

VIRGINIA BOARD OF BAR EXAMINERS
Norfolk, Virginia - February 25, 1997

Answer Questions 1 and 2 in Answer Booklet A

1. In 1970, John and Mary were married in Giles County, Virginia. They lived there together until June 1996, at which time they separated because of irreconcilable differences. John then moved to Union, West Virginia, where he was employed.

Mary filed a bill of complaint for divorce in the Circuit Court of Giles County, Virginia, charging John with adultery. A subpoena in chancery and the bill of complaint were served personally on John in Giles County during a visit there in September 1996. John did not employ counsel, nor did he make an appearance in the suit.

In January 1997, without notice to John, Mary's attorney took depositions which were subsequently presented to the Circuit Court judge. Based on the information contained in the depositions, the judge entered a final decree granting Mary an uncontested divorce and awarding her spousal support in the amount of \$600 per month.

Upon learning that a final decree had been entered, John employs counsel, who appeals the case, citing as error Mary's failure to serve John with notice of the taking of the depositions. Mary, by counsel, concedes that notice was not given and asserts that notice was not required under these circumstances.

- (a) Which Court has jurisdiction to hear John's appeal? Explain fully.
- (b) How should the Court rule on the assignment of error in John's appeal? Explain fully.
- (c) Should the Court's ruling be any different if John had been personally served with process in Union, West Virginia, and had still failed to employ counsel, to appear in the suit or to file responsive pleadings? Explain fully.

* * * * *

2. Oscar owns a sporting goods store in Lynchburg, Virginia, as a sole proprietor. He specializes in the sale of skiing equipment. One of his sales techniques is to put his own label on as many items as possible. Typically, his "store label" items bear the name of the store and a logo that his wife, a commercial artist, designed for him.

In May 1993, Oscar met Sid, a salesman for the Slick Ski Company ("Slick"), at an industry convention, and they hit it off very well. The result of their meeting was an oral contract which was sealed with a handshake. The only terms Oscar and Sid discussed were:

that Slick would manufacture skis for Oscar's store; that the initial price would be \$200 per pair, with annual price adjustments based on the increase or decrease in the Consumer Price Index; that the skis would be furnished in a variety of standard sizes and designs; that each pair of skis would be imprinted with Oscar's store label and logo; that the quality of the skis would be the same as that of Dynaflex, an internationally known brand; and that Slick would ship to Oscar 50 pairs of skis a year no later than July 1 of each year. In due course, Oscar sent Slick a sample of his store label and logo.

There is no writing that specifically refers to the agreement. Subsequently, however, each of the shipments was accompanied by Slick's shipping documents and invoices which contained the price and quantity terms agreed to between Oscar and Sid.

The skis were shipped at varying times between the end of July and the end of August in each of the succeeding years and were accepted without objection by Oscar. In the past two years, however, 20 pairs of the skis have been returned to Oscar because they have broken during apparently normal use by his customers. Oscar has absorbed the losses without complaint to Slick, but he has become increasingly concerned about the breakage.

On August 15, 1996, having not yet received the 1996 shipment, Oscar called Slick's sales manager by telephone and told him that he (Oscar) considered the contract terminated and he would accept no further shipments. The sales manager responded that it was too late to cancel, and he told Oscar truthfully that all 50 pairs of the 1996 skis had already been imprinted with Oscar's logo, that 25 pairs had been completed and shipped that very morning, and that Slick was putting the finishing touches on the remaining 25 pairs for shipment within the next few days. Oscar repeated that he would not accept any further shipments and hung up.

You are asked to advise Slick on the following questions:

- (a) If Slick sues Oscar for damages for Oscar's refusal to accept the 1996 shipment, what defenses, if any, might Oscar reasonably assert and, as to each defense, is he likely to succeed? Explain fully.
- (b) Assume that Oscar's repudiation constituted an immediate breach of an enforceable contract. What seller's remedies are available to Slick under the Uniform Commercial Code? Explain fully.

* * * * *

Answer Questions 3 and 4 in Answer Booklet B

3. Desirous of cashing in on the American public's preoccupation with dieting and weight loss, Suzy Jones quit her job as a real estate sales agent, which she had held since college, and started her own business, "Suzy's Weight Loss Center," in the City of Manassas, Virginia on January 1, 1993. Although Suzy had earned a decent income as a

real estate agent, she had saved none of it - preferring instead to buy fancy clothes, eat in pricy restaurants, lease expensive foreign automobiles, and take exotic vacations. Suzy sought "financial backing" for her new diet and weight loss venture from her parents, Fred and Ethyl, who had retired to Florida from a very successful real estate development business in the Manassas area shortly after Suzy's graduation from college in 1988.

Fred and Ethyl readily agreed to "back" Suzy's new venture, seeing this as a means of both helping their daughter and possibly obtaining some tax benefits for themselves. Suzy and her parents decided that rather than incur the expense of forming a new corporation, the weight loss business could utilize Fred's former, but now dormant, real estate development corporation, Jones Development Ltd. ("JDL"). JDL had been incorporated as a Virginia stock corporation in 1958 and had elected S corporation tax status in the early 1980's. Fred and Ethyl had been the only directors and officers of JDL since its incorporation. Following his retirement, Fred had kept JDL "alive" for sentimental reasons, by continuing to pay from his own personal checking account the annual Virginia corporate registration and franchise tax and the accountant's fees necessary to prepare the required Federal and state corporate tax returns. JDL had ceased all operations as of December 31, 1988, and since then had no assets and no income from any source.

All of the 1,000 outstanding shares of common stock of JDL had been owned by Fred and Ethyl, as joint tenants with right of survivorship, since 1958. In order to inaugurate Suzy's new venture, Fred and Ethyl decided to transfer 100 shares of their holdings to Suzy, and they also loaned JDL \$25,000, which loan was evidenced by an unsecured, demand promissory note with an interest rate of 14%. Suzy and her parents agreed that she would be the president and sole director of JDL, and that Suzy's boyfriend, Fritz, would be secretary/treasurer. JDL had no other officers, and its only full-time employees were Suzy and Fritz, who himself had studied nutrition before dropping out of college. JDL hired a number of high school students to work on a part-time basis, as needed.

Suzy and Fritz deposited the \$25,000 loan proceeds in a money market checking account in the name of JDL at Manassas National Bank (the "Bank") on January 2, 1993. As part of the paperwork for the new account, Suzy signed a board of directors resolution on a form provided by the Bank, authorizing the opening of the account and authorizing any one of the officers of JDL to sign checks drawn on the account. Suzy and Fritz then executed the Bank's customary signature cards for a business checking account as JDL's president and secretary/treasurer, respectively.

Although Fred and Ethyl both signed an assignment separate from stock certificate to transfer the 100 shares to Suzy, they were unable to locate their original stock certificate itself. After some bickering between themselves as to who had mislaid the original certificate, no further effort was made to document the stock transfer. Beginning in 1993, each annual report to the State Corporation Commission for JDL listed Suzy as the sole director and president, and Fritz as secretary/treasurer. Other than the Bank's form, there were no shareholders' or directors' minutes or consents reflecting the changes in the board of directors or the appointment of Suzy and Fritz as officers of JDL or any other matter in connection with the diet and weight loss business. JDL properly registered the fictitious

name "Suzy's Weight Loss Center" and made its tax filings, as required by law.

Solely because of the prominence of the JDL name, Suzy was able to lease a prime store location in the premier shopping center in Manassas, Battlefield Mall, without providing any information about JDL's finances or her experience in the diet and weight loss business. Nor did Battlefield Mall require any personal guarantees of JDL's performance of its lease obligations. The agreed-upon rent for the Battlefield Mall store was \$5,000 per month with an additional charge of 3% of gross sales, plus a proportionate fee for real estate taxes and common area charges. Suzy's Weight Loss Center at Battlefield Mall opened to the public for business on February 1, 1993.

Business was slow during the first two years of operation, with JDL sustaining annual losses of \$50,000 and \$40,000 in the first and second years. Fred and Ethyl, as majority shareholders, took a deduction for business losses on their own personal income tax returns of \$45,000 and \$36,000 in those years. To keep JDL going, Fred and Ethyl loaned JDL an additional \$100,000 during that period of time, which amount was evidenced by a series of promissory notes executed on the same terms as the original note. In order to save money, Fritz decided not to pay any insurance premiums for JDL, including those due for its general liability policy, and JDL thus became "self-insured" from that point forward.

During the third year of the Center's operation, Fritz concocted the idea of JDL manufacturing its own dietary supplements and selling them in the store under the name, Energy Plus, along with the advertising slogan: "Drink 2 a day for a month and feel twice as good." Energy Plus was touted as providing an energy boost and, incredibly, as slowing the aging process. The Energy Plus drinks were a huge success, and JDL's business boomed.

Fritz decided that rather than pay premiums for product liability insurance, as had been recommended to him by JDL's accountant, the new found profits would be better spent on curtailing the indebtedness to Fred and Ethyl and increasing the officers' salaries. JDL leased additional store locations at two shopping centers in nearby Fairfax County without even being required to furnish its financial statements to the leasing agents. The rental terms for the two new Center stores were substantially similar to those contained in the Battlefield Mall lease. By February of 1996, JDL had repaid all but \$11,000 of the monies loaned to it by Fred and Ethyl.

In July of 1996, Nutrition Monthly magazine published an article which was highly critical of Energy Plus, describing the product at one point as "nothing more than colored sugar water with a touch of tabasco sauce." Sales plummeted, and consumers began to picket all of Suzy's Weight Loss Center stores. To compound its troubles, JDL was sued not only by its landlords for nonpayment of rent but also for millions of dollars by five customers who claimed that their consumption of Energy Plus caused each of them to develop stomach ulcers and other digestive problems. After withdrawing all funds from his personal account, Fritz abruptly left town and his whereabouts are unknown.

While Fred and Ethyl agree that they would like to strangle "that idiot Fritz," they

love Suzy and do not want to take any action against her.

Fred and Ethyl have retained you as their attorney and have asked your advice on the following questions:

- a. On what legal theory, if any, can Fred and Ethyl be held personally liable to the plaintiffs in each of the pending lawsuits? Explain fully.
- b. Are there any measures Fred and Ethyl can take under the Virginia Stock Corporation Act to avoid potential personal liability to the plaintiffs in the pending lawsuits? Explain fully.

Do not discuss bankruptcy law.

* * * * *

4. Al Jones owns numerous rental units in the city of Norfolk, Virginia. His overall occupancy rate is 95%. Since 1985, he has owned a 20-unit apartment building, known as the Pretlow Apartments, which accounts for most of his vacancies.

He attributes the problems at the Pretlow Apartments to conditions at Dana Village, an adjacent apartment complex owned by John Smith. Since January 1990, when Smith purchased and began operating Dana Village, the area has increasingly become crime-infested because of the drug dealers who regularly conduct their transactions at Dana Village. Gunfire is often heard at Dana Village, and stray bullets frequently shatter windows in the Pretlow Apartments. Jones has repeatedly had to evict drug using tenants of Dana Village from vacant units at the Pretlow Apartments and pay to repair the damage they have caused.

In February 1997, Jones sues Smith in the Circuit Court for the City of Norfolk. The suit seeks both equitable and monetary relief.

In addition to the facts stated above, Jones' complaint alleges that Smith is maintaining a nuisance at Dana Village; that before Smith became the owner and operator of Dana Village the turnover and vacancy rates at the Pretlow Apartments were less than 1% a year; that, between mid-1990 and the present, the turnover rate among Jones' tenants at the Pretlow Apartments has ranged between 75% and 90% each year and the vacancy rate has been 50% year-round; that vandalism, which began in mid-1990, has increased to the point where every vacant apartment is subject to trespass and damage by the criminal elements who frequent Dana Village; and that the nuisance being maintained at Dana Village is the cause of the turnover and vacancy rates and vandalism at the Pretlow Apartments.

Jones' prayer for an injunction, which contains detailed specifications, would essentially require Smith, prospectively, to take all steps necessary to abate and prevent the recurrence of the nuisance. Jones also prays for money damages, consisting of the cost of repairs to the apartments vandalized and lost rentals from mid-1990 to the time of entry of judgment.

In response, Smith files a special plea in bar seeking to dismiss the suit on grounds that Jones has no standing, that the Court has no jurisdiction, and that Jones' claims are barred by laches and the applicable statute of limitations.

The Circuit Judge assigned to the case asks you, as her clerk, to draft a memorandum addressing the following questions:

- (a) Does Jones have standing to maintain this suit?
- (b) If so, does the Court have jurisdiction in equity to decide the suit and grant the relief sought?
- (c) Are Jones' claims, or any part of them, barred by laches or a statute of limitations?

Draft such a memorandum explaining fully the reasons for your conclusions.

* * * * *

Proceed to questions in Booklet C