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Examination No. _____

520 BUSINESS ASSOCIATIONS I
Semester II, 2003-04

UNM School of Law
Final Examination

Professor Mathewson
Wednesday, May 12, 2004
9:00 a.m. to 12:00 noon

INSTRUCTIONS

You May not collaborate with each other. The written product you turn in should be solely your work. Your answers may be handwritten or typed,

Answer each question. If you use bluebooks, please use a separate bluebook for each question. If you type, start each question at the top of a page.

Be sure that your Examination Number (NOT your name) is on each bluebook or typewritten page, as well as the course name and number and the professor's name. Number your bluebooks or typed pages.

You may use your casebook, statutory supplement, handouts from the professor, course notes, and any course outline that you have prepared for this course. You may not use any other materials.

Factual information used in a previous question may be used in subsequent questions.

Be certain to carefully follow instructions in questions.

[END OF INSTRUCTIONS]

QUESTION ONE

Dear Associate;

We represent Crystal Alfonso, a director of Polyglon Broadcasting Corporation. Polyglon is a closely held corporation. It has been in the headlines recently. On February 10, it announced that it was considering filing for bankruptcy unless WorldFinanz Bank agreed to restructure a loan. It fired Michael Eisner as Chief Executive Officer and hired Alex Rodriguez. Eisner has informed our client that he intends to sue her as well as the other board members for breach of their fiduciary duties. He intends to challenge his termination, the failure to provide him with severance benefits and Rodriguez' employment contract. WorldFinanz is also grumbling about suing because it expects to lose money on any debt restructuring. Our client wants to know about her rights and duties as a director under the circumstances.

Please read the attached file and prepare a letter to our client outlining her defenses, including actions she should now take, and rights she may have as a director. Keep in mind that our representation is not inexpensive. If this matter goes to trial, she should expect legal fees in the low seven figure range. The clock is running.

**SELECTED PROVISIONS OF THE ARTICLES OF INCORPORATION OF
POLYGLON CORPORATION
A Revised Model Business Corporation Act Company**

FIRST: The name of this corporation is Polyglon Broadcasting Corporation.

SECOND: The total number of shares of all classes of stock that the corporation shall have authority to issue is 1,000,000 shares. Each holder of shares of common stock shall be entitled to one vote for each share of common stock held of record on all matters on which the holders of shares of common stock are entitled to vote.

THIRD: The nature of the business or objects or purposes proposed to be transacted, promoted or carried on are to conduct any and all lawful business in New Mexico, the United States and the world.

SEVENTH: The Board of Directors, by a resolution passed by a majority of the whole Board, may designate two or more of their number to constitute an Executive Committee, who, to the extent provided in said resolution or By-Laws of the corporation, shall have and may exercise the powers of the Board of Directors in the management of the business and affairs of the corporation

EIGHTH:

1. A director of the corporation shall not be personally liable to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the corporation or its shareholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, or (iii) for any transaction from which the director derived any improper personal benefit. If the Revised Model Business Corporation Act is amended after approval by the shareholders of this Article to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the corporation shall be eliminated or limited to the fullest extent permitted by the Act, as so amended.

SELECTED BY-LAWS OF POLYGLON CORPORATION

ARTICLE II

DIRECTORS:

Section 5. Quorum and Voting. A majority of the directors holding office shall constitute a quorum for the transaction of business.

ARTICLE V

OFFICERS:

Section 1. Officers of the Company. The officers of the Company shall be selected by the Board of Directors and shall be a Chief Executive Officer and President, one or more Vice Presidents, a Secretary and a Treasurer. The Board of Directors may elect one or more of the following: Senior Executive Vice President, Executive Vice President, Senior Vice President, Chief Financial Officer, Assistant Vice President, Assistant Secretary, Associate Treasurer, Assistant Treasurer, Associate Controller and Assistant Controller. Two or more offices may be held by the same person.

Section 2. Election of Officers. At the first meeting of the Board of Directors after each annual meeting of shareholders, the Board of Directors shall elect the officers. From time to time the Board of Directors may elect other officers.

Section 3. Tenure of Office; Removal. Each officer shall hold office until the first meeting of the Board of Directors after the annual meeting of shareholders following the officer's election and until the officer's successor is elected and qualified or until the officer's earlier resignation or removal. Each officer shall be subject to removal at any time, with or without cause, by the affirmative vote of a majority of the entire Board of Directors.

Section 4. Chief Executive Officer and President. The Chief Executive Officer and President shall be subject to the overall direction and supervision of the Board of Directors and committees thereof, shall be in general charge of the affairs of the Company; and shall consult and advise with the Board of Directors and committees thereof on the business and the affairs of the Company. The Chief Executive Officer and President shall have the power to make and execute contracts on behalf of the Company and to delegate such power to others.

ARTICLE VII

INDEMNIFICATION:

Section 1. Indemnification of Directors, Officers, Employees and Agents. The Company shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the Company) by reason of the fact that he is or was a director, officer, employee, or agent of the Company, or is or was serving at the request of the Company as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding to the fullest extent permitted by law.

Section 2. Expenses. To the extent that a director, officer, employee or agent of the Company has been successful on the merits or otherwise, in whole or in part, in defense of any action, suit or proceeding referred to in Section 1 or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith. The entitlement to expenses under this Section 2 shall include any expenses incurred by a director, officer, employee or agent of the Company in connection with any action, suit or proceeding brought by such director, officer, employee or agent to enforce a right to indemnification or payment of expenses under this Article. If successful in whole or in part in any such action, suit or proceeding, or in any action, suit or proceeding brought by the Company to recover a payment of expenses pursuant to the terms of an undertaking provided in accordance with Section 4, the director, officer, employee or agent also shall be entitled to be paid the expense of prosecuting or defending such action, suit or proceeding.

Section 4. Payment of Expenses. Expenses incurred in defending a civil or criminal action, suit or proceeding shall be paid by the Company in advance of the final disposition of such action, suit or proceeding within 30 days after receipt by the Company of a statement requesting payment of such expenses. Such statement shall evidence the expenses incurred by the claimant and shall include an undertaking by or on behalf of the claimant to repay such expenses unless it shall ultimately be determined, by final judicial decision from which there is no further right to appeal, that he is not entitled to be indemnified by the Company as authorized by this Article. The burden of establishing that a claimant is not entitled to payment of expenses under this Article or otherwise shall be on the Company. Any such payment shall not be deemed to be a loan or extension or arrangement of credit by or on behalf of the Company.

Section 5. Insurance. The Company shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the Company, or is or was serving at the request of the Company as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the Company would have the power to indemnify him against such liability under the provisions of this Article.

Notes from Client Interview

Polyglon Broadcasting Corporation is a small Spanish language television and radio network with stations in Albuquerque, Corpus Christi, El Paso, Tucson, and San Diego. It has assets of \$100,000,000 and liabilities of \$80,000,000. It was formed in 1990 by five individuals. They are Michael Eisner, Gloria Garcia, Juan Gonzales, Wayne Johnson and Lou Gallegos. Each shareholder owns 100,000 shares. Eisner was the entrepreneur and moving force. It has averaged revenues of \$25,000,000 per year. Profits have fluctuated from a high of \$5,000,000 in 2000 to \$1,000,000 in 2003. In fact, revenues have been declining since 2000, the year it last acquired a radio or television station. No dividends have been distributed since 2001. It has been hard hit by the merger of Univision with the Hispanic Broadcasting Corporation. After the announcement of the proposed merger in 2002, Garcia, Gonzales and Johnson were dissatisfied with Eisner's leadership and entered into an agreement to vote their shares for the same slate of directors. Consequently, they voted Gallegos off the board and voted to elect Crystal Alfonso. The relationship between the trio and Eisner has been strained every since. Harsh words were exchanged at the meeting at which Eisner was fired.

Alfonso is a professor at the Martha Stewart Graduate School of Business. She knew Rodriguez professionally before he was considered for the job. In fact, she recommended him and urged his hiring. She wrote an article reviewing his management style for the Stewart Business Review two years ago. Rodriguez was known for motivating his subordinates with praise and cash and showing underachievers the door. Rodriguez subsequently donated \$50,000 to the Stewart School in 2003. The school provided Alfonso with half of the donation for scholarly research.

Alfonso has a national reputation and is one of the leading experts on management style and executive compensation.

She thinks that Rodriguez is a cousin.

Minutes of February 10, 2004 Board of Directors Meeting

The following directors were present: Crystal Alfonso, Juan Gonzales, Gloria Garcia, Wayne Johnson, and Michael Eisner.

The meeting convened at 2:00 p.m. After a vigorous discussion, the board approved the following resolution:

Whereas the performance of Michael Eisner is no longer satisfactory and whereas her serves as Chief Executive Officer and President as an employee at the will, the board believes that it is in the best interest of the corporation that he be terminated immediately; and whereas the board believes that he has been adequately compensated for his services, the board believes that no further compensation is warranted;

Be it therefore resolved, that Michael Eisner is removed from his office as Chief Executive Officer and President of the corporation and that his employment is hereby terminated.

The action was approved by a vote 6 to 1. Mr. Eisner dissented. He then left the meeting after the vote.

The board then discussed the vacancy. Director Crystal Alfonso recommended Alex Rodriguez, the retired Chairman and Chief Executive Officer of ABS Communications. Director Alfonso had met with Mr. Rodriguez previously at the request of Directors Gonzales, Garcia and Johnson. The board then approved the following resolution:

Whereas the board believes that Alex Rodriguez is highly qualified to serve as Chief Executive Officer and President of the corporation and desires to have his services,

Be it therefore resolved that the Alex Rodriguez be offered the position of Chief Executive officer and President for a period of five years beginning on March 1, 2004, at an annual compensation of \$1,000,000 per year and a signing bonus of \$10,000,000. Be it further resolved that in the event, Mr. Rodriguez should be terminated during that five-year period for any reason, the corporation will pay him a severance payment of \$10,000,000. The severance payment is in lieu of incentive stock options. Be it further resolved that Director Crystal Alfonso is authorized to negotiate an employment contract with Mr. Rodriguez substantially on the terms set forth above.

The board asked Director Alfonso for an opinion as to the fairness of the employment contract terms. She was of the opinion that the terms were fair and, while above industry norms for a company of this size, they were necessary to attract an executive of the caliber of Mr. Rodriguez.

The meeting was adjourned at 3:00 p.m.

Joe Dunn, Secretary

QUESTION TWO

Dear Associate:

We represent Polyglon Broadcasting Corporation. Alex Rodriguez, the new Chief Executive Officer and President moved fast. He brought a new strategic vision to the company. He wanted to diversify into the entertainment industry. His vision as explained to us was to form joint ventures with rising performers. He proposed to do so by forming manager-managed limited liability companies with Polyglon and the performers as members. Polyglon would control the entity as its employees would serve as the managers. We were asked to do the paperwork for the first venture with a group called Hot Toddy. I think they may have been a group of law students who were disillusioned with law school. They mixed heavy metal with latin jazz. You figure it out. Rodriguez thought they were the bomb. Under Rodriguez's plan, the group would be the visible face of the entity with Polyglon in the background with control. Accordingly, we formed Hot Toddy Band LLC.

As the attached file reveals, things went haywire almost immediately.

A lawsuit has already been filed against Polyglon by Slim Shady seeking \$1,000,000 in compensatory damages and \$20,000,000 in punitive damages. The complaint alleges two causes of action. First, it alleges that Hot Toddy LLC was the alter ego or instrumentality of Polyglon and that Polyglon is liable for the tortuous conduct of the band. Secondly, it alleges that he band was the agent of Polyglon and that it is liable as the principal for the tortuous conduct of the band. Please prepare a motion to dismiss the complaint with a memorandum in support of the motion.

Nightclub Burns to the Ground. No One Hurt

April 1, 2004

Hot Toddy , the Lawschool Band, was hot last night. The group known for its fiery combination of heavy metal and Latin jazz added fireworks to end its show at the Advocate. Most of the crowd had left by then. Within seconds after the fireworks were ignited, the club was in flames. The club had numerous safety features and exits. The remaining crowd left the building as smoke filled the room. Although everyone was able to get out, at least 30 people were treated for smoke inhalation. Several were hospitalized over night. The building worth an estimated \$1,000,000 was destroyed. Personal injury lawsuits could result in millions more in tort damages.

**SELECTED PROVISIONS OF THE ARTICLES OF ORGANIZATION
OF
HOT TODDY BAND LLC**

The undersigned, desiring to form a limited liability company under the Uniform Limited Liability Company Act, states:

1. Name: The name of the limited liability company is: Hot Toddy Band LLC.

4. Management: Management of the limited liability company is vested in one or more managers. The initial manager shall be Joe Dunn.

**SELECTED PROVISIONS OF THE OPERATING AGREEMENT
OF
HOT TODDY BAND LLC**

ARTICLE V

RIGHTS AND DUTIES OF MANAGERS

5.01 Management. The business and affairs of the Company will be managed by its Manager. The Manager will direct, manage and control the business of the Company to the best of his, her or its abilities. Except for situations in which the approval of the Members is expressly required by this Operating Agreement or by nonwaivable provisions of applicable law, the Manager has full and complete authority, power and discretion to manage and control the business, affairs and properties of the Company, and to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of the Company's business. At anytime when there is more than one Manager, any one Manager may take any action permitted to be taken by the Managers, unless the approval or more than one of the Managers is expressly required under this Operating Agreement or the Act.

5.02 Number, Tenure and Qualifications. The Company shall initially have one Manager. The number of Managers of the Company shall be fixed from time to time by the affirmative vote of a majority of Capital Interests in the Company's capital, but in no instance shall there be less than one Manager. Each Manager will hold office until the next annual meeting of Members or until his successor is elected and qualified. Managers shall be elected by the affirmative vote of Members holding at least a majority interest. Managers need not to be residents of the State of New Mexico or Members of the Company.

5.04 Liability for Certain Acts. A Manager does not guarantee, in any way, the return of a Members' Capital Contributions or a profit for the Members from the operations of the Company. A Manager shall not be liable to the Company or any Member for any loss or damage sustained by the Company or any Member, unless the loss or damage was the result of fraud, deceit, gross negligence, willful misconduct or a wrongful taking by the Manager.

5.05 Managers Have No Exclusive Duty to Company. A Manager is not required to manage the Company as his sole and exclusive function and he may have other business interests and may engage in other activities in addition to those relating to the Company. Neither the Company nor any Member has the right, by virtue of this Operating Agreement, to share or participate in such other investments or activities of a Manager or to the income or proceeds derived therefrom. A Manager shall incur no liability to the Company or to any of the Members as a result of engaging in any other business or venture.

RIGHTS AND OBLIGATIONS OF MEMBERS

6.01 Limitation of Liability. Each Member's liability shall be limited as set forth in this Operating Agreement, the Act and other applicable law.

6.02 Company Debt Liability. A Member will not be liable personally for any debts or losses of the Company beyond his respective Capital Contributions and any obligation of the Member to make Capital Contributions hereunder, except as otherwise provided herein or as otherwise required by law.

ARTICLE VII

MEETINGS OF MEMBERS

7.01 Meetings. Meetings of Members, for any purpose or purposes, unless otherwise prescribed by statute, may be called by any Manager or by any Member or Members holding at least 10% of the Capital Interests.

7.02 Manner of Acting. The affirmative vote of Members holding a Majority Interest is the act of the Members, unless the vote of a greater or lesser proportion or number is otherwise required by the Act, by the Articles of Organization, or by this Operating Agreement. Unless otherwise expressly provided in this Operating Agreement or required under applicable law, Members who have an interest (economic or otherwise) in the outcome of any particular matter upon which the Members vote or consent, may vote or consent upon any such matter and their Capital Interest, vote or consent, as the case may be, shall be counted in the determination of whether the requisite matter was approved by the Members.

7.03 Action by Members Without a Meeting. Action required or permitted to be taken at a meeting of Members may be taken without a meeting if the action is evidenced by one or more written consents describing the action taken, signed by each Member entitled to vote and delivered to the Manager of the Company for inclusion in the minutes or for filing with the Company records.

Interview Transcript of Joe Dunn

Question: Who is the manager of Hot Toddy Band LLC?

Answer: I am.

Question: How did you become manager?

Answer: I am a vice president of Polyglon Broadcasting Company, the parent company. I was assigned to be manager by virtue of my job as vice president. I believe I was named as manager in the organizational documents.

Question: What were your duties as manager?

Answer: I was the chief executive officer. I oversaw the operations and finances of the company. I supervised the members of the band as employees but they were more like junior executives. They made the contacts with clubs and record companies. They had complete creative control over their music and performances.

Question: Did they consult with you at all?

Answer: We sat down when we negotiated the deal. We talked about their business concept and our interest in making money. I hired a professional from the entertainment business to make booking arrangements and record deals. So far they had only that one performance and there is no record contract yet. I think people are afraid to touch them right now.

Question: Who was the professional?

Answer: Gus Malone. He worked for Disney and spent a couple of years at Time Warner in its music division. He had an MBA from the Martha Stewart Graduate School of Business. He was recommended by Crystal Alfonso, one of the directors of Polyglon.

Question: Was the band free to do whatever it wanted?

Answer: As long as they stayed within budget and did not jeopardize the product.

Question: Did you ever call any membership meetings?

Answer: No. We were only in business for less than a month when the fire occurred. I am real sorry about what happened but I had nothing to do with it. We did sit down after the documents were filed and go over the business plan again. As I understood it, we did not have to have formal meetings. We talked maybe two or three times a week.

Question: How many members of the band?

Answer: Three

Question: Did the LLC ever pay any money to Polyglon?

Answer: No way. It was not in business that long. Polyglon put in \$50,000 in cash. The band members did not have to make initial capital contributions. They would contribute a share of future profits. So no, Polyglon is in the hole right now. Once this band hits the big time, and I really believe it was. Those law students could really play.

QUESTION THREE

Dear Associate:

I have one last assignment. We represent Lou Gallegos. He has been on the outside for some time. Any way, he called me yesterday. He told me that he thought Rodriguez' innovative business strategy was doomed from the start and was going to take Polyglon down. He sold his 100,000 shares to a friend of his who was thrilled about owning an interest in television and radio stations on April 1, 2004. The friend already knew about the bankruptcy and the executive changes at the top. Lou did not tell him about the entertainment strategy or Hot Toddy Band LLC. Lou was aware of them. The purchase price was \$2,000,000. If the Polyglon is held liable for the fire, the shares are going to be worth a lot less. In fact, Polyglon has offered to buy the shares for \$100,000. Lou is concerned that he may be liable to his friend. His transaction was negotiated largely by email.

Please research the matter and prepare a brief memo to me outlining his potential exposure and defenses under state and federal law.