2(b)(1)-(9).

1. THE NASH'S CARRY OUT THEIR ACTIVITIES WITH RESPECT TO THE CHRISTMAS TREE FARM IN A BUSINESSLIKE MANNER AS EVIDENCED BY THEIR PURCHASE OF SPECIALIZED EQUIPMENT AND PLANTING OF ADDITIONAL FIELDS.

The fact that a taxpayer is carrying out the activities in a businesslike manner, maintaining complete and accurate records of the books and records is an indication that they are a for profit venture. Here, Mr. Nash has testified that they keep all their books and records in an exclusive home office, further Mr. Nash has shown that they are carrying out their venture in a businesslike manner by changing their operating methods, adopting new techniques, and abandoning previous unprofitable methods. They originated with selling the trees for $15-30 to friends and nearby consumers, and they have changed that entire operation. They have consulted with businessmen in the field of Christmas Tree Farming, as well as purchasing specialized equipment to shape and cut trees, clearing forest areas to plant new trees, and purchasing additional equipment to faster plant and harvest. They have also hired additional employees to help with the venture because it has gotten too big to do it on their own.

2. MR. NASH HAS ENGAGED IN EXTENSIVE BUSINESS STUDY OF CHRISTMAS TREE FARMING THROUGH OBTAINING SPECIALIZED EDUCATION AND CONDUCTING EXTENSIVE RESEARCH THROUGH BOOKS AND OTHER CHRISTMAS TREE FARMERS.

In addition to the changes in the business activity, Mr. Nash has done thorough research and looked to increase his acumen in the business of Christmas Tree Farming. Mr. Nash has taken classes on forest management, read numerous books on raising trees, and met a nearby Christmas tree farmer and spent an entire vacation on that farm. Further, he has kept in touch with that farmer and continued to seek his advice and business activities and carried out all the advice that the farmer has given to him.

In *Stone v. FDR*, the court determined that the individuals in their horse farm were not engaged in the business study because they had no formal educational training, just recreational training. That is not the case here, Mr. Nash purposefully availed himself to education in this specific area as it was venture where he sees a profit and potential for growing and blossoming business.

3. MRS. NASH IS ENGAGED IN THIS VENTURE FULL-TIME WHILE MR. NASH IS ENGAGED IN THIS VENTURE ON WEEKENDS AND ANY FREE TIME OUTSIDE OF HIS FULL TIME JOB AT A LOCAL SCHOOL

The CFR and the courts have stated that whether an individual is solely engaged in the business, and derives no additional income, can show that the taxpayer is engaged in the business for profit. Here, it is correct that Mr. Nash is a full time associate principal at a local school; however Mrs. Nash is working full time within the venture. She retired from her job around the time where the Nash's decided to engage in this venture as a business, at the same time where they changed their entire business plan and modified it in a way where they can expect future profits.

As such, despite Mr. Nash's full time job, Mrs. Nash's full-time devotion to the venture as well as Mr. Nash's weekends and free-time devotion shows they intend this to be a profitable venture. To penalize an individual for having a job and hoping to start a business is not the manner in which the tax code works, this factor is looking for the intent of the parties, and despite Mr. Nash's job, there is a clear intent here to be engaged in a for-profit venture.

In *Stone*, spending 30 to 40 hours per week on the farm yet still having a full time job made this factor neutral, therefore it is likely that despite Mr. Nash's job-it is still clear from Mrs. Nash that this is intended to be a profitable venture.

4. THE NASH'S EXPECT AN APPRECIATION IN VALUE OF ASSETS, PARTICULARLY OF THE ACERAGE WHICH HAS RECENTLY BEEN PLANTED THAT THEY ARE WAITING TO BE READY TO SELL TO THEIR CUSTOMERS

Not only have the Nash's invested in costly equipment (which is the main reason for their lack of profits) which they expect to appreciate, they have also planted many additional acres of trees which they expect will appreciate as they continue to grow and once they are ready to be cut and sold, their income and profits will significantly increase. They have loyal customers, including some commercial customers, who eagerly await these baby trees to be ready to be sold.

5. THE FACT THAT THE NASH'S HAVE NEVER HAD ANOTHER BUSINESS VENTURE BEFORE IS NOT DISPOSITIVE TO WHETHER THEY HAVE A RIGHT TO FULL TAX DEDUCTIONS UNDER THE IRC

As with all factor tests, there is no one factor which can be dispositive. It is true, as stated in Mr. Nash's testimony, that they have never had another business venture before, however that factor in and of itself should not be dispositive in denying their right to full tax deductions.

6. THE NASH'S HAVE EXPERIENCED MAJOR LOSSES OVER THE PAST FIVE YEARS, HOWEVER THEY HAVE DECREASED A SIGNIFICANT AMOUNT AND MR. NASH EXPECTS A PROFIT RETURN SOON

The factor looking at the profits and losses is also not dispositive. While it is true that the Nash's have never taken a profit, they have seen an increase in income. Further, the reason that they have not seen a profit is because 2011 was a bad year, the economy has had a rough time (but it is coming back), and the acreage that they planted is still not ready. Unlike other business ventures, trees take many years to grow so it is not unexpected that the first few years of this venture are not profitable. However, the Nash's

have been conducting this venture like a business and are holding themselves out as business people.

The Nash's are easily differentiated from the case of *Stone v. FDR*, where the Stone family experienced major losses and the only income they ever experienced was $4,000 for the sale of a horse. They never had any other income. Here, the Nash's experience yearly income which has steadily increased, including a $1,500 increase both from 2013 to 2014, and from 2014 to 2015. It is clear that they are making more and more money and they can expect future profits.

A taxpayer should not be penalized on their business venture just because they have not recognized substantial profits which exceed their losses. It is clear here that the Nash's are working hard to make money and intend to be profitable in their venture.

7. THE NASH'S HAVE EXPERIENCED INCOME, HOWEVER IT HAS GONE TO RECOVER FROM THEIR LOSSES IN THE PURCHASE OF SPECIALIZED EQUIPMENT TO MAINTAIN THE FARM

Mr. Nash has stated that the reason they are not experiencing profits is because they have to pay their debts from the purchase of equipment, including the specialized equipment, and maintenance on the farm. They also have to pay the newly hired workers that they are paying salaries to in order to maintain the farm. There has been income, and as earlier stated, there has been a steady increase in income, but they are backlogged with a previous expense that was necessary to change this venture into a for profit minded venture.

Unlike in *Stone*, where they argued they had purchased expensive race-horse seamen, here the Nash's have made quality investments in their business venture, which can be seen by the steady increase in profits.

8. THE FACT THAT MR. AND MRS. NASH DERIVE INCOME FROM MR. NASH'S FULL TIME JOB AND MRS. NASH'S PENSION IS NOT DISPOSITIVE OF WHETHER THEY HAVE A RIGHT TO FULL TAX DEDUCTIONS

Like factor 5 and in accordance with the arguments in factor 3, while Mr. Nash works full time and they experience additional income, it is clear that they intend this to be the main portion of their lives. The income coming in from
Mr. Nash's full time job and Mrs. Nash's pension should not penalize them, it should not be wrong for them to have money to live on while they are working to get their business venture off the ground.

It is true that neither Mr. nor Mrs. Nash currently take a salary, and while that may be equated as the same as in *Stone*, it is very different. It has only been five years, and

2011 as conceded by Mr. Nash was a very bad year for the venture. In *Stone*, they never took a salary for 20 years. That is four times as long. They are not equivalent at all. For the Nash's to take a profit would harm the venture and it is clear that they hope for it to continue growing and to be profitable in the future.

9. WHILE MR. NASH HAS STATED HE ENJOYS CHRISTMAS TREE FARMING, THE NASH'S SET OUT IN THIS VENTURE WITH THE INTENT TO MAKE MONEY, IT WAS NOT A PRE-EXISTING RECREATIONAL ACTIVITY

In *Stone*, the court looked to the fact that Mr. Stone had been riding horses since he was a child, and the fact that the Stones only went to rodeo and show events, and did not have a plan which looked like anything more than a hobby to them. The fact that Mr. Nash stated that he enjoys tree farming and is fascinated by it does not show that this is a hobby. Mr. Nash specifically stated that he and his wife saw the potential and that is when he became interested in it, by taking classes and reading books with the very intent to run this business. Mr. Nash's activities clearly show an intent for this venture to be profitable, and as such it is not a hobby or recreational. It is not dis-allowed to enjoy something you are doing while you are doing it for profit, the IRC does not require misery to equate with profit, Mr. Nash can enjoy his work in a for profit venture, which this is.

As such, the Nash's should be deemed to be a for-profit venture, and are therefore entitled to full tax deductions. The factors (1) (2) (3) (4) (6) (7) and (9) show a clear intent to exist for profit. The CFR lays this out as a balancing test, and that is what it is. The factors in favor of the Nash’s being engaged in a for profit venture far outweigh the 5th and 8th factors that look to the fact that Mr. Nash has a job and Mrs. Nash has a pension, it is clear that the Nash's have an intent to retain a profit, but unfortunately have yet to

B. THE NASH'S HAVE A RIGHT TO TAX DEDUCTIONS FOR THE HOME-OFFICE IN THEIR RESIDENCE AS IT IS USED SOLELY AS A PRINCIPAL PLACE OF BUSINESS FOR THEIR CHRISTMAS TREE FARM AS EVIDENCED BY A PHYSICAL CONVERSION FROM RESIDENCE TO HOME-OFFICE

The Internal Revenue Code and Code of Federal Regulations state that generally, there is no allowed deduction with respect to a personal residence of a taxpayer. However, there is an exception for expenses allocated to a portion of that residence which is used exclusively and on a regular basis as the principal place of business for any trade or business of the taxpayer. This exception is outlined in the case of *Lynn v. Franklin Department of Revenue*, where the case looks to legislative history and the case of *McBride v. FDR* to lay out the "exclusive use" requirement and test. It states that the

portion being claimed for a tax deduction must be used solely for the purpose of carrying on the trade or business. In *Lynn v. FDR*, the court determined that the first residence, where the plaintiff made (1) a physical separation from living areas; and (2) a physical conversion from residence to office; and (3) had a separate entrance constituted as an exclusive use under the test and therefore was allowed to gain the full tax deductions under the exception. However, in that same case, the court determined that a room in his apartment was not an exclusive use because the plaintiff failed to offer details about what is in the "exclusive" area and how the room was used. Further, the court said that the presence of a television coupled with the lack of testimony about the business use, as well as the conclusion that the computer was likely used for both personal and business purposes constituted it as not-exclusive and therefore did not obtain the full tax deductions.

Here, Mr. Nash has testified that they have a room which they physically converted from a bedroom (before forming this business venture) into a home-office. They took out the bed and have a desk and two chairs in the office, as well as a television which is used to watch the weather channel for business purposes of growing trees. Additionally, Mr. Nash testified that they keep records, catalogues, and books that they consult in the room and that the computer in the office is for business use, and nothing else. He affirmatively stated in his testimony that nothing happens there but business.

As such, based on Mr. Nash's testimony and the fact that there was physical conversion (which the court in *Lynn* stated is a factor in identifying an exclusive use) the home-office fulfills the exclusive use test and therefore the Nash's should be able to obtain tax deductions for their home office under the exception.