July 2019
MEE Question 1
Decedents' Estates / Conflict of Laws

JULY 2019 MEE
QUESTION 1—DECEDENTS' ESTATES / CONFLICT OF LAWS

Testator's handwritten and signed will provided, in its entirety,

> *I am extremely afraid of flying, but I have to fly to City for an urgent engagement. Given that I might die on the trip to City, I write to convey my wish that my entire estate be distributed, in equal shares, to my son John and his delightful wife of many years if anything should happen to me.*
>
> *January 4, 2010*
> *Testator*

When Testator wrote the will, he was domiciled in State A, and his son John was married to Martha, whom he had married in 2003. Testator had known Martha and her parents for many years, and Testator had introduced Martha to John. At the time John and Martha married, Martha was a widow with two children, ages five and six. Following their wedding, John and Martha raised Martha's children together, although John never adopted them.

Two years ago, Martha was killed in an automobile accident.

Six months ago, John married Nancy.

Four months ago, Testator died while domiciled in State B. All of his assets were in State B. The handwritten will of January 4, 2010, was found in Testator's bedside table. Testator was survived by his sons, John and Robert, and John's wife Nancy. Testator was also survived by Martha's two children, who have continued to live in John's home since Martha's death.

State A does not recognize holographic wills. State B, on the other hand, recognizes "wills in a testator's handwriting so long as the will is dated and subscribed by the testator."

Statutes in both State A and State B provide that "if a beneficiary under a will predeceases the testator, the deceased beneficiary's surviving issue take the share the deceased beneficiary would have taken unless the will expressly provides otherwise."

How should Testator's estate be distributed? Explain.

July 2019
MEE Analysis 1
Decedents' Estates / Conflict of Laws

JULY 2019 MEE
ANALYSIS 1—DECEDENTS' ESTATES / CONFLICT OF LAWS

This July 2019 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) Does the law of State A or State B determine whether Testator's holographic will is valid?

(2) Is Testator's holographic will valid under the law of State B?

(3) Was Testator's will contingent on his dying during his trip to City?

(4) Was Martha or Nancy the intended beneficiary of Testator's bequest to John's "delightful wife of many years"?

(5) Assuming that Martha is the intended beneficiary of the bequest to John's wife, are her children entitled to take Martha's share under the State B anti-lapse statute?

(6) Assuming the will is valid, is Robert entitled to any share of the Testator's estate?

DISCUSSION

Summary

The law of Testator's domicile at death (here, State B) determines the validity of his will. Thus, Testator's will is valid because it is in Testator's handwriting, it is dated, and it is "subscribed" (i.e., signed by Testator at the end). Testator's will was not contingent on his dying while flying to City because the evidence shows that the text of the will reflects Testator's motive for writing a will rather than stating a condition precedent to its operation. A will is typically construed as of a testator's death; here, Nancy was John's wife at Testator's death. But Testator's use of the phrase "delightful wife of many years," plus the other facts, strongly suggests that his intention was to benefit a specific individual, namely Martha. Thus, a court is likely to find that Martha was the intended beneficiary of Testator's bequest to "[John's] delightful wife of many years." Under State B's broad anti-lapse statute, Martha's children would take Martha's share.

Thus, Testator's estate will be distributed according to the will as follows: one half to his son John and the other half in equal shares to Martha's two children. Neither Testator's son Robert nor John's wife Nancy will take anything.

Nevertheless, if the will is valid, Robert could be entitled to a share of the estate if he was born after the will was signed in 2010. No facts tell us when he was born, but from the surrounding facts it appears most likely he was living in 2010.

Point One (10%)

The law of a testator's domicile at the time of the testator's death determines the validity of the testator's will. Thus, State B's law controls the validity of Testator's will.

At common law, the validity of a testator's will was determined under the law of the state where the testator was domiciled at the time of his death. *See* Restatement (Second) of Conflict of Laws § 314; *In re Barrie's Estate*, 35 N.W.2d 658 (Iowa 1949). Thus, under the common law, State B law controls the validity of Testator's will.

Under the Uniform Probate Code (UPC), a will is valid if it complies either with the law of the state in which it was executed or with the law of the place where the testator was domiciled when he signed his will or when he died. Unif. Probate Code § 2-506. Many non-UPC states have similar statutes. *See, e.g.*, Iowa Code § 633.283. Testator's will is valid under this statutory approach because it was valid under the law of State B, the state of Testator's domicile at death.

[NOTE: The following MEE jurisdictions have enacted the Uniform Probate Code: Arizona, Colorado, Hawaii, Idaho, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wisconsin.]

Point Two (10%)

Testator's will was validly executed because it was in Testator's handwriting, it was dated, and it was subscribed by Testator.

State B law provides that a will is valid if it is "in a testator's handwriting so long as the will is dated and subscribed by the testator." Courts have held that when a statute requires a will to be subscribed, the testator's signature must appear at the end of the will. *See Matter of Estate of Rowell*, 585 So. 2d 731 (Miss. 1991); *Matter of Estate of Reed*, 625 P.2d 447 (Kan. 1981). *See also Matter of Estate of Wedeberg*, 589 N.E.2d 1000 (Ill. App. 1992) (will not "signed" when testator's name appeared at the top of the will).

Here, Testator's will met the statutory requirements of State B: the will was in Testator's handwriting, it was dated, and it was signed by Testator at the end.

Point Three (15%)

Most likely, Testator's will was not contingent on his death during travel to City because the facts support the conclusion that Testator's statement described his motive for writing the will rather than a condition to its operation.

In determining whether a will is conditional or contingent, "[a] court must first determine 'whether the happening of the possibility referred to is a condition . . . to the operation of the will, or whether the possibility of the happening was only a statement of the motive or

inducement which led to the preparation and execution of the instrument.'" *In re Estate of Franklin*, 2001 WL 896635 (Tenn. Ct. App., Aug. 9, 2001). A number of factors can be considered in resolving this issue, including where the will was kept after the purported condition lapsed, whether there were any other testamentary documents, whether setting aside the will would result in intestacy, and whether effectuating the terms of the document would result in an inequitable distribution. *Id. See also Estate of Martin*, 635 N.W.2d 473 (S.D. 2001).

Here, two facts support the conclusion that Testator's words—"I am extremely afraid of flying, but I have to fly to City for an urgent engagement. Given that I might die on the trip to City, I write to convey my wish that my entire estate be distributed, in equal shares, to my son John and his delightful wife of many years if anything should happen to me."— merely stated Testator's motive for executing a will and not a condition precedent that had to occur for the will to be given effect.

First, Testator did not destroy the will after returning from City but kept it in his bedside table until the time of his death many years later.

Second, there are no other known testamentary documents, and if the holographic will were construed as conditional, Testator would die intestate; intestacy would result in a portion of Testator's estate being distributed to his other son, Robert, a person not mentioned in Testator's will. This seems inconsistent with Testator's intentions.

Additionally, it does not seem inequitable to permit Martha's children to inherit her share of Testator's estate given that they were being raised by Testator's son John up to the time of Testator's death. Testator, who introduced Martha to John and had a long-standing relationship with Martha and her parents, presumably knew the children and knew that his son John was raising them. *See* Points Four and Five.

Thus, a court will likely find that Testator's holographic will was not contingent on his dying during his trip to City.

[NOTE: If an examinee were to conclude that the will was conditional, then because the condition did not occur, the will would no longer be valid and Testator would have died intestate. In this case, the estate would pass to Testator's heirs, John and Robert.]

Point Four (35%)

<u>Because the phrase "delightful wife of many years" is ambiguous, a court will admit extrinsic evidence to determine its meaning, and all relevant evidence suggests that Martha, not Nancy, was the intended beneficiary under Testator's will.</u>

Testator left his estate in equal shares to his son John and John's "delightful wife of many years." Testator did not mention John's wife by name in the will. Because Martha died and John later married Nancy, it is ambiguous as to which wife Testator referred to in his will.

Wills are generally construed as of the time of the testator's death. Under this approach, the phrase "delightful wife of many years," if it were not ambiguous, could be construed in favor of John's wife at the time of Testator's death, i.e., Nancy. *See* William M. McGovern, Jr. &

Sheldon F. Kurtz, Wills, Trusts and Estates § 6.1 (3d ed. 2004). However, in light of the phrase "of many years," there is clearly an ambiguity in the will in that John and Nancy, in fact, have not been married "for many years," whereas John and Martha had been.

When a will is ambiguous, courts allow extrinsic evidence to resolve the ambiguity. To resolve ambiguities, the facts and circumstances surrounding the execution of the will may be taken into account. *See id.* As noted above, a court would likely find that the phrase "delightful wife of many years" is ambiguous because Nancy and John had been married for only a few months when Testator died, whereas John and Martha had been married for seven years when the will was executed in 2010. Furthermore, the fact that Testator introduced Martha to John and had a long-standing prior connection to her and her parents suggests that Testator was referring to Martha when he used the phrase "delightful wife of many years" and was not using the word "wife" in a generic sense. Because the evidence suggests that Testator meant Martha specifically when he left a portion of his estate to John's "delightful wife of many years," a court is likely to rule that Martha, not Nancy, is the intended beneficiary.

Point Five (20%)

Martha's children will take Martha's share of Testator's estate under the State B anti-lapse statute.

Under the common law, a bequest to a beneficiary who predeceased the testator failed. *See* McGovern & Kurtz, *supra*, § 8.3. All states have abandoned the common law rule by enacting so-called anti-lapse statutes. Anti-lapse statutes, when applicable, typically substitute a deceased beneficiary's issue as the beneficiaries of the bequest to the deceased beneficiary. The typical anti-lapse statute extends anti-lapse protection only to blood relatives of the testator. *See, e.g.*, Unif. Probate Code § 2-603. State B, however, has a very broad anti-lapse statute, which provides that "if a beneficiary under a will predeceases the testator, the deceased beneficiary's surviving issue take the share the deceased beneficiary would have taken unless the will expressly provides otherwise." Under this statute, Martha's children take the share to which Martha would have been entitled had she survived Testator, assuming that the court finds that Martha is the intended beneficiary. (*See* Point Four.)

[NOTE: One of the most important skills a minimally competent lawyer should have is the ability to read and apply a statute. A purpose of Point Five is to test examinees' ability to read a statute, and for this purpose, we have given them an uncommon anti-lapse statute.]

Point Six (10%)

Robert could be entitled to an omitted child' share only if he had been born after Testator's will was signed in 2010. There are no facts that state when Robert was born.

All states have a statute providing a forced share of an estate for a child who was born after the will was signed but was not provided for in the will. These statutes vary, however, on the size of that omitted child's share. *See generally* UPC § 2-302.

Robert would qualify for this share if he was born after Testator's will was signed in 2010. The facts do not provide us with information as to when he was born, so whether he is entitled to that

share is unclear. However, it is more likely than not that Robert was living when Testator signed his will given the other facts in the problem.

[NOTE: An important lawyering skill is knowing when the lawyer needs more facts to answer a legal problem. Here the question asks how Testator's estate should be distributed, and an important fact to know in order to properly answer that question is when Robert was born.]

July 2019
MEE Question 2
Criminal Law & Procedure

JULY 2019 MEE
QUESTION 2—CRIMINAL LAW & PROCEDURE

On February 1, a woman began serving a 60-day sentence in the county jail for operating a motor vehicle under the influence of alcohol. On February 4, a detective from the county sheriff's department took the woman from her cell to an interrogation room in the jail building. He informed her that she was a suspect in a homicide investigation and that he wanted to ask her some questions. The detective then read the woman the state's standard Miranda warnings:

> You have the right to remain silent. Anything you say can be used against you in court. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you. If you decide that you wish to speak with us, you may change your mind and stop the questioning at any time. You may also ask for a lawyer at any time.

The detective asked the woman if she understood these rights. When she replied, "Yes, and I want a lawyer," questioning ceased immediately, and she was returned to her cell.

On March 15, the detective removed the woman from her cell and took her back to the same interrogation room. The detective told her that he wanted to ask her questions about the homicide because he had new information about her involvement. The detective read her the same Miranda warnings he had read on February 4 and asked her whether she understood her rights. She said, "Yes."

The woman then asked the detective, "If I ask you to get me a lawyer, how long until one gets here?" The detective replied as follows:

> We have no way of getting you a lawyer immediately, but one will be appointed for you, if you wish, if and when you go to court. We don't know when that will happen. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering questions until a lawyer is present.

The detective's statement accurately characterized the procedure for appointment of counsel. The woman then said, "I might need a lawyer." The detective responded, "That's your call, ma'am."

After a few minutes of silence, the woman took a Miranda waiver form from the detective and checked the boxes indicating that the rights had been read to her, that she understood them, and that she wished to waive her rights and answer questions. She then signed the form. After the detective began to question her, she confessed to the homicide.

The woman was charged with murder in state court. Her lawyer filed a motion to suppress the woman's March 15 statements to the detective, alleging three violations of her Miranda rights by the detective:

> (1) Interrogating the woman on March 15 after she had invoked her Miranda right to counsel on February 4.

(2) Incorrectly conveying to the woman her Miranda right to counsel by the statements he made on March 15.

(3) Interrogating the woman on March 15 after she had invoked her Miranda right to counsel on March 15.

This state affords a criminal defendant no greater rights than those mandated by the U.S. Constitution.

After an evidentiary hearing, the trial court denied the motion to suppress on all three grounds raised by defense counsel.

Did the court err? Explain.

July 2019
MEE Analysis 2
Criminal Law & Procedure

JULY 2019 MEE
ANALYSIS 2—CRIMINAL LAW & PROCEDURE

This July 2019 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

Did the detective violate the woman's rights by

(1) interrogating the woman on March 15 after she had invoked her right to counsel under *Miranda* on February 4;

(2) incorrectly conveying to the woman her Miranda right to counsel by the statements he made on March 15; or

(3) interrogating the woman on March 15 after she had invoked her right to counsel under *Miranda* on March 15?

DISCUSSION

Summary

The woman invoked her Miranda right to counsel on February 4 when she said, "I want a lawyer." At that point, the detective was required to cease interrogation or provide an opportunity for the woman to obtain counsel. This restriction on interrogation, however, does not continue in perpetuity.

Here, following the woman's invocation, the detective properly ended the custodial interrogation on February 4. There is no indication that the detective and the woman had any further contacts until March 15. This was sufficient time to terminate the detective's obligation to honor the woman's February 4 invocation of the right to counsel. Therefore, it was not a violation of the woman's Miranda rights for the detective to wait more than a month, repeat the Miranda warnings, obtain a waiver, and engage in custodial interrogation on March 15. The fact that the woman remained in jail from February 4 through March 15 does not mean that she was in "custody" during this time for Miranda purposes.

On March 15, the detective properly read the woman the state's standard Miranda warnings. The detective's subsequent statement describing the procedures for obtaining counsel did not undermine the reasonable conveyance to the woman of her Miranda rights.

On March 15, the woman did not invoke her right to counsel when she said, "I might need a lawyer." This was not a "clear and unequivocal request" for counsel. Faced with an ambiguous

or equivocal statement, the detective was not required to (1) cease questioning the woman or (2) take any further action to determine whether the woman wanted counsel present.

Thus, the court did not err in denying the woman's motion to suppress on any of the grounds raised by the woman's lawyer.

Point One (40%)

The woman's invocation of her Miranda right to counsel on February 4 did not prevent the detective from interrogating her on March 15.

If a suspect clearly and unequivocally invokes her right to counsel after being informed of her Miranda rights, the police must cease the custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). After invocation, counsel must be provided before a suspect can be questioned *unless* the suspect (1) initiates contact with law enforcement, (2) is given a fresh set of Miranda warnings, and (3) executes a knowing and intelligent waiver. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981). However, in *Maryland v. Shatzer*, 559 U.S. 98 (2010), the Court held that cessation of custodial interrogation for 14 days terminated the *Edwards* requirements. Thus, after 14 days, law enforcement may approach a suspect who has previously invoked the right to counsel and (assuming new Miranda warnings and a valid waiver) reinitiate custodial interrogation even without a lawyer present.

Here, assuming that the woman was undergoing custodial interrogation, she invoked her right to counsel and was returned to her cell on February 4, more than five weeks before the detective's March 15 interrogation. Assuming that *Miranda* was fully complied with on March 15 (*see* Point Two), the woman's February 4 invocation of the right to counsel had terminated by March 15.

Finally, this analysis is not affected by the fact that the woman remained in jail from February 4 through March 15. In *Maryland v. Shatzer, supra*, the Court held that there are "vast differences between *Miranda* custody and incarceration pursuant to conviction." The release of a person from interrogation and back into his "normal life" in the general prison population ends the "'inherently compelling pressures' of custodial interrogation. Thus, the lengthy break between the woman's initial invocation of her *Miranda* right to counsel and her interrogation on March 15 terminated the *Edwards* requirement, notwithstanding that she was in jail during that time."

The court properly rejected the defense argument.

[NOTE: Custody is an objective, totality-of-the-circumstances test: whether "a **reasonable person** would have felt he or she was not at liberty to terminate the interrogation and leave." *Howes v. Fields*, 565 U.S. 499, 509 (2012). The Supreme Court has held that "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Id*. More specifically, the Court has found that "when a person who is already serving a term of imprisonment is questioned, . . . the ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar and thus do not involve the same 'inherently compelling pressures' that are often present when a suspect is yanked from familiar surroundings in the outside world and subjected to interrogation in a police station." *Id*. at 511. Thus, the woman's ongoing incarceration from February 4 to March 15 should be treated as a break in her custodial interrogation.]

Point Two (30%)

On March 15, the detective properly informed the woman of her right to counsel.

Miranda v. Arizona requires that law enforcement inform a suspect that she has the "right to the presence of an attorney and that if [she] cannot afford an attorney one will be appointed for [her] prior to any questioning if [she] so desires." 384 U.S. at 479. *Miranda* does not require perfect adherence to the suggested language in the decision itself. *See* 384 U.S. at 476. *See also California v. Prysock*, 453 U.S. 355, 359 (1981) (*per curiam*); *Duckworth v. Eagan*, 492 U.S. 195, 202–03 (1989). For example, in *Florida v. Powell*, 559 U.S. 50 (2010), the Court rejected the defense argument that informing a suspect of "the right to talk to a lawyer before answering any of [their] questions" and "the right to use any of [his] rights at any time [he] want[ed] during th[e] interview," but failing to inform the suspect of the right to counsel during interrogation violated *Miranda*. 559 U.S. at 62. Miranda warnings need not be "the clearest possible formulation," *id*. at 63; instead they must "reasonably convey to a suspect his rights as required by *Miranda*." *Id.* at 62; *Duckworth*, 492 U.S. at 203.

Here, the state's standard Miranda warnings read to the woman on both February 4 and March 15 "reasonably conveyed" her Miranda rights.

However, the question remains: did the detective undermine or alter the Miranda warnings on March 15 when he told the woman:

> We have no way of getting you a lawyer immediately, but one will be appointed for you, if you wish, if and when you go to court. We don't know when that will happen. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering questions until a lawyer is present.

Under the relevant constitutional standard, it is clear that the detective did nothing more than inform the woman of the procedure for appointment of counsel in the state. Taken in conjunction with the detective's March 15 reading of the state's standard Miranda warnings, this statement did not undermine the reasonable conveyance of Miranda rights. Thus, the court did not err in rejecting the argument that the woman's statements should be excluded on this basis.

[NOTE: Some examinees might argue that the woman was not in custody when she was questioned on March 15 (or on February 4) and therefore was not entitled to any *Miranda* warnings at all. In *Howes v. Fields, supra*, the Supreme Court held that an incarcerated person who was questioned about a crime unrelated to his incarceration was not "in custody" for *Miranda* purposes when the circumstances of the questioning were not coercive. In that case, the prisoner was told twice that he could return to his cell whenever he wanted; he was not restrained or threatened during interrogation; and the other circumstances were such that, according to the Court, he would have felt free to leave the interrogation. Hence, the Court concluded, *Miranda* warnings were unnecessary.

There are no facts in this problem from which one could determine whether the March 15 interrogation was custodial and whether *Miranda* warnings were necessary. Nonetheless, the warnings were given and the problem asks whether they were correctly conveyed. An examinee

who notes the possibility that it was not a custodial interrogation and that *Miranda* warnings were not required should nonetheless consider whether they were given adequately."]

Point Three (30%)

On March 15, the woman did not invoke her right to counsel when she said, "I might need a lawyer" because this was not a "clear and unequivocal request" for counsel.

The mere mention of the word "lawyer" does not constitute an invocation of the Miranda right to counsel requiring cessation of questioning under *Edwards*. Invocation of the right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994), *citing McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991). To "unambiguously request counsel," a suspect must "articulate [her] desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 459. In contrast, where a suspect's request is ambiguous or equivocal, questioning need not cease. An ambiguous request is one that "a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel." *Id.* (emphasis in original). When a suspect makes an ambiguous or equivocal request for counsel, officers are not required to attempt to assess "the likelihood that a suspect would wish counsel to be present." *Id.*

The woman's statement, "I might need a lawyer," on its face, is not an unambiguous invocation of the right to counsel. In addition, the detective's response—"That's your call, ma'am"—and the fact that the woman remained silent before signing the waiver form suggests that, at the time of the woman's statement, she was not asking for a lawyer to be present but was still weighing her options. Under these circumstances, the woman did not invoke her right to counsel, and the court properly rejected the defense argument that the woman's statements to the detective should be excluded.

[NOTE: Discussion of the woman's Sixth Amendment right to counsel is not relevant to the problem. The right to counsel under *Miranda* is a branch of the Fifth Amendment's "privilege against compelled self-incrimination" law. By contrast, "the Sixth Amendment right does not attach until adversary judicial criminal proceedings commence, such as when a suspect is arraigned or indicted." Joshua Dressler, Alan C. Michaels, Criminal Procedure Vol. 1: Investigation § 21.03 (6th ed. 2013).]

July 2019
MEE Question 3
Corporations & LLCs

JULY 2019 MEE
QUESTION 3—CORPORATIONS & LLCs

Parent Inc., a company in the renewable energy business, has several subsidiaries. In all cases, Parent maintains control of its subsidiaries by selecting the members of each subsidiary's board of directors, most of whom also serve as officers and employees of Parent.

One of the subsidiaries, HomeSolar Inc. (incorporated in a jurisdiction that has adopted a version of the Model Business Corporation Act), was acquired three years ago by Parent. Parent owns 80% of HomeSolar's voting shares, with the remaining shares publicly traded on a national stock exchange. HomeSolar manufactures and sells products exclusively for the residential solar power market.

Another subsidiary, IndustrialSolar Inc., is wholly owned by Parent and manufactures products exclusively for the industrial solar power market.

A shareholder of HomeSolar, after making a proper demand on the board to which the board failed to timely respond, brought a derivative suit against Parent, as the controlling shareholder of HomeSolar, making the following allegations:

> (1) HomeSolar has not paid dividends since being acquired by Parent three years ago. In SEC filings, HomeSolar has explained that its no-dividend policy provides funds for its research and development budget as it seeks to develop new products for the residential solar power market in which it operates. Nonetheless, HomeSolar has more than adequate earnings and was obligated to pay dividends to its shareholders.
>
> (2) Since acquiring HomeSolar, Parent has caused HomeSolar to purchase the "rare earth" minerals necessary for the manufacture of its residential solar panels from SolarMaterials Corp., a wholly owned subsidiary of Parent. SolarMaterials was created for the purpose of acquiring such minerals and reselling them to the various renewable energy subsidiaries of the Parent group. The long-term contract under which HomeSolar purchases rare earth minerals from SolarMaterials, however, sets prices significantly higher than the current market prices under similar long-term contracts for such minerals.
>
> (3) After Parent learned about a large government grant to develop industrial-scale solar projects, Parent caused IndustrialSolar to apply for and secure this grant, denying HomeSolar the opportunity to obtain this grant.

1. Did Parent breach any duties to HomeSolar with respect to HomeSolar's no-dividend policy? Explain.

2. Did Parent breach any duties to HomeSolar with respect to HomeSolar's contract with SolarMaterials for the purchase of rare earth minerals? Explain.

3. Did Parent breach any duties to HomeSolar by denying HomeSolar the opportunity to apply for the government grant? Explain.

July 2019
MEE Analysis 3
Corporations & LLCs

JULY 2019 MEE
ANALYSIS 3—CORPORATIONS & LLCs

This July 2019 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) Did Parent breach any duties to HomeSolar with respect to HomeSolar's no-dividend policy?

(2) Did Parent breach any duties to HomeSolar with respect to HomeSolar's contract with SolarMaterials for the purchase of rare earth minerals?

(3) Did Parent breach any duties to HomeSolar by denying HomeSolar the opportunity to apply for the government grant?

DISCUSSION

Summary

Controlling shareholders (including parent corporations) generally owe fiduciary duties to their partially owned subsidiaries and may not use their power to benefit themselves at the expense of the subsidiary and its minority shareholders. Here, Parent likely did not violate its fiduciary duties of loyalty and care by causing its subsidiary, HomeSolar, to adopt a no-dividend policy, given that the policy applied equally to all shareholders of HomeSolar and had the purpose of ensuring funding for HomeSolar's research and development budget.

Business dealings by parent corporations with partially owned subsidiaries can be set aside as self-dealing transactions unless approved by a majority of disinterested directors or shareholders or unless, in the absence of such approval, they are judicially determined to be fair. Here, Parent breached its fiduciary duty of loyalty by causing HomeSolar to enter into a long-term contract with SolarMaterials, a wholly owed subsidiary of Parent, at prices significantly higher than current market prices under similar long-term contracts for the minerals. Because Parent selected the entire board of HomeSolar, there are no disinterested directors to approve the transaction. Furthermore, there are no facts to suggest that the minority shareholders of HomeSolar approved the transaction. And, because HomeSolar paid higher than market prices, the transaction cannot satisfy the fairness test. The presumption of the business judgment rule does not apply to this conflict-of-interest transaction. There are no facts indicating that Parent or the directors of HomeSolar breached a duty of care.

Parent did not violate its fiduciary duties by allocating the opportunity to apply for the government grant to its wholly owned subsidiary IndustrialSolar and not to its partially owned

subsidiary HomeSolar, given that the grant was for development of industrial solar projects and thus beyond the existing residential business of HomeSolar.

[NOTE: The question involves a corporation incorporated in an MBCA jurisdiction, thus requiring examinees to consider the relevant provisions of the MBCA. The MBCA, however, does not specify the fiduciary duties of controlling shareholders in a publicly traded corporation. Thus, in determining whether Parent breached its duties to HomeSolar and its minority shareholders, the law of the state of incorporation would likely look to general principles of corporate law in a matter of first impression. Given the lack of indication of case law on the point in the jurisdiction of incorporation, an examinee should look to general principles of corporate law, specifically those related to the fiduciary duties of controlling shareholders. General principles of corporate law, including the case law of Delaware, are thus relevant to the analysis of the question.]

Point One (35%)

Parent likely did not violate its fiduciary duties of loyalty and care by causing HomeSolar to institute a no-dividend policy, given that the policy applied equally to all shareholders of HomeSolar and had the purpose of ensuring funding for the company's research and development budget.

The MBCA does not specify the duties of controlling shareholders to a controlled corporation or its minority shareholders. Instead, the duties of controlling shareholders generally arise as a matter of the court's "inherent equity power" to fashion fiduciary duties owed by majority shareholders to minority shareholders. *See* Official Comment, MBCA § 10.01 (stating that actions by majority shareholders "may be reviewable by a court under its inherent equity power to review transactions for good faith and fair dealing to minority shareholders"), *citing McNulty v. W. & J. Sloane*, 54 N.Y.S.2d 253 (Sup. Ct. 1945).

Generally, courts have examined business dealings between a controlling shareholder (such as a parent corporation) and the controlled corporation using a fairness test. *See Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 109–110 (Del. 1952). But when the transaction does not involve self-dealing (as is the case with respect to dividends payable to all shareholders of the controlled corporation), then the "business judgment" standard applies. *See Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971); *see also Wolfensohn v. Madison Fund, Inc.*, 253 A.2d 72, 76 (Del. 1969) (holding that overreaching must be shown in a suit against a parent of a subsidiary). That is, the fairness test applies to parent-subsidiary dealings only where the "parent . . . causes the subsidiary to act in such a way that the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders . . . ." *Sinclair*, 280 A.2d at 720; *see generally* Lewis H. Lazarus & Brett M. McCartney, *Standards of Review in Conflict Transactions on Motions to Dismiss: Lessons Learned in the Past Decade*, 36 Del. J. Corp. L. 967, 998–1003 (2011) (concluding that the business judgment rule is standard under Delaware law unless rebutted).

Here, the shareholder challenges the no-dividend policy of HomeSolar instituted by Parent. The no-dividend policy affects the shareholder and all other HomeSolar shareholders (including

Parent) equally and thus is not a self-dealing transaction in which Parent receives something to the exclusion of other shareholders.

Parent did not breach any duty of care. Under a "business judgment" standard, it is sufficient if Parent can offer a rational business justification for the no-dividend policy, which it has by explaining that the no-dividend policy is meant to provide funds for HomeSolar's research and development budget as the subsidiary seeks to develop new products for the residential solar power market. *See* Note on Business Judgment Rule, MBCA § 8.31 (decisions subject to the business judgment standard "will not be disturbed (by a court substituting its own notions of what is or is not sound business judgment) if they can be attributed to any rational business purpose"), *citing Sinclair*, 280 A.2d at 720; *see also Auerbach v. Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979) (business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes").

[NOTE: An examinee who seeks to analyze the question of Parent's duties to the complaining shareholder under the "oppression" standard created by the involuntary dissolution provisions of the MBCA should not receive credit. *See* MBCA § 14.30(a) (calling for the court to order involuntary dissolution for significant abuse of power by controlling shareholders). For one thing, the question asks whether Parent breached any duties to HomeSolar, not whether the court should order involuntary dissolution. For another, an "oppression" claim is "appropriate only for shareholders of corporations that are not widely held." *See* Official Comment, MBCA § 14.30 (pointing out that shareholders in a publicly traded corporation, such as one whose shares are listed on the New York Stock Exchange, "will normally have the ability to sell their shares if they are dissatisfied with current management").]

Point Two (40%)

Given that Parent caused HomeSolar to enter into a contract for the purchase of minerals with Parent's wholly owned subsidiary SolarMaterials at significantly higher prices than current market prices under similar long-term contracts for the same minerals, Parent engaged in unfair self-dealing and thus breached its duty of loyalty to HomeSolar. The business judgment rule does not apply to this conflict-of interest transaction.

As described above, business dealings between a parent corporation (or its wholly owned subsidiary) and a partially owned subsidiary can involve self-dealing-and a breach of the duty of loyalty when the parent causes the partially owned subsidiary to enter into a transaction that prefers the parent (or its wholly owned subsidiary) at the expense of the partially owned subsidiary and its minority shareholders. This breach cannot be cured here because there are no disinterested directors to approve the transaction, as Parent appointed all the directors of HomeSolar, and there is no evidence that the minority shareholders of the partially owned subsidiary approved the transaction. This means that liability can be avoided only if the transaction is judicially determined to be fair.

Generally, the person seeking to justify a self-dealing transaction has the burden of proving its fairness to the corporation. The MBCA has described "fairness," in connection with directors' conflicting-interest transactions, to include not only "the market fairness of the terms of the

deal—whether it is comparable to what might have been obtainable in an arm's-length transaction—but also . . . whether the transaction was one that was reasonably likely to yield favorable results (or reduce detrimental results)" for the corporation. Official Comment to MBCA § 8.61 (Comment 6, Fair to the Corporation). Thus, contractual dealings by a partially owned subsidiary (here HomeSolar) with a wholly owned subsidiary (here SolarMaterials) in a corporate group must not only be shown to reflect the terms obtainable in comparable market transactions but must also be shown to be beneficial to the partially owned subsidiary. Here, given that the prices set in the contract between HomeSolar and SolarMaterials were significantly higher than current market prices under similar long-term contracts for the same minerals, Parent cannot establish the fairness of the contract. Thus, Parent breached its fiduciary duty of loyalty to HomeSolar.

[NOTE: The business judgment rule does not apply to conflict-of-interest transactions and thus is no defense to a claim that the defendant breached its duty of loyalty, and no credit should be given to an examinee who seeks to apply the business judgment rule in the context of a discussion of the duty of loyalty.]

[NOTE: Some examinees may conclude that the self-dealing transaction in this case is subject to "entire fairness" review, which requires a showing of both "fair price" and "fair dealing." *See Kahn v. Lynch Commc'n Sys., Inc*., 638 A.2d 1110, 1117 (Del. 1994) (applying "entire fairness" review to parent-subsidiary merger transaction, in which minority shareholders of the subsidiary are forced out of the corporation). However, it is unclear whether the MBCA would apply this heightened standard to typical intra-group corporate dealings not involving a change in control. *See* MBCA § 13.40(b)(3) & Official Comment (rejecting the "entire fairness" test of *Kahn* when an interested transaction is approved by both a majority of informed, independent, disinterested directors (or a special board committee) and an informed majority of disinterested shareholders). Thus, an examinee should not receive additional credit for discussing the absence of "fair dealing" in this case where the challenged contract was approved by neither disinterested directors nor disinterested shareholders. Here, the absence of "fair price" is critical to the analysis of this intra-group self-dealing transaction.]

Lastly, there are no facts to indicate that Parent or the directors of HomeSolar breached a duty of care. First, there are no facts indicating that Parent caused the HomeSolar directors to act with a faulty decision-making process. Second, there are no facts indicating that the above-market transaction was "wasteful," meaning that no reasonable person would have paid those higher prices. There could be any number of reasons why HomeSolar agreed to pay higher prices, and there are no facts indicating that the deliberation processes were faulty.

Point Three (25%)

<u>Parent likely did not violate its fiduciary duties by allocating the opportunity to apply for the government grant to its wholly owned subsidiary IndustrialSolar rather than its partially owned subsidiary HomeSolar, given that the grant was for development of industrial solar projects and thus beyond the residential business of HomeSolar.</u>

The MBCA does not address the duties of controlling shareholders to not usurp corporate opportunities of partially owned corporations. Nonetheless, an official comment to the MBCA explains the corporate opportunity doctrine in connection with the duties of directors:

> The corporate opportunity doctrine [applicable to directors] is anchored in a significant body of case law clustering around the core question whether the corporation has a legitimate interest in a business opportunity, either because of the nature of the opportunity or the way in which the opportunity came to the director, of such a nature that the corporation should be afforded prior access to the opportunity before it is pursued (or, to use the case law's phrase, "usurped") by a director.

MBCA, Introductory Comment to Subchapter F (Comment 4, Non-Transactional Situations Involving Interest Conflicts – Corporate Opportunity). In a similar vein, the American Law Institute (ALI) Principles of Corporate Governance define a corporate opportunity, for purposes of directors and senior executives, generally as a business opportunity where either "the person offering the opportunity expects it to be offered to the corporation," the opportunity "would be of interest to the corporation," or the opportunity is "closely related to a business in which the corporation is engaged or expects to engage." ALI Principles of Corporate Governance § 505(b); *see also Northeast Harbor Golf Club, Inc. v. Harris*, 661 A.2d 1146 (Me. 1995) (adopting the ALI Principles approach to corporate opportunities as consistent with the MBCA).

For business opportunities allocated within a corporate group, courts have accepted that the parent should have some leeway in allocating business opportunities within the group. *See Sinclair*, *supra*; *see also In re Synthes, Inc. S'holder Litig*., 50 A.3d 1022, 1040–41 (Del. Ch. 2012) ("the duty to put the best interest of [a partially owned subsidiary] above any interest . . . does not mean that the controller has to subrogate his own interests so that the minority stockholders can get the deal that they want") (internal quotations omitted).

Here, although HomeSolar might have wanted to receive the government grant, there is no indication that HomeSolar was capable of using the grant to pursue industrial solar projects; instead, the facts indicate that HomeSolar's line of business is developing residential solar projects. Finally, it is unclear that the government would have given the grant to HomeSolar, as opposed to the wholly owned subsidiary IndustrialSolar.

July 2019
MEE Question 4
Contracts

JULY 2019 MEE
QUESTION 4—CONTRACTS

On March 1, a contractor and an owner of movie theaters signed an agreement providing that, no later than August 15, the contractor would install seats in the owner's new movie theater. The agreed-upon price was $100,000, which was less than the $150,000 that other similar contractors would charge for the same work. The agreement required that the owner pay the contractor half the price at the time the work commenced and the other half at completion. The contractor was willing to do the work for less money than its competitors because the contractor was new to the area and hoped to build up a positive reputation.

The agreement further provided that the contractor would start work no later than July 1. On July 1, before beginning the agreed-upon work, the contractor informed the owner that it would not perform its obligations under the agreement because it had obtained a more lucrative installation contract elsewhere. At that point, no payments had been made to the contractor.

The installation of the seats was the last step necessary for the theater to open to the public. The owner, which had anticipated that the contractor would install the seats by the August 15 deadline, had planned and widely promoted a film festival for September 1–10 to celebrate the opening of the new movie theater.

Immediately after learning that the contractor would not install the seats, the owner began to look for a substitute contractor. Despite diligent efforts, the owner could not find a contractor that would agree to install the seats by August 15. Eventually, after an extensive search, the owner found a substitute contractor that agreed to install the seats for $150,000 by September 15. No other contractor could be found who would agree to install the seats at a lower price or before September 15.

Installation of the seats was completed on September 15, the substitute contractor was paid $150,000, and the theater opened a few days later. Because the theater had no seats at the time of the film festival scheduled for September 1–10, the owner canceled the festival.

The owner sued the original contractor for breach of contract, and the parties agreed to a non-jury trial. The judge has concluded that the contractor's actions with respect to the seat-installation agreement constituted a breach of contract by the contractor. In addition, the judge has made the following findings of fact:

- The contractor was unaware that the owner was planning to hold a film festival when it entered into the contract.

- The owner would have made a profit of $35,000 if the seats had been installed in the new movie theater and the film festival had been presented there as scheduled on September 1–10.

- The owner could have relocated the film festival to a nearby college auditorium that was available September 1–10 and, if this had occurred, the owner would have made a profit of $25,000.

1. Do the damages recoverable by the owner include $50,000 for the amount paid to the substitute contractor above the $100,000 price to be paid to the original contractor under the contract? Explain.

2. May the owner recover for lost profits resulting from the cancellation of the film festival? Explain.

3. Assuming that the owner is entitled to recover for lost profits resulting from the cancellation of the film festival, how much should the owner recover? Explain.

July 2019
MEE Analysis 4
Contracts

JULY 2019 MEE
ANALYSIS 4—CONTRACTS

This July 2019 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

> (1) Do the damages recoverable by the owner from the original contractor include $50,000 for the additional amount paid to the substitute contractor beyond the $100,000 price to be paid to the original contractor under the contract?
>
> (2)(a) Can the owner recover from the original contractor as consequential damages lost profits from the canceled film festival even though the contractor was unaware of the owner's plan to hold the film festival?
>
> (2)(b) Assuming that the owner can recover consequential damages resulting from the canceled film festival, does the owner's failure to reduce those damages by relocating the film festival rather than canceling it result in lower consequential damages?

DISCUSSION

Summary

Damages for breach of contract are typically based on the aggrieved party's expectation interest—how much worse off the aggrieved party is than if the breaching party had fulfilled its obligation under the contract. In this case, the owner would have had to pay the contractor $100,000 to install the seats but, because the contractor breached its contract, had to pay the substitute contractor $150,000 for that task. Thus, the owner is $50,000 worse off than it would have been if the contractor had satisfied its obligation. As a result, the owner's "direct damages" are $50,000.

Whether the owner is also entitled to consequential damages arising from the cancellation of the film festival depends on whether the original contractor had reason to foresee the cancellation as a probable result of its breach. Here, the original contractor did not know about the scheduled film festival, and there is no indication in the facts that the original contractor had reason to know of it. Thus, it is unlikely that the owner will be able to recover damages arising from the cancellation of the film festival.

Even if the original contractor had reason to know of the owner's plans for the film festival, the owner might not be entitled to recover its $35,000 in lost profits as consequential damages. If the college auditorium was a reasonable substitute location for the film festival, the owner could have avoided $25,000 of the $35,000 in lost profits and thus would be entitled to recover only

the $10,000 that would have been lost had the film festival been held at the college auditorium. But the college auditorium may not have been a reasonable substitute. An apparent reason for the film festival was to showcase the new theater, and moving the film festival to the college auditorium would not then have been a reasonable substitute, so the fact that the owner did not move the film festival there would not reduce the recovery for lost profits.

Point One (20%)

The owner is entitled to recover expectation damages equal to the difference between the price that the owner paid to the substitute contractor ($150,000) and the price that the owner would have paid the original contractor ($100,000). That is, the owner is entitled to recover $50,000 from the original contractor.

Generally, the party injured by a breach of contract has a right to damages based on the party's expectation interest. Restatement (Second) of Contracts § 347. Such damages are "intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." *Id.* cmt. a. Here, the contractor promised to install the seats by August 15 for $100,000 and did not do so. No other contractor could be found who would agree to install the seats by August 15; the substitute contractor, though, agreed to do the installation later for $150,000. Thus, to put the owner, to the extent possible, in as good a position as it would have been in had the contract been performed (the owner would have paid $100,000 and the seats would have been installed) requires an award to the owner of $50,000. This is because use of the substitute contractor resulted in the owner spending $150,000 for seat installation instead of $100,000. Thus, the owner is $50,000 worse off than if the original contractor had performed under the contract, so it will take a payment of $50,000 to the owner to put it in "as good a position as [it] would have been in had the contract been performed."

Point Two(a) (40%)

It is unlikely that the owner is entitled to recover the loss it suffered as a consequence of the cancellation of the film festival (consequential damages). That loss would be recoverable if the original contractor had reason, at the time the contract was made, to foresee it as a probable result of the breach. Inasmuch as the court has found that the contractor was unaware that the owner was planning to hold a film festival when it entered into the contract, the loss would be recoverable only if the original contractor nonetheless had reason to know of the film festival.

In addition to the expectation damages described in Point One, the owner may seek to recover consequential damages arising from the breach. Restatement (Second) of Contracts § 347(b). However, under the rule announced in the landmark case of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854), as currently applied in almost every state, such damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made. Restatement (Second) of Contracts § 351(1). Loss may be foreseeable as a probable result of a breach if it follows from the breach either in the ordinary course of events or as a result of special circumstances beyond the ordinary course of events that the party in breach had reason to know of. *Id.* § 351(2).

Here, it is unlikely that a court would conclude that cancellation of a film festival would follow in the ordinary course of events from breach of a contract to install seats in a movie theater by a stated date. Although the contractor likely would have known that general ticket sales would be lost because of the delayed opening, there is nothing in the facts to indicate that film festivals or similar events are usually scheduled immediately following the construction of a movie theater. It might be argued, however, that the original contractor would have reason to know that the owner of a new theater would promote its opening with some sort of special event that could generate significant revenue. Thus, while it might be argued that the loss from the cancellation of the film festival was foreseeable as following from the breach in the ordinary course of events, these facts offer little to support that argument.

[NOTE: New York does not follow the rule in *Hadley v. Baxendale*. Rather, recovery of consequential damages in New York is limited to liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made. *See Kenford Co. v. County of Erie* (Kenford II), 537 N.E.2d 176 (N.Y. 1989). This test, derived from the opinion of Justice Holmes in *Globe Ref. Co. v. Landa Cotton Oil Co*., 190 U.S. 540 (1903), is often referred to as the "tacit agreement" test. *See* Restatement (Second) of Contracts § 351, Reporter's Note to comment a.]

Point Two(b) (40%)

Even if the cancellation of the film festival was reasonably foreseeable, it is unclear whether the owner would be entitled to recover the $35,000 in lost profits resulting from the cancellation. If holding the film festival at the college auditorium was a reasonable substitute for holding it at the new movie theater, the owner will not be able to recover that portion of the loss that could have been averted by holding the film festival at the college auditorium. If, on the other hand, holding the film festival at the college auditorium was not a reasonable substitute because a primary purpose of the film festival was to showcase the new movie theater, the failure of the owner to relocate the film festival will not reduce the owner's recovery for lost profits.

In addition to foreseeability, consequential damages can be limited for reasons related to "mitigation" or "avoidability." As a general rule, a party cannot recover damages for loss that the party could have avoided by reasonable efforts. *See* Restatement (Second) of Contracts § 350, comment b. Once a party has reason to know that performance by the other party will not be forthcoming, the party is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss by making substitute arrangements or otherwise. *Id.* Thus, the amount of loss that the aggrieved party could reasonably have avoided by stopping performance, making substitute arrangements, or otherwise is simply subtracted from the amount that would otherwise have been recoverable as damages. *Id.* Affirmative steps to avoid loss are not required, however, if they would involve undue risk, burden, or humiliation. *Id*. § 350(1).

Here, the facts indicate that the owner could have reduced its loss by putting on the film festival at a nearby college auditorium. Because the owner could have avoided some of the loss by moving the festival, it can be argued that the owner cannot recover for the portion of the loss that could have been avoided that way. In that case, the owner would be entitled to recover only the $10,000 lost profits that it would have suffered if it had moved the film festival to the college auditorium. But it might also be argued that a purpose of the film festival was to showcase the

new movie theater, in which case moving the festival to another location would not serve this purpose. “Whether an available alternative transaction is a suitable substitute depends on all the circumstances, including the similarity of the performance.” *Id*. § 350 cmt. e. In that case, holding the film festival at the college auditorium would not have been a reasonable substitute for a film festival at the new theater, and the consequential damages recoverable by the owner would not be reduced by the amount that could have been saved by moving the film festival to the college auditorium.

[NOTE: Sometimes the reduction in consequential damages because the aggrieved party did not take affirmative steps to avoid contractual losses is described as a breach of the party’s “duty to mitigate damages.” This terminology is misleading because that party has no duty to avoid loss; rather, contract law simply provides that the aggrieved party cannot recover losses that could reasonably have been avoided.]

July 2019
MEE Question 5
Family Law

JULY 2019 MEE
QUESTION 5—FAMILY LAW

Twelve years ago, Wendy and Frank were married in State A. One year later, their daughter, Danielle, was born in State A. The couple and their daughter have continued to live in State A.

One year ago, Frank lost his job as a steelworker after suffering a serious back injury. Frank's doctor has said that he will not be able to return to work.

One month ago, Frank filed an action against Wendy seeking spousal support. Frank filed the action after Wendy, a commercial airline pilot whose work frequently necessitates her absence from home, stopped depositing her wages into the couple's joint bank account and refused to pay household bills. Frank's unemployment insurance is inadequate to pay all the household bills.

Danielle's school recently sent her parents a note indicating that Danielle will not be allowed to enroll in school next year unless the parents provide proof of her vaccination. Frank, based on his personal, nonreligious beliefs, has consistently refused to allow Danielle to receive any vaccinations. Danielle does not satisfy the requirements for a medical exemption. State A has amended its mandatory vaccination law by eliminating all nonmedical exemptions based on "personal beliefs." As amended, the law requires, as a precondition to a child's enrollment in any public school, that "the child's parent or guardian must provide proof that the child has received all vaccinations mandated by the State Department of Health." Frank has brought an action challenging the State A vaccination law under the U.S. Constitution as a violation of his parental rights.

Two weeks ago, Danielle, age 11, with her parents' permission, went to visit her aunt in State B. One week into the visit, the aunt called Frank and Wendy and told them that Danielle did not want to return to her parents' home because "Mom is always traveling, Dad is really depressed since his back injury, and I just can't stand living there anymore." The aunt told Frank and Wendy that "I can't in good conscience send her home, so I'm immediately going to court to seek legal custody."

1. May Frank obtain spousal support from Wendy? Explain.

2. Will Frank's constitutional challenge prevail? Explain.

3. In what state must the aunt file a custody petition? Explain.

4. Is the court likely to grant legal custody of Danielle to her aunt? Explain.

July 2019
MEE Analysis 5
Family Law

JULY 2019 MEE
ANALYSIS 5—FAMILY LAW

This July 2019 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

(1) May Frank obtain spousal support from Wendy?

(2) Will Frank's constitutional challenge prevail?

(3) In what state must the aunt file a custody petition?

(4) Is the court likely to grant legal custody of the daughter, Danielle, to her aunt?

DISCUSSION

Summary

Frank may not obtain a spousal support order against his wife, Wendy. In the absence of a contrary statute, courts typically do not order support in the context of an intact, co-residential marriage.

Although parents have a constitutional right to the care, custody, and control of their children, including the right to make most health-care decisions, the state may, pursuant to its police-power authority, mandate vaccination in order to protect public health. Thus, Frank will not succeed in his action to overturn the state vaccination requirement.

Under the UCCJEA and PKPA, applicable in all states, an initial child-custody action must be brought in a child's "home state," i.e., the state where she has lived for the preceding six months. Thus, the aunt's custody petition must be brought in State A.

It is highly unlikely that a court will grant the aunt's custody petition. In determining child custody, all states today grant a fit legal parent preference over a nonparent, an approach that is almost certainly mandated under *Troxel v. Granville,* 530 U.S. 57 (2000). Although a child's preference is relevant in a custody contest, Danielle's desire to live with her aunt should not provide a sufficient basis for an award of custody to the aunt.

Point One (20%)

Because Frank and Wendy are not separated, Frank may not obtain a support order against Wendy.

In all states, marriage establishes a mutual support obligation between spouses. *See* 41 C.J.S. Husband and Wife § 66. However, the spousal support obligation is limited by the common law doctrine of nonintervention, which disallows judicial intervention in an intact family. Although the case law is sparse, courts have relied on the nonintervention principle to deny a support petition when the couple is living together. *See, e.g.*, *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953). Thus, until and unless Frank and Wendy separate, a court will not intervene in their private affairs. The fact that Wendy is frequently absent for work-related reasons does not constitute a separation. There is nothing in the facts to suggest that Wendy has moved or even that she has a second residence.

[NOTE: Were Frank to purchase necessary household items on credit, the merchant who extended credit to him might be able to recover from Wendy the value of the goods furnished under the common law necessaries doctrine. The necessaries doctrine is generally applicable to food, clothing, shelter, and health care. Here, however, there appears to be no merchant who has furnished goods to Frank on credit. Therefore, any discussion of the doctrine of necessaries is inapplicable.]

Point Two (30%)

Although a parent's right to the care, custody, and control of his or her child is constitutionally protected, that right does not provide a basis for overturning a state vaccination mandate.

The Supreme Court of the United States has held that the parental right to the care, custody, and control of a child is constitutionally protected under the 14th Amendment. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

However, parental rights are not absolute. "[T]he power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Yoder*, *supra*, at 233–34. The spread of preventable, contagious illnesses is a "significant social burden."

Moreover, the Supreme Court has specifically held both that a vaccination mandate is within the state's police power to protect the public health (*Jacobson v. Massachusetts*, 197 U.S. 11 (1905)) and that a state may refuse school admission to a student who fails to receive a vaccination as mandated. *Zucht v. King*, 260 U.S. 174, 176 (1922). Recent challenges to state rules that disallow school attendance by unvaccinated students have thus been summarily dismissed. *See Phillips v. City of New York*, 775 F.3d 538, 542–44 (2d Cir. 2015) (granting summary judgment to City defendants).

Point Three (20%)

Under both the UCCJEA and PKPA, only a child's "home state" may exercise jurisdiction over an initial child-custody petition. Here, because State A is Danielle's home state, only a State A court may hear the aunt's custody petition.

Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which has been adopted in all but one state (Massachusetts), a court may exercise jurisdiction over a petition for child custody *only if* "this State is the home State of the child on the date of the commencement of the proceeding, or was the home State of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State" and no other state's courts would have jurisdiction under the above standard or other courts having jurisdiction have declined to exercise it. UCCJEA § 201(a)(1). A "home state" is the state in which the child "lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." *Id.* § 102(7). The "physical presence of, or personal jurisdiction over, a party or a child is not necessary . . . to make a child-custody determination." *Id.* at § 201(c).

The federal Parental Kidnapping Prevention Act (PKPA) similarly grants exclusive jurisdiction over a child-custody petition to a child's "home state." 28 U.S.C. § 1738A(d). Under the supremacy clause, PKPA takes precedence over any conflicting state law. *See, e.g., Murphy v. Woerner*, 748 P.2d 749 (Alaska 1988).

Here, Danielle has lived in State A continuously since her birth. She has been present at her aunt's home in State B for only two weeks. The child's parents both continue to live in State A. Thus, only a State A court may exercise jurisdiction over the aunt's custody petition.

[NOTE: The UCCJEA "temporary emergency jurisdiction" provision is not relevant here, as it is applicable only when the child has been "abandoned . . . or is threatened with mistreatment or abuse." UCCJEA § 204. The mother's traveling does not constitute abandonment, as she has invariably left the child with the child's father. There is nothing in the facts to support a claim that the father has not continued to act as his child's guardian.]

Point Four (30%)

<u>It is highly unlikely that the court will grant the aunt's petition for custody, given the constitutionally based parental preference.</u>

In all states, when a nonparent seeks to obtain a child's custody from a fit legal parent, the parent is accorded a preference. *See, e.g., People ex rel. Anonymous v. Anonymous*, 530 N.Y.S.2d 613, 615 (App. Div. 1988). Although the strength of the preference varies from one state to the next, in *Troxel v. Granville*, 530 U.S. 57 (2000), the Supreme Court of the United States implied that such a preference is constitutionally mandated. *Troxel* involved a state statute under which "[a]ny person" could petition for visitation rights "at any time" and authorized a court to grant such visitation whenever it concluded that "visitation may serve the best interest of the child." Because the statute was "breathtakingly broad" and required the court to give "no special weight at all to [a parent's] . . . determination of her daughter's best interests," a plurality of the Court found that it "contravened the traditional presumption that a fit parent will act in the best interest of his or her child." 530 U.S. at 67–69.

Here, the aunt might argue that Danielle's desire to live with her is sufficient to overcome the preference in favor of continued parental custody. And in all states, the views of a child who is

mature enough to form and express a preference are certainly relevant to a custody determination. Indeed, the wishes of an older child are typically given substantial weight. *See* Annotation, *Child's Wishes as Factor in Awarding Custody,* 4 A.L.R.3d 1396 (1965).

However, the child's wishes "are not treated equally in every case":

> Sometimes the child's wishes are given controlling effect, while at other times the wishes are disregarded altogether. The circumstances determining what effect, between these two extremes, should be given to a child's wishes in a particular case are, in addition to the comparative effect of objective factors affecting its welfare generally, . . . and in addition to the natural right of the child's parent to have its custody (frequently invoked successfully, at least in the absence of the parent's long-term abandonment of the child to another's custody): the child's age and judgment capacity; the basis for and strength of its preference, generally; the treatment extended to the child by the contestants for its custody; and the wrongful inducement of the child's wishes.

Id. at § 2(a). *See also* Wanda Ellen Wakefield, Annotation, *Desire of Child as to Geographic Location of Residence or Domicile as Factor in Awarding Custody or Terminating Parental Rights,* 10 A.L.R.4th 827 (1981).

Although there are a handful of states in which, by statute, the court must defer to the wishes of an older child when choosing between fit parents (*see* 4 A.L.R.3d, *supra)*, even if State A has such a statute it would not be applicable in this case because the custody contest is between a fit parent and a nonparent.

Here, Wendy's frequent absences from home are work-related, and Frank has been at home and able to provide care at all times. And even if the aunt were to substantiate Danielle's claim that her father is "depressed," the father's mental state does not represent a showing that his care is inadequate or that he is unfit. In sum, because of the preference accorded parents in a custody contest with a nonparent, it is highly unlikely that a court will grant the aunt's custody petition despite Danielle's stated preference.

July 2019
MEE Question 6
Civil Procedure / Constitutional Law

JULY 2019 MEE
QUESTION 6—CIVIL PROCEDURE / CONSTITUTIONAL LAW

Trident Healthcare Inc., incorporated in State X, owns and operates hospitals and clinics in States X, Y, and Z. Medical information for all of Trident's current and former patients is stored on computer equipment housed at Trident's corporate headquarters in State X.

Last December, unknown persons hacked into Trident's computer system and obtained the personal medical information of at least 30,000 Trident patients, including 5,000 patients living in State X, 10,000 patients living in State Y, and 15,000 patients living in State Z. However, there is no evidence that the thieves have used any of this medical information.

The State X Privacy Protection Act imposes an absolute duty on health-care providers, including companies like Trident, to keep patient medical information private. The legislature concluded that the "invasion of privacy" resulting from data breaches causes significant harm to the individuals involved. Thus, the law allows any person whose private medical information is obtained by an unauthorized third party in any manner to recover actual damages from the health-care provider. Further, because such damages are sometimes difficult to quantify, the state law provides that an individual is entitled to a minimum statutory (nominal) damages award of $500 to compensate for this "invasion of privacy." This state law is not preempted by any federal law.

A man, who is a citizen of State X and whose medical records were stored in the Trident computers, has brought a class action in the federal district court of State X against Trident on behalf of himself and all the persons whose health-care information was taken during the hacking of Trident's computer system. The man is represented by counsel with extensive experience in class actions of this type. The complaint is limited to claims arising out of the hacking of medical information. It seeks no actual damages but does seek statutory damages on behalf of all members of the class pursuant to the State X statute. The complaint alleges the facts detailed above and alleges that the court has jurisdiction based on diversity, pursuant to 28 U.S.C. § 1332. The complaint also alleges that most if not all of Trident's patients are U.S. citizens who are domiciled in the states where they receive their health care.

State X's legislatively adopted Civil Practice Rules provide that "if any statute or law of this state allows for an award of statutory or nominal damages, recovery of such damages may be sought in an individual action but not in a class action."

Trident has moved to dismiss the man's class action brought in federal district court, arguing that (i) the court lacks subject-matter jurisdiction over the state-law claim raised by the class action, (ii) the action fails to allege a claim upon which relief can be granted because of the state law barring class actions to recover statutory damages, and (iii) the man does not have standing to bring a statutory damages claim in federal court.

With respect to each of these arguments, how should the court rule? Explain.

July 2019
MEE Analysis 6
Civil Procedure / Constitutional Law

JULY 2019 MEE
ANALYSIS 6—CIVIL PROCEDURE / CONSTITUTIONAL LAW

This July 2019 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

ANALYSIS

Legal Problems:

> (1) Does a federal district court have diversity jurisdiction over a class action when (a) the amount in controversy is $15,000,000 and (b) there is no diversity between the defendant and the class representative, though there is diversity between the defendant and other class members?
>
> (2) Does a state-law rule prohibiting class actions for recovery of statutory damages apply to bar a class action brought in federal court when the state rule is contained in a state statute governing court procedure and is not tied to any particular state-law substantive right?
>
> (3) Do the members of a plaintiff class have standing to bring a claim in federal court when they cannot prove tangible damage to themselves but do have a claim for statutory damages for violations of privacy rights protected by state law?

DISCUSSION

Summary

Trident's motion to dismiss for lack of subject-matter jurisdiction should be denied. A federal district court can exercise diversity jurisdiction over a class action if the amount in controversy exceeds $5,000,000 and *any* member of the class is diverse from *any* defendant (i.e., there is minimal diversity). Here, those requirements are met. Each member of the class is alleged to be entitled to statutory damages of $500 and there are at least 30,000 class members. If the class claims are upheld, total damages will be at least $15,000,000, far in excess of the $5,000,000 required to be in controversy for this kind of action. There is minimal diversity because the defendant is a citizen of State X, while some members of the class live in States Y and Z.

When a claim based on state-law rights is brought in federal court, it is governed by federal procedure law. So federal procedural rules for class actions govern, not State X procedural rules. The federal court is not bound by State X's law barring class actions to recover statutory damages. Thus, the action should not be dismissed on this basis.

The plaintiff probably has standing to bring the statutory (nominal) damages claim in federal court. The issue is whether the alleged "invasion of privacy" suffered by the plaintiff is an "injury in fact" even though the plaintiff cannot prove any actual damages. Given the state's

determination that data breaches involving private medical information cause harm to individual privacy even when actual damages cannot be shown, it is likely that a federal court would conclude that the invasion of privacy resulting from disclosure of private medical information is sufficiently concrete to warrant a finding of standing.

Point One (35%)

Because the amount in controversy in this class action exceeds $5,000,000 and there is minimal diversity, the federal district court has subject-matter jurisdiction to hear the case under its diversity jurisdiction.

In 2005, Congress amended the federal diversity-jurisdiction statute, 28 U.S.C. § 1332, to allow large class actions to be brought in federal court, even if there is not complete diversity between the defendants and the plaintiffs. Under § 1332(d)(2)(A), a federal district court can exercise diversity jurisdiction over a class action if (i) "the matter in controversy exceeds the sum or value of $5,000,000" and (ii) "any member of a class of plaintiffs is a citizen of a State different from any defendant" (i.e., "minimal diversity").

Here, those requirements are met. First, the amount in controversy exceeds $5,000,000. The plaintiff is suing on behalf of a class of at least 30,000 plaintiffs, each of whom has a statutory damages claim of $500. These claims can be aggregated in determining jurisdiction. *See* 28 U.S.C. § 1332(d)(6). Thus, if the plaintiff's class claim is upheld, the amount in controversy exceeds $15,000,000.

Second, there is minimal diversity between some members of the plaintiff class and the defendant. Trident is a citizen of State X, where it is incorporated and where its corporate headquarters are located. *See* 28 U.S.C. § 1332(c)(1) (a corporation is a citizen of its state of incorporation and the state where it has its principal place of business); *Hertz Corp. v. Friend*, 559 U.S. 77 (2010) (corporation's principal place of business is state "where the corporation's high level officers direct, control, and coordinate the corporation's activities"). All that is required, therefore, is that at least one member of the plaintiff class be a citizen of a state other than State X.

Here, 10,000 members of the plaintiff class live in State Y, and 15,000 members live in State Z. The complaint further alleges that most, if not all, of these class members are U.S. citizens. Assuming that Trident does not contest these factual claims, there is almost certainly at least one member of the class who is a citizen of either State Y or State Z and therefore diverse from Trident, a citizen of State X. A U.S. citizen is a citizen of the state in which she has her domicile. Domicile is defined as "residence in fact, combined with the intention of making the place of residence one's home for an indefinite period." Friedenthal, Kane & Miller, Civil Procedure § 2.6 at 31 (4th ed. 2005). Among the 25,000 members of the class actually living in States Y or Z, there will doubtless be thousands who meet the requirements of U.S. citizenship and domicile in those states, so that the minimal diversity requirements are met. It does not matter that there are also members of the plaintiff class (i.e., those living in State X) who are not diverse from the defendant.

[NOTE: According to the class-action provisions of the diversity-jurisdiction statute, a court may decline (and sometimes must decline) to exercise jurisdiction when a class involves a significant

proportion of nondiverse class members. *See* 28 U.S.C. § 1332(d)(3), (d)(4) (court "may" decline when nondiverse members constitute greater than one-third and less than two-thirds of total class; and court "shall" decline when nondiverse members constitute greater than two-thirds of total class). Here, the number of State X class members (5,000) is less than one-third of the total class (at least 30,000), and thus these special provisions do not apply. In addition, the further exceptions to the class-action diversity rules (for class actions against state officials, class actions with fewer than 100 members, and class actions involving securities or corporate fiduciary claims) are not raised by the facts of this question. *See* 28 U.S.C. § 1332(d)(5), (d)(9).]

Point Two (35%)

When a claim based on state-law rights is brought in federal court, it is governed by federal procedure. So federal procedural rules for class actions govern, and the federal court is not bound by State X's procedural law barring class actions to recover statutory damages. Thus, the action should not be dismissed because of State X's law.

This action is appropriate if it is authorized by Federal Rule of Civil Procedure 23 regardless of what the state procedural law says. In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court held that federal courts sitting in diversity must look to state law for the substantive rules of decision governing such cases. However, in a series of subsequent cases, the Court made clear that federal law would continue to govern procedural matters in federal court, even if the federal procedure affected the outcome of the litigation. *See Byrd v. Blue Ridge Rural Electric Coop., Inc.*, 356 U.S. 525 (1958) (federal rule providing for jury determination of particular issue controls in federal court despite contrary state rule requiring the issue to be decided by a judge). If there is a federal procedural rule that governs an issue, it applies "unless it exceeds statutory authorization or Congress's rulemaking power." *See Shady Grove Orthopedic Associates v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (citing *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 5 (1987)).

In *Shady Grove*, the Court considered a New York law barring class actions to enforce statutory damages claims. The Court concluded that such actions can be maintained in federal court, despite the state law, if the action is authorized by Rule 23. According to the Court, Rule 23 is both a procedural rule within the scope of the Rules Enabling Act and a rule that entitles "a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." 559 U.S. at 398. Thus, a class action may be maintained in federal court even though there is a contrary state-law provision forbidding class actions.

[NOTE: To bring a class action under Rule 23, a plaintiff must first satisfy the requirements of Rule 23(a). Here, the requirements of Rule 23(a) (numerosity, commonality, typicality, and adequate representation) are satisfied.]

[NOTE: The facts of this problem fall squarely within the holding of *Shady Grove*, so there should be no question that Rule 23 should be applied, not the contrary law of State X. However, the Court was fractured as to the rationale for its decision in *Shady Grove*, and Justice Stevens (a critical fifth vote) suggested that Rule 23 would not apply if a state law limiting class actions is "so intertwined with a state right or remedy that it functions to define the scope of the state-created right." 559 U.S. at 423. Thus, some examinees might emphasize that the state law in this

problem is a general law that does not directly modify rights granted by any particular substantive law, including the State X Privacy Protection Act at issue in this question.]

Point Three (30%)

The court is likely to conclude that there is a "concrete" injury arising from the hacking of the medical information, as required for there to be standing under Article III. Thus the court should probably not grant the motion to dismiss for lack of the plaintiff's standing.

Federal court jurisdiction is limited by Article III of the Constitution to "Cases" and "Controversies." *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). To establish standing, a plaintiff must show (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S.Ct. 1540, 1547 (2016), *citing Lujan* at 560–561.

Here, the plaintiff's claimed injury is the invasion of his privacy resulting from unauthorized access by third-party hackers to his personal medical information. The facts indicate that his injury was a result of the defendant's failure to protect that information (as it was required to do by the State X Privacy Protection Act). A favorable decision would redress the injury through an award of damages, but that award would be based on the statute's provision for statutory damages, not on proof of the actual extent of harm to the plaintiff. Thus, the issue is whether the asserted "invasion of privacy" counts as an "injury in fact" when the plaintiff does not claim that he, or any member of the class, suffered any actual damage and seeks to recover only statutory damages.

In *Spokeo*, 136 S.Ct. at 1549, the Supreme Court concluded that "Article III standing requires a concrete injury even in the context of a statutory violation." In *Spokeo*, inaccurate information about a plaintiff was included in a credit-reporting database, but there was no evidence that the plaintiff had been harmed by that fact. The Supreme Court held that there was no "injury" for standing purposes, despite the fact that a state law would have awarded the plaintiff statutory damages based on the presence of the inaccurate information alone. The Court emphasized that the "injury in fact" element of the Court's standing test required a showing that the plaintiff suffered "an invasion of a legally protected interest" that is "concrete" as well as "particularized." The mere fact that a defendant has acted improperly toward a particular plaintiff (e.g., by including inaccurate information about the plaintiff in a credit-reporting database) is not enough; nor is it enough that the defendant's conduct violated a state statute. For the plaintiff to have standing to bring a claim in federal court, the defendant's statutory violation must have "concretely" injured that plaintiff.

The Court in *Spokeo* also said that actual monetary harm to a plaintiff isn't required for standing: an "intangible" injury can nonetheless be a "concrete injury." Moreover, the Court indicated that a legislative judgment that certain intangible harms constitute injury in fact would be "instructive." But the Court made clear that a plaintiff does not satisfy the injury-in-fact requirement merely because a statute has granted the plaintiff a statutory right and the defendant has allegedly violated that statute. *Id*. at 1549.

After *Spokeo*, the question is whether an invasion of a plaintiff's privacy, without more, is a sufficiently "concrete" injury to satisfy standing requirements. Although it can be argued that no

harm is present on our facts here because there is no evidence that the plaintiff's improperly disclosed medical information has been improperly used to the plaintiff's detriment, the invasion of privacy alone may constitute concrete harm, albeit 'intangible' harm, sufficient for standing. Knowledge that one's private medical information is in the hands of a third party may cause emotional distress or worry, even if the information is never used. Support for a conclusion that such harms are concrete harms is also found in State X's legislative judgment that the loss of privacy that occurs when medical records are disclosed constitutes injury warranting a recovery of damages even when no actual damages can be established.

In cases decided since *Spokeo*, several federal courts have held that an invasion of privacy is, in and of itself, a concrete injury, even when extensive damages cannot be proved. *See Perry v. Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017) (disclosure to third party of user's viewing history on CNN mobile software app is violation of personal privacy sufficient to constitute "concrete injury"); *Blumenfeld v. Regions Bank*, 374 F.Supp. 3d 1165 (N.D. Ala. 2019) (invasion of privacy from disclosure of person's private financial information to a third party is a concrete injury); *Soukhaphonh v. Hot Topic, Inc*., 2017 WL 2909403 (C.D. Cal. 2017) ("an invasion of privacy, even one based on a solitary text message, is a sufficient injury to establish standing"); *Toldi v. Hyundai Capital America*, 2017 WL 736882 (D. Nev. 2017) ("intrusive invasion of privacy" from autodialed and prerecorded calls is a concrete injury); *Krakauer v. Dish Network L.L.C*., 168 F.Supp. 3d 843, 845 (M.D. N.C. 2016) ("disruptive and annoying invasion of privacy" from telemarketing calls is concrete injury).