Student Number ______

University of Illinois College of Law
Examination Cover Sheet

Business Associations I
Professor Amitai Aviram
Spring Semester 2007: May 3/11, 2007
Number of Pages: 8 (including this page)
Time Allotted: 4 hours

Exam Instructions

1. **Permissible material**: This is an open book exam. You may use any materials you want, whether in hardcopy or electronic format.
2. **Anonymity**: The exams are graded anonymously. Do not put your name or anything else that may identify you (except for your student number) on the exam.
3. **Legibility**: If you handwrite your exam, please write legibly. I will do my best to read your handwriting, but will have to disregard (and not give you points for) writing that is too small to read or otherwise illegible.
4. **Confidentiality**:
    a. Once you receive this exam form, you are not allowed to discuss the exam with anyone until after the final day of the exam period for this semester (which may be later than the day of the exam).
    b. Students who are enrolled in this course are not allowed to solicit or receive information on the exam if the source of this information (directly or indirectly) is a person who has seen the exam.
    c. After the last day of the exam period for this semester, you are allowed to freely discuss the exam.
5. **Writing the exam**
    a. Cite relevant case and statutory authority.
    b. Within the constraints of the length limit, answer all relevant issues that arise from the fact pattern, even if your conclusion on one of the issues is dispositive to other issues.
    c. If you think a question cannot be answered without additional facts, state clearly what facts you believe to be necessary to answer the question.
6. **Applicable law**
    a. If a question specifies the applicable law, then assume that the relevant jurisdiction applies that law.
    b. If a fact pattern specifies the applicable law (and the specific question does not specify applicable law), then assume that the relevant jurisdiction applies that law.
    c. If neither the question nor the fact pattern specified the applicable law, then apply the law we addressed in the course. If the issue was addressed differently in different jurisdictions, then state the rule, application and result in each jurisdiction we addressed.

7. **Length limit**: The total length of your answers is limited as follows:
   a. If you type the exam on a computer, it should not exceed 1,600 words. If you handwrite your exam, it should not exceed 160 lines. These limits are for the entire exam, not for each question.
   b. **For every 10 words (typed exams) / 1 line (handwritten exams) in excess of the length limit (rounded up), one point will be taken off the exam's raw score**.
   c. If you type your exam, please write at the end of it the word count (e.g., "Word Count: 1,519 words"). If you handwrite your exam, please do a similar line count. The words/line used in reporting the word/line count are not calculated in the word/line count itself. **Failure to follow this sub-section will result in a reduction of one point from the raw score**.
8. **Choice**: The exam contains three questions. Answer any two of them. I will grade only the two questions you answered first.
9. **"Fact" patterns are fiction**: The "facts" presented in the exam were constructed for an educational purpose, and were not intended to refer to or inform about any real person or event.

<u>**Good Luck!**</u>

Essay Fact pattern (answer TWO of the three questions)

Volunteer: Ann is a retired professor of Serbian history and a frequent patron of the Sleepyville Public Library ("SPL"), a non-profit corporation (for the purposes of this exam, assume that SPL is governed by the same rules as a regular corporation). With plenty of time on her hands and having heard that SPL is about to hold a used book sale, she offered to volunteer (without being compensated, of course) to help with the book sale. Patrick, an SPL employee who was in charge of organizing the book sale, gladly accepted her offer and gave her the following instructions:

"The book sale's purposes are to raise money for the library and to get rid of books we don't need so that they don't take up storage space. Throughout the year, many people donate books to the library. Our librarians review the books and add some to our collection. Those books that the library decides it does not need are offered at the book sale for $1 a book. As an exception to this rule, a few books that are very valuable are sold for a higher price. Volunteers should use their best judgment as to which books should be sold at a higher price, and should determine the appropriate price for each such book. I recommend that you price these books well below market price to make sure that the public buys them and we don't get stuck having to keep them. Finally, at the end of the day our volunteers can receive for free any books that were not sold."

Prior to the book sale, Ann and other volunteers looked at the books and picked a few (about 1% of all books offered in the sale) that they decided should be sold for more than $1. The prices requested for these books varied from $2 to $15, with most selling under $5. The books were priced well below their market value, so that the library could get rid of them.

Pricing Serbia's History: During the sale Tom, a local resident and Serbian history aficionado who attended the book sale spotted an rare, antique book called "The History of Serbia" ("Book 1"). The book was placed in the high priced book pile, but did not have the price stated on it (either the volunteer who put it there forgot to price it or the price tag fell off of it). Tom took the book to the cashier, who happened to be Ann, and explained the situation to her. He asked how much the book would cost, understanding that it would be more than $1, but hoping that it would be under $5, like most of the books in that pile.

Ann, who did not see the book before, wanted it very much for herself. Being an expert in Serbian history and often buying books in this field, she knew this book would sell for $50 in a used book store or on the internet. She therefore told Tom that the price was $50. Tom was shocked to hear a price that was more than three times higher than the next most expensive book at the sale (and fifty times more expensive than 99% of the books). He decided not to buy the book. Ann quickly purchased the book for herself, paying the library $50 for it.

<u>A Book Takes a Tumble</u>: A few minutes later Ann was relieved from her position as cashier so that she could take a break and rest. Worried that she might have missed another exceptional book, she spent her break looking at the available books. To her joy she spotted another book on Serbian history ("Book 2"). She pushed the book off of the edge of the table, so that it fell under the table and out of sight. After the sale ended, Patrick told the volunteers that they can take any books that remained for free. Ann picked Book 2 from under the table, and took it (as well as Book 1 which she purchased earlier).

Excited about acquiring two great books, Ann told a friend how she acquired the books, and that friend told Patrick and Tom. Tom sued Ann, claiming that her decision to price the book at $50 was self-interested and therefore breached her fiduciary duties. As a remedy, he demands that Book 1 be given to him and says that he is willing to pay the library $15 for it – the highest price charged for a book (other than Book 1) at the sale.

SPL also sued Ann, claiming that she breached her fiduciary duties and demanding that she return both Book 1 and Book 2 to them.

I. **Discuss both Tom's suit and SPL's suit**.

<u>A Taste of Croatia – Denied</u>: While Tom's passion is Serbian history, his day job is managing Food for Thought, Inc. ("FfT"), a Delaware corporation that owns several restaurants. Tom is CEO of FfT and one of its five directors, but does not own any FfT shares (nor do any of FfT's other directors). FfT has 1,000,000 shares outstanding.

All of FfT's restaurants are profitable, but its restaurant in Chicago is its crown jewel. The restaurant, which is called Dubrovnik on Lake Michigan ("DoLM") is considered the best Croatian restaurant in America, and many fans of Croatian cuisine travel to Chicago just to dine there. DoLM is not a separate entity; just a trade name.

Tom was contacted by Chelsea, the CEO of Croatian-American Brands, Inc. ("CAB"), a corporation governed by the MBCA, who offered to buy DoLM for $2 million. Chelsea explained that DoLM is very attractive for CAB, because CAB seeks a dominant presence in the Croatian restaurant business to complement its other activities.

Tom said that he does not want to separate DoLM from the rest of FfT, and suggested that CAB buy all of FfT. Chelsea declined, saying that the rest of FfT's restaurants are unrelated to CAB's business and therefore unattractive to acquire. Also, she said, CAB does not have the money to buy all of FfT. The meeting concluded without agreement.

<u>Friends and Foes Bid for FfT</u>: That evening, Tom met with his friend Miranda, a wealthy businesswoman. When he told Miranda about his meeting with Chelsea, Miranda became intrigued with the possibility of buying FfT. The following day, after doing some research about FfT, she called Tom to tell him that she decided to offer FfT's shareholders $5 a share ($5 million for all of the shares of FfT). Tom asked her whether

she had plans to replace FfT's management team, and Miranda responded that the management has done a spectacular job and that she would not want to replace any of FfT's directors or senior officers. Miranda then asked Tom for a list of FfT's shareholders and their contact information, and called them to offer to buy their shares.

When Chelsea heard of Miranda's bid for FfT, she was furious. However, CAB did not have enough money to outbid Miranda, and didn't want the other restaurants. Chelsea met with Vic, the CEO of Unfocused Enterprises, Inc. ("UEI"), a corporation governed by the MBCA that invests in various unrelated businesses and that currently had some spare cash to invest. UEI already owned 10,000 FfT shares (1% of the company). Chelsea suggested that CAB and UEI bid together for FfT, and then break it up: CAB will receive DoLM, and UEI will receive all the other restaurants.

Initially, Vic was not excited about acquiring FfT's restaurants. However, he changed his mind when Chelsea sweetened the deal by offering him, in addition to those restaurants, shares in CAB. Vic thought CAB was an excellent company, and the opportunity to invest in it enticed him to accept Chelsea's plan. They agreed that they would jointly bid for FfT, offering CAB and UEI shares (rather than cash) in return for FfT shares. They agreed to offer one CAB share (worth $1.05) and one UEI share (worth $4) for each share of FfT. The total value received per FfT share, at current CAB and UEI share prices, will therefore be $5.05, higher than Miranda's offer.

Chelsea and Vic also agreed that after acquiring FfT they would break it up so that CAB would own DoLM, while UEI would own the rest of the restaurants. Finally, to balance what each company is paying with what each company will receive after the breakup, CAB will issue 500,000 CAB shares to UEI.

Chelsea then called Tom to tell him about their bid for FfT. "You should have accepted my offer to buy DoLM," she told him gleefully. "Now we will break up FfT and you and the rest of your management team will lose your job." She then asked Tom for a list of FfT's shareholders and contact information, reminding Tom that he had a fiduciary duty to facilitate her communication with FfT's shareholders so that they would get the best offer for their shares. Tom immediately complied and gave Chelsea the requested information (the same information he earlier gave Miranda).

A Taste of Croatia Denied – Again: Two days later, before either Miranda or Chelsea reached any agreements to purchase FfT's shares, Tom signed a deal (subject to the approval of FfT's BoD) to sell DoLM to Nuno (a wealthy investor) for $2.1 million. Tom presented the deal to FfT's board of directors, together with a written report from an independent appraiser that analyzed the value of DoLM and concluded that $2.1 million was an adequate price. Only three of FfT's directors (including Tom) were able to attend the BoD meeting. After reading the appraiser's report, deliberating and considering alternatives, the three directors voted unanimously to approve the deal.

Tom then convened a shareholders' meeting and requested shareholder approval of the sale. Vic appeared at the meeting and protested vehemently, explaining that this deal

thwarts his bid for FfT. Tom pointed out that the price received for DoLM is higher by $100,000 than Chelsea's offer, so the sale makes sense on its merits. He warned that Vic's threat to withdraw the bid for FfT may be a bluff. Finally, he told the shareholders that Chelsea told him she intends to break up FfT after acquiring it, and intends to fire the current management team, "which is responsible for FfT's superb performance in the past decade. Instead, your investment will be at the mercy of the mediocre management at CAB and UEI and the unpredictable fluctuation in the value of their shares" (in Tom's words). Therefore, he said, even if the sale of DoLM would result in losing the bid for FfT, this would not be bad for the shareholders. The shareholders voted (with the required quorum present). Shareholders holding 85% of the present shares approved the sale; 15% voted against it.

<u>Seller's Remorse</u>: Without DoLM, Chelsea had no reason to acquire FfT, and without Chelsea's participation (and the CAB shares she offered to UEI) UEI had no interest in FfT either. UEI and CAB withdrew their offer to acquire FfT. Meanwhile, CAB's share price increased to $1.20.

The withdrawal of the UEI/CAB offer and the rise in the value of CAB shares (and therefore the value of the UEI/CAB offer) upset some FfT shareholders. In the hope of attracting UEI and CAB to bid again for FfT, another shareholder meeting was convened. Shareholders voted on a resolution retracting the approval given in the previous shareholder meeting for the sale of DoLM, and declaring that if the contract is binding on FfT, then FfT is hereby breaching it and refusing to sell DoLM (even if this means that it is liable to Nuno for damages). The shareholders voted (again, the required quorum was present), and narrowly approved the resolution with 55% in favor, 45% against. FfT's BoD met to discuss the shareholder resolution and decided to ignore it.

UEI sued FfT and Nuno for a declaratory judgment that DoLM was not sold to Nuno because shareholders retracted their authorization and ratification of the sale, and in the alternative that DoLM was not sold to Nuno because FfT breached the contract by the action of the shareholders.

Donna, an FfT shareholder, sued Tom derivatively, on behalf of FfT, for breach of Tom's duty of loyalty in selling DoLM to Nuno [Assume that the suit was appropriately derivative and do not discuss this issue]. Donna claims that Tom sold DoLM to Nuno to thwart the CAB/UEI bid for FfT, because he knew that he would lose his job if that bid succeeded, but would keep his job if Miranda acquired FfT. According to Donna, CAB/UEI's bid was superior to Miranda's offer, and may have induced Miranda to raise her bid if it were not retracted. Donna does not claim that the price Nuno paid for DoLM was unfair.

II. **Discuss UEI's and Donna's suits**.

Now, a Turkish Restaurant: While CAB and UEI waited for the outcome of the lawsuits against FfT, Vic suggested to Chelsea that they join forces to open a Turkish restaurant called “The Near East”. Chelsea was initially reluctant to participate because she was concerned that CAB’s involvement in Turkish cuisine will dilute CAB’s brand in Croatian cuisine. Vic assured her that CAB’s involvement in The Near East will be kept confidential.

Vic prepared bylaws for The Near East, Inc. (“TNE”), which created a board of directors that will manage all of TNE’s affairs except for modifying the bylaws, approving mergers and issuing new shares, which would be decided by the shareholders. According to the bylaws, shareholders will annually meet to elect the directors. The bylaws also state that TNE will have a single class of shares with equal control and economic rights. Vic also prepared articles of incorporation for TNE, which among other things stated that the number of authorized shares in TNE is two. However, Chelsea, who was concerned about any evidence that would tie CAB to the Turkish restaurant, did not want to have any public filing for TNE. Vic agreed and they tore up the articles of incorporation and did not file them. Instead, they added to the bylaws a section that stated that the number of authorized shares in TNE is two.

Finally, an organizational meeting was held in which Chelsea and Byron (one of UEI’s directors) were appointed as directors of TNE. TNE then issued two shares, one to CAB and one to UEI. Vic was not a director, officer or otherwise an employee of TNE.

Origins of Baklava: Initially, TNE purchased Baklava (a sweet pastry popular in Turkey and the Middle East) from a Greek corporation called Taste of Greece (“ToG”). A few months after TNE started to operate, ToG’s owner was interviewed in the New York Times and said that Baklava was first created by the Greeks, a claim that infuriated some aficionados of Turkish cuisine.

TNE’s board of directors was concerned that some of TNE’s patrons might boycott TNE if they discovered that its Baklava came from ToG. They voted unanimously not to order any more Baklava from ToG.

Vic Strikes a Deal: The Baklava they purchased from other suppliers, however, was more expensive. Vic, who was cost-conscious and thought a boycott of ToG Baklava was unlikely, approached ToG and identified himself as the CEO of UEI, a 50% owner of TNE. To prove his identity he presented to ToG his share certificate in TNE, and a copy of TNE’s bylaws (redacting any mention of CAB so that it was clear that there is another entity owning the other TNE share, but it was impossible to tell who the other shareholder was). Vic highlighted the section that said that TNE had two authorized shares. ToG wanted to confirm the number of authorized shares by examining TNE’s articles of incorporation. Vic explained to them that articles of incorporation were not filed.

Vic then negotiated with ToG, leveraging the perceived insult to Baklava's Turkish origins into a 20% discount on ToG's previous prices. Happy about the low prices he secured, he signed a contract to purchase $100,000 worth of Baklava, signing "Vic, CEO of UEI, on behalf of TNE". The contract itself specified only two parties: TNE (the buyers) and ToG (the sellers).

Thanks for Nothing: When ToG delivered the Baklava and demanded payment from TNE, Chelsea and Byron (who knew nothing of this agreement) were outraged. They refused to pay ToG and claimed that TNE is not bound by the agreement. ToG sued TNE, claiming that TNE was bound by the agreement.

III. **Discuss ToG's suit**. Assume that the governing corporate law is the MBCA.

Business Associations – Spring 2007
Memo on the Exam

Grades:

	Average	Median	Lowest	Highest
Entire Exam	44.02	45.5	22	83
Question 1	19.25	18.5	8	38
Question 2	26.88	28	10	43
Question 3	22.04	23	9	40

Below is an example of what would constitute an excellent exam. This is only an example, not the example; i.e., some students received credit for very different, but well explained and correct responses.

I. **Discuss both Tom's suit and SPL's suit**.

1. Tom's suit

(a) Tom's suit alleges self-interest, which could be a breach of fiduciary duties. However, as SPL's agent Ann owes fiduciary duties to SPL, not to Tom. Ann would owe Tom fiduciary duties for pricing Book 1 only if she was Tom's agent in this transaction.
  (i) Ann was not Tom's agent, under the 3-part rule in Restatement §1.01. She was not acting on Tom's behalf in selling him the book, and was not subject to his control.
  (ii) Tom is a third party, not a principal. According to Rest. §7.02. agent's breach of a fiduciary duty is not an independent basis for tort liability to a third party. Tom's suit will be dismissed.

2. SPL's suit

(a) Ann is SPL's (sub-)agent (Restatement §3.15). She was to sell books on behalf of SPL, and subject to SPL's control (Patrick's instructions), and consented to this (Restatement §1.01). Being a gratuitous agent does not absolve Ann from her duties.

(b) Did Ann's **pricing** of Book 1 violate her fiduciary duties?
  (i) Non-fiduciary duties: Ann was authorized by Patrick to price some books above $1, and to determine the price of the book according to her discretion. Patrick recommended, but did not require, that the books would be priced below market value. Ann did not violate her duty to act within actual authority and comply with principal's lawful instructions (Restatement §8.09). If Ann's behavior will harm the library's reputation and reduce future public participation in book sales, Ann may have violated her duty of good conduct (Restatement §8.10), but this seems unlikely in this case.

(ii) Fiduciary Duties: Even if Ann was authorized to set a book's price to $50, she would violate her Duty of Loyalty if she set the price in a way that was not for the benefit of SPL (Restatement §8.01) or if she derived a material benefit out of her agency in pricing the book (Restatement §8.02).

Pricing the book at market value enhances one goal of the book sale (raising more money for SPL) without compromising the other goal (having the book sold so it doesn't take up space, since she knew the book would be purchased at this price). Therefore, the mere pricing of the book at $50 (without Ann's subsequent purchase) did not violate §8.01 (since it was in SPL's benefit), or §8.02 (since at that point Ann did not receive a benefit). However, the combination of the pricing and the subsequent purchase did violate her duties (see (c) below).

(c) Did Ann's **<u>purchase</u>** of Book 1 violate her fiduciary duties?

(i) An agent may not deal with his principal as an adverse party in a transaction connected with her agency without the principal's knowledge (Restatement §8.03). Since only Ann purchased Book 1 from SPL without letting SPL know about it, she breached her fiduciary duties.

(ii) Ann probably did not violate §8.01 (because the pricing and purchase benefited both goals of the library book sale (see (b)(ii) above), nor §8.02, since buying the book at market price is likely not a benefit (though her purchasing the book rather than looking for it online suggests the book may not be immediately available, in which case she did receive a benefit and violated §8.02).

(iii) The sale may be rescinded by SPL because it was made in violation of Ann's DoL to them. Ann must return Book 1 to SPL.

(d) Book 2

(i) **<u>Hiding</u>** the book: Ann's action of hiding Book 2 was aimed for Ann's benefit and not for SPL's (who may have sold the book if it were not hidden). Thus her hiding of the book violates Restatement §8.01.

(ii) **<u>Acquiring</u>** the book: Ann's subsequent acquisition of Book 2 is a material benefit to Ann derived "in connection with… the agent's use of the agent's position", potentially violating §8.02. In addition, by acquiring the book (even for free) Ann acts as an adverse party to SPL, potentially violating §8.03.

(iii) Consent: Each of these violations may be cured by the principal's consent, and in this case SPL consented – Patrick specifically told Ann that she can take books for free at the end of the sale. However, according to Restatement §8.06 this consent must be obtained in good faith, fair dealing and with full disclosure of all material facts. Hiding the book was not fair dealing and knowing of this behavior may have caused SPL to refuse to give the book to Ann. Thus, SPL's consent is not valid and Ann's acquisition of Book 2 violated §§8.01, 8.02 and 8.03.

(e) Conclusion: Ann violated her fiduciary duties in purchasing (but not in merely pricing) Book 1, and in both hiding and acquiring Book 2. She will have to return both books to SPL.

II. **Discuss UEI's and Donna's suits**.

1. UEI's suit

The BoD, not SHs, manage the business of a corporation (DGCL §141(a)). Therefore, SHs decision to breach a contract that the corporation signed does not constitute an act of the corporation.

Also, SHs cannot retract valid ratification given under DGCL §144(a)(2). SHs received adequate disclosure (see 2(d)(i) below), and voted in good faith to ratify (with a proper quorum present). Upon ratification, and because the transaction did not amount to corporate waste (see 2(d)(ii) below), the breach of DoL was cured. Future displeasure of the SHs does not change that.

2. Donna's suit

(a) Challenged action: FfT BoD's decision to sell DoLM to Nuno, which caused Vic & Chelsea to withdraw their offer to buy FfT. Authority: DGCL §141(a) – business of corporation managed by BoD. Quorum: DGCL §141(b) – majority of total number of directors (3 of 5) – quorum exists for this decision.

(b) BJR:

(i) No fraud/illegality

(ii) Business Judgment? Fact pattern suggests deliberation and consideration of alternatives, so likely a business judgment has been reached. Possible concern: Tom (who has CoI; see 2(b)(iii) below) selected the appraiser, so perhaps appraiser can't be relied on under DGCL §141(e); but fact pattern considered the appraiser "independent".

(iii) Conflict of Interest: Tom knows that Miranda does not plan to replace FfT's directors if she acquires FfT, while Chelsea told him that he would lose his job. Whether this creates CoI for the sale of DoLM depends on whether Tom expects that selling DoLM would cause Chelsea to abandon her bid for FfT. Her initial discussion with Tom, in which she showed interest for DoLM and not the other restaurants, suggests a CoI.

(iv) It is not clear whether Tom told the other directors about Chelsea's plan to replace them. If he did, they too have a CoI (because they know their jobs are also at stake) and BJR is rebutted; if he didn't, then he failed to disclose a material fact and under *Cinerama* the decision remains tainted with CoI and BJR is rebutted.

(c) Fairness: Under *Bayer* & DGCL §144(a)(3), a transaction does not breach DoL even if there is CoI, if it is fair. The sale price is $100,000 higher than Miranda's offer, but that might not matter if shareholders sell the entire company to either Miranda or CAB/UEI (unless the revenue received for DoLM will cause Miranda to increase her offer price, which is unlikely since it frustrates the CAB/UEI bid and eliminates Miranda's competition). Fairness, therefore depends on whose offer is better: Miranda's, or CAB/UEI's. This compares $5 in cash to shares currently worth $5.20 (but which fluctuate in value). If both are close in value (as they seem to be), the transaction is likely unfair because it deprives SHs of competition between the bidders which may raise the bids.

(d) Ratification:

(i) Requires disclosure and approval in good faith by SHs (DGCL §144(a)(2)); here, Tom disclosed that Chelsea intends to fire the management team, which is the source of the CoI. A majority of SH (85%) ratified.

(ii) Under *Wheelabrator*, ratification shifts the burden of proof of a breach to the plaintiffs, and requires (in the case of a defendant director) proof of corporate waste. If a $140M golden parachute was not corporate waste in Brehm, it is unlikely that the sale of DoLM would be corporate waste.

(e) Conclusion: No DoL violation due to the ratification and lack of corporate waste. Otherwise, likely a breach of DoL due to CoI and apparent unfairness of the transaction.

III. **Discuss ToG's suit**.

1. TNE - A Corporation?

(a) A corporation forms only when AoI are filed (MBCA §2.03(a)). Here, AoI were not filed, so TNE is not a corporation.

(b) Exception 1: De facto corporation – if the promoters:

(i) Acted in good faith to incorporate – this is doubtful, since they consciously decline to file the AoI;

(ii) Had the legal right to incorporate – which they did; and

(iii) Acted as if they were incorporated – possibly yes (e.g., they manage TNG themselves via BoD decisions; but this is an appropriate form of governance for partnerships as well (see 2(a) below; *Day*).

Conclusion: Probably not de facto corporation.

(c) Exception 2: Corporation by estoppel (*SGM*) – if third party:

(i) Acted as if it were transacting with a corporation – not the case here: ToG was told by Vic that no AoI was filed, so they knew TNE was not a corporation;

(ii) Would earn a windfall if it were now allowed to deny that the business was a corporation – no, because they anticipated that they are dealing with a partnership, not a corporation.

(d) If, despite above analysis, TNE is a corporation, then all TNE's business is managed by the BoD unless otherwise said in AoI (MBCA §8.01(b)). TNE's bylaws specifically authorize the BoD to manage all of TNE's affairs except for bylaw amendment, merger approval and issuing new shares. Vic was not an agent for TNE's BoD, and therefore cannot bind TNE.

(e) Conclusion: TNE is not a corporation. If it were, though, TNE would not be bound by the agreement Vic signed.

2. TNE – A Partnership?

(a) Is TNE a partnership?

(i) The bylaws are a partnership agreement. RUPA §§101(6) and 202(a) define a partnership as "an association of two or more persons to carry on as co-owners a business for profit." This requires:

(1) Shared profits: here, UEI and CAB share the profits of TNE 50%/50%;

(2) Shared control: UEI and CAB each have half of the shares that allow appointing the directors that manage the company, thus they share control of TNE.

(ii) Can a partnership be managed by a BoD, like a corporation? According to *Day*, centralized management does not eliminate the shared control element, even when it leaves very little power in the hands of some partners (executive committee in *Day* is analogous to BoD here);

(iii) Can a partnership issue shares, like a corporation? Nothing in RUPA §103(b) prohibits opting out of the non-transferability of membership in RUPA §401(i), so it is permissible.

(b) If TNE is a partnership, can UEI bind it?

(i) If TNE is a partnership, its shareholders UEI and CAB are partners.

(ii) RUPA §301(1) – An act of a partner for apparently carrying on in the ordinary course the partnership business bind the partnership – Ordering pastries is "in the ordinary course [of the partnership's business]", similar to *Nabisco v. Stroud*. The partnership agreement ("bylaws") may be seen as an attempt to opt-out from this rule, but they cannot modify RUPA §301(1) because it would restrict rights of third parties, contrary to RUPA §103(b)(10). So, UEI should be able to bind TNE, but…

(iii) Exception: Under RUPA §301(1), if the partner had no actual authority and the third party knew or had notice that the partner lacked authority. Here, partners lack authority because bylaws give the authority to the BoD. ToG has notice because Vic showed them the bylaws.

(iv) Conclusion: UEI cannot bind TNE because it lacks authority under the bylaws, and ToG knows of that clause in the bylaws.

(c) If UEI can bind TNE, can Vic bind TNE?

Vic is the CEO of UEI, and as the chief executive likely has at least apparent authority to bind UEI, because a reasonable third party is likely to believe that a CEO has authority to represent his company in minor matters such as ordering pastries for one of its subsidiaries (Restatement §3.03). Vic may have actual authority if a reasonable agent in Vic's place is likely to believe he has authority to sign such minor deals (Restatement §3.01). Therefore, if UEI can bind TNE, then Vic can bind UEI.

(d) Conclusion: TNE, a partnership, is not bound by the contract (see 2(b)).