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In re Bryan Carr

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In re Bryan Carr

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FILE

Anders, Davis & Waters
Attorneys at Law
6241 Lowell Street
Franklin City, Franklin 33205

To: Examinee
From: Miles Anders
Re: Bryan Carr
Date: July 28, 2015

My friend and former college roommate Bryan Carr has consulted me about a credit card problem he is facing. I offered to help him figure out a strategy for responding.

Bryan's mother died last year. Since then his father, Henry Carr, has become more and more dependent upon Bryan. Several months ago, Henry asked Bryan if Bryan could pay the estimated \$1,500 it would take to repair Henry's van. Bryan gave his credit card to Henry and told him that he could charge all the repairs but could not use the card for anything else. Bryan also gave Henry a letter that said Bryan was giving Henry permission to use the card. In the end, the total repair cost was \$1,850, which was charged to Bryan's card.

Bryan forgot to get the credit card and letter back from his father, and Henry used the card to buy several things in addition to the auto repairs. Over several months, Henry charged gasoline, groceries, books, and, most recently, power tools to Bryan's account. Bryan always pays the entire balance on his credit cards each month, and he had already paid for the first three months of purchases without noticing Henry's charges. However, earlier this month, Bryan discovered the unauthorized purchases. He promptly contacted the bank that issued the card to dispute the charges. The bank has notified him that he is responsible for all charges.

Bryan would like our advice about his legal obligation to pay the bank for the charges Henry made in March, April, May, and June, as detailed in the statements for these months. Please draft an opinion letter for my signature to Bryan. This letter should advise Bryan of the extent of his liability for each of Henry's purchases. The letter should follow the attached firm guidelines for opinion letters.

Anders, Davis & Waters
Attorneys at Law
6241 Lowell Street
Franklin City, Franklin 33205

OFFICE MEMORANDUM

To: Associates
From: Managing partner
Re: Opinion letters
Date: September 5, 2013

The firm follows these guidelines in preparing opinion letters to clients:

- Identify each issue separately and present each issue in the form of a “yes or no” question. (E.g., Is the client’s landlord entitled to apply the security deposit to the back rent owed?)
- Following each issue, provide a concise one- or two-sentence statement which gives a “short answer” to the question.
- Following the short answer, write a more detailed explanation and legal analysis of each issue, incorporating all important facts and providing legal citations. Explain how the relevant legal authorities combined with the facts lead to your conclusions.
- Bear in mind that, in most cases, the client is not a lawyer; avoid using legal jargon. Remember to write in a way that allows the client to follow your reasoning and the logic of your conclusions.

Transcript of telephone conversation between Miles Anders and Bryan Carr
July 24, 2015

Anders: Bryan, I heard your voicemail message. I'm sorry you are having problems, and I'd like to help. Can you tell me what happened?

Carr: Well, you know that my mom died late last year. My dad has been devastated. They were married for 40 years. My mom had always organized and maintained their household and paid all the bills. Now my dad is pretty much at a loss for how to cope. Even though this is a busy season for my landscaping business, I've tried to step in to support him as much as I can, including paying some of his bills. It's been tough keeping up with all that's going on.

Anders: Can you tell me more about your dad's situation? I'm asking because I understand that this has contributed to your current problem.

Carr: About four months ago, my dad came to me after his van broke down. He had gotten a repair estimate for \$1,500, and he didn't have the money on hand to pay for the repairs. I decided to help him out and told him I would pay whatever it cost to have his van repaired. I also told my dad it was a loan, but honestly, I was never going to ask him to pay me back. I love my dad and wanted to help him in his time of need.

Anders: How did you give him the money?

Carr: I let him use one of my credit cards. It seemed the easiest thing to do at the time. I had a card that had a zero balance on it. It's with Acme State Bank. When I gave my dad the credit card, I told him that he could charge the van repairs, but I also specifically told him that that was the only purchase or charge he should make on the card.

Anders: Did you do anything else?

Carr: Yes, I wrote a letter that said that my dad was authorized to use my credit card and gave it to him. I think I also wrote the credit card account number and expiration date on the letter. I made a copy of the letter and have it in my desk. I will scan it and email it to you as soon as we get off the phone.

Anders: Did the letter say anything about restricting the purchase specifically to the van repairs?

Carr: No, it didn't.

Anders: Did your dad charge the repairs?

Carr: Yes, my dad used my Acme State Bank card to pay for the van repairs. The final bill was somewhat more than the original estimate. Apparently an additional part was needed, making the total repair cost \$1,850. That was \$350 more than the original estimate. My dad charged the total amount to my credit card.

Anders: Then what happened?

Carr: With all that was going on in my life, I forgot to get my credit card back from my dad until about six weeks ago. When I finally did, I also got back the letter I'd given him. Unfortunately, I subsequently learned that my dad had already used the card to make additional purchases without ever asking my permission or even telling me. In fact, he even used my account information after returning the card and letter.

Anders: How did you find out about the additional purchases?

Carr: When I was reviewing and preparing to pay my current credit card statement, I noticed a \$1,200 charge to Franklin Hardware Store for power tools. I knew I had not made this purchase. I called my dad to see if he knew anything about the power tools purchase.

Anders: What did your dad say?

Carr: He admitted he had used my account number to buy the power tools. He told me he wanted to prove to himself and the rest of the family that he could take care of the house, and he impulsively went to buy some tools to make some household repairs. He said he had written the account information on a piece of paper before returning the credit card and my letter to me.

Because my dad had already returned the credit card and my letter to me before he purchased the tools, he said he merely presented the credit card account name, number, and expiration date to the hardware store clerk. The clerk must have been out of his mind, but he accepted the information my dad presented and charged the tools to my account. My dad feels terrible and has apologized profusely. He is so ashamed of himself.

Anders: Are these the only other charges your dad made?

Carr: I wish. He also admitted that before he returned my card, he had used it to buy gas, groceries, and books over the past few months.

Anders: What did you do after you learned of all these transactions?

Carr: I pulled out my file with my Acme State Bank credit card statements and reviewed my statements for the past several months. Sure enough, upon review, I noticed that during the past four months, in addition to the van repairs, my dad had charged gasoline on two occasions at Friendly Gas, groceries on one occasion at the Corner Market, books at Rendell's Book Store, and most recently, the power tools at the Franklin Hardware Store. I always pay the entire balance on my credit cards on the due date each month. All the gas, grocery, and book charges made by my dad have already been paid in full. I noted this fact by writing "Paid—BC" on each of the past statements. I never noticed these charges before I paid my statements. The truth is, I usually don't review the bills very carefully, and I didn't notice the gas, grocery, and book charges because he and I both shop at the same places. I probably gave each statement a quick glance, if that. However, I have not yet paid the current credit card statement for June with the \$1,200 power tools charge.

Anders: Have you contacted the bank or done anything else?

Carr: I called the bank to discuss the problem. They directed me to fill out and send in their form disputing the charges. I did this right away.

Anders: What happened?

Carr: This morning I received a letter from the bank informing me that I was responsible for all the charges. That's when I called your office.

Anders: What would you like to see happen?

Carr: I know my dad did something he shouldn't have done; I told him to return the tools if he still could. But he's a senior citizen and in considerable distress. The various vendors should not have allowed him to use my credit card. I know he had the card in his possession for all but the power tools purchase, but it's still not right for the bank to say I'm responsible. I'd like to know whether the bank can hold me responsible for each of the charges my dad made.

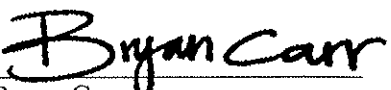
Anders: Bryan, we'll look into this quickly. Meanwhile, please don't pay your credit card statement until you get further advice from us. I'll be back in touch before the current payment due date.

March 12, 2015

To Whom It May Concern:

I, Bryan Carr, give my father, Henry Carr, permission to use my Acme State Bank credit card: account number 474485AC66873641, expiration date 09/2017. If you have any questions, please feel free to call me at 555-654-8965.

Thank you,


Bryan Carr

ACME STATE BANK

P.O. Box 309
Evergreen, Franklin 33800

Billing Statement: March 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Account Number 474485AC66873641

New Charges

DATE	DESCRIPTION	AMOUNT
March 16, 2015	Schmidt Auto Repair	\$1,850.00
	Total	\$1,850.00

Payment Due Date Minimum Due
April 30, 2015 \$55.50

DIRECT ALL INQUIRIES TO
(800) 555-5555

MAKE ALL CHECKS PAYABLE TO
Acme State Bank
P.O. Box 309
Evergreen, FR 33800

THANK YOU FOR YOUR BUSINESS!

PAID-BC April 29, 2015

ACME STATE BANK
P.O. Box 309
Evergreen, Franklin 33800

Billing Statement: April 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Account Number 474485AC66873641

April 30, 2015 Payment Received \$1,850.00

New Charges

DATE	DESCRIPTION	AMOUNT
April 10, 2015	Friendly Gas Station	\$75.00
April 16, 2015	Corner Store	\$55.00
April 21, 2015	Friendly Gas Station	\$76.50
	Total	\$206.50

Payment Due Date Minimum Due
May 31, 2015 \$15.00

DIRECT ALL INQUIRIES TO
(800) 555-5555

MAKE ALL CHECKS PAYABLE TO
Acme State Bank
P.O. Box 309
Evergreen, FR 33800

THANK YOU FOR YOUR BUSINESS!

PAID-BC May 30, 2015

ACME STATE BANK
P.O. Box 309
Evergreen, Franklin 33800

Billing Statement: May 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Account Number 474485AC66873641

May 31, 2015 Payment Received \$206.50

New Charges

DATE	DESCRIPTION	AMOUNT
May 16, 2015	Rendell's Book Store	\$45.70
	Total	\$45.70

Payment Due Date Minimum Due
June 30, 2015 \$15.00

DIRECT ALL INQUIRIES TO
(800) 555-5555

MAKE ALL CHECKS PAYABLE TO
Acme State Bank
P.O. Box 309
Evergreen, FR 33800

THANK YOU FOR YOUR BUSINESS!

PAID-BK June 29, 2015

ACME STATE BANK
P.O. Box 309
Evergreen, Franklin 33800

Billing Statement: June 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Account Number 474485AC66873641

June 30, 2015 Payment Received \$45.70

New Charges

DATE	DESCRIPTION	AMOUNT
June 21, 2015	Franklin Hardware Store—power tools	\$1,200.00
	Total	\$1,200.00

Payment Due Date Minimum Due
July 31, 2015 \$36.00

DIRECT ALL INQUIRIES TO
(800) 555-5555

MAKE ALL CHECKS PAYABLE TO
Acme State Bank
P.O. Box 309
Evergreen, FR 33800

THANK YOU FOR YOUR BUSINESS!

LIBRARY

**Excerpts from Federal Truth in Lending Act
15 U.S.C. §§ 1602 and 1643**

§ 1602 Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

...

(k) The term “credit card” means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

...

(o) The term “unauthorized use,” as used in section 1643 of this title, means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

* * *

§ 1643 Liability of holder of credit card

(a) Limits on liability

(1) A cardholder shall be liable for the unauthorized use of a credit card only if—

(A) the card is an accepted credit card;

(B) the liability is not in excess of \$50;

...

(E) the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as a result of loss, theft, or otherwise; and

(F) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

...

(d) **Exclusiveness of liability.** Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

Excerpts from Restatement (Third) of Agency (2006)

§ 1.01 Agency Defined

Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.

§ 2.01 Actual Authority

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.

§ 2.03 Apparent Authority

Apparent authority is the power held by an agent or other actor to affect a principal’s legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.

§ 3.01 Creation of Actual Authority

Actual authority, as defined in § 2.01, is created by a principal’s manifestation to an agent that, as reasonably understood by the agent, expresses the principal’s assent that the agent take action on the principal’s behalf.

§ 3.03 Creation of Apparent Authority

Apparent authority, as defined in § 2.03, is created by a person’s manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.

§ 3.11 Termination of Apparent Authority

- (1) The termination of actual authority does not by itself end any apparent authority held by an agent.
- (2) Apparent authority ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority.

BAK Aviation Systems, Inc. v. World Airways, Inc.

Franklin Court of Appeal (2007)

In 2005, BAK Aviation Systems, Inc. (BAK), issued a credit card to World Airlines, Inc. (World), to purchase fuel for a corporate jet leased by World from BAK. World designated Ken Swenson, an independent contractor hired by World, as chief pilot of the leased jet and gave him permission to make fuel purchases with the BAK credit card but only in connection with *non-charter* flights involving World executives. However, Swenson used the credit card to charge \$89,025 to World in connection with *charter* flights involving non-World customers prior to the cancellation of the credit card in 2006. When World refused to pay, BAK sought recovery in court.

The trial court entered judgment for BAK for the full amount in dispute. The court held that the federal Truth in Lending Act, which limits a cardholder's liability for "unauthorized" uses, did not apply to charges incurred by one to whom the cardholder had voluntarily allowed access for another purpose. World appeals.

The Truth in Lending Act, 15 U.S.C.

§ 1643(a), places a limit of \$50 on the liability of a credit cardholder for charges incurred by an "unauthorized" user. This appeal concerns the applicability of this provision to a card bearer who was given permission by the cardholder to make a limited range of purchases but who subsequently made additional charges on the card. We conclude that Swenson, who incurred the charges, was not an "unauthorized" user within the meaning of § 1643(a) and therefore affirm.

Congress enacted the 1970 Amendments to the Truth in Lending Act in large measure to protect credit cardholders from unauthorized use perpetrated by those able to obtain possession of a card from its original owner. The amendments limit the liability of cardholders for all charges by third parties made without "actual, implied, or apparent authority" and "from which the cardholder receives no benefit." 15 U.S.C. §§ 1602(o), 1643. Where an unauthorized use has occurred, the cardholder can be held liable only up to a limit of \$50 for the amount charged on the card, if certain conditions are satisfied. 15 U.S.C. § 1643(a)(1)(B).

By defining “unauthorized use” as that lacking “actual, implied, or apparent authority,” Congress intended, and courts have accepted, primary reliance on principles of agency law in determining the liability of cardholders for charges incurred by third-party card bearers. Under the parameters established by Congress, the inquiry into “unauthorized use” properly focuses on whether the user acted as the cardholder’s agent in incurring the debt in dispute. A cardholder, as principal, can create actual authority only through manifestations to the user of consent to the particular transactions into which the user has entered. *See* RESTATEMENT (THIRD) OF AGENCY § 3.01.

“Implied authority” has been held to mean actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent’s express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent’s reasonable interpretation of the principal’s manifestations in light of the principal’s objectives and other facts known to the agent. These meanings are not mutually exclusive. Both fall within the definition of

actual authority. *See* RESTATEMENT (THIRD) OF AGENCY § 2.02, comment (b).

With respect to the transactions Swenson made in connection with the charter flights, we conclude that no actual or implied authority existed.

Unlike actual or implied authority, however, apparent authority exists entirely apart from the principal’s manifestations of consent to the agent. Rather, the cardholder, as principal, creates apparent authority through words or actions that, reasonably interpreted by a third party from whom the card bearer makes purchases, indicate that the card bearer acts with the cardholder’s consent. *See* RESTATEMENT (THIRD) OF AGENCY § 3.03.

Though a cardholder’s relinquishment of possession of a credit card may create in another the appearance of authority to use the card, the statute clearly precludes a finding of apparent authority where the transfer of the card was without the cardholder’s consent, as in cases involving theft, loss, or fraud. However elastic the principle of apparent authority may be in theory, the language of the 1970

Amendments demonstrates Congress's intent that charges incurred as a result of *involuntary* card transfers are to be regarded as unauthorized under §§ 1602(o) and 1643.

Because the Truth in Lending Act provides no guidance as to uses arising from the *voluntary* transfer of credit cards, the general principles of agency law, incorporated by reference in § 1602(o), govern disputes over whether a resulting use was unauthorized. These disputes frequently involve, as in this case, a cardholder's claim that the card bearer was given permission to use a card for only a limited purpose and that subsequent charges exceeded the consent originally given by the cardholder. Acknowledging the absence of actual authority for the additional charges, a majority of courts have declined to apply the Truth in Lending Act to limit the cardholder's liability, reasoning that the cardholder's voluntary relinquishment of the card for one purpose gives the bearer apparent authority to make additional charges. (Citations omitted.)

Nothing about the BAK credit card itself, or the circumstances surrounding the purchases, gave fuel sellers reason to distinguish the authorized fuel purchases

Swenson made for the *non-charter* flights from the disputed purchases for the *charter* flights. It was industry custom to entrust credit cards used to make airplane-related purchases to the pilot of the plane. By designating Swenson as the pilot and subsequently giving him the BAK card, World thereby imbued him with more apparent authority than might arise from voluntary relinquishment of a credit card in other contexts. In addition, with World's blessing, Swenson had used the card, which was inscribed with the registration number of the Gulfstream jet, to purchase fuel on non-charter flights for the same plane. The only difference between those uses expressly authorized and those now claimed to be unauthorized—the identity of the passengers—was insufficient to provide notice to those who sold the fuel that Swenson lacked authority for the charter flight purchases.

Here, the disputed charges were not "unauthorized" within the meaning of 15 U.S.C. §§ 1602(o) and 1643(a)(1). Accordingly, BAK was entitled to recover the full value of the charges from World under their credit agreement. The judgment of the trial court is affirmed.

Transmutual Insurance Co. v. Green Oil Co.

Franklin Court of Appeal (2009)

This is an appeal from a holding of the trial court finding against defendant Green Oil Co. and in favor of plaintiff Transmutual Insurance Co. In March 2000, Transmutual obtained a Green Oil credit card for use in its business. Transmutual's office manager, Donna Smith, was responsible for requesting credit cards for Transmutual employees and paying bills. Smith did not have the authority to open new credit accounts for Transmutual; only its general manager had this authority.

On May 16, 2005, Smith made a written request to Green Oil for a GreenPlus credit card. A GreenPlus credit card may be used for purchases of goods and services other than those furnished at gasoline service stations. The GreenPlus application was signed by Smith as office manager. It also contained a signature purporting to be that of Alexander Foster as general manager and secretary-treasurer of Transmutual; however, the trial court determined that Foster's signature was forged by Smith.

During the period from May 2005 until July 2008, Smith wrongfully and fraudulently

used the GreenPlus card to obtain goods and services in the amount of \$26,376.53. Transmutual paid for these purchases with checks signed by Smith and an authorized officer. During this time, Transmutual employed accounting firms to perform audits, but they did not discover the fraud.

Under the federal Truth in Lending Act, 15 U.S.C. § 1643(a), a cardholder is liable only for a limited amount if certain conditions are met and if the use of the credit card was unauthorized. Accordingly, the initial determination is whether or not the use of the credit card in the case at hand was unauthorized. The federal definition of "unauthorized use" is "a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit." 15 U.S.C. § 1602(o). The test for determining unauthorized use is governed by agency law, and agency law must be used to resolve this issue.

Smith did not have actual or implied authority to request a GreenPlus credit card.

The trial court correctly determined that the principle of apparent authority controls in this case.

Apparent authority is created when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation of the principal. RESTATEMENT (THIRD) OF AGENCY § 3.03. Transmutual is bound by Smith's acts under apparent authority only to third persons who have incurred a liability in good faith and without ordinary negligence. The trial court correctly determined that Green Oil acted negligently by issuing Smith a GreenPlus credit card without independently verifying her authority. Because of Green Oil's negligence, the trial court determined that Green Oil, as the card issuer, could not rely upon Smith's ostensible authority to establish the existence of agency between Smith and Transmutual.

However, the trial court erred in not looking beyond Green Oil's negligence in issuing Smith the card. After receiving the first statement from Green Oil containing the fraudulent charges, Transmutual was negligent in not finding and reporting Smith's fraud. If the person or entity to whom a credit card is issued is careless, that

person or entity may be held liable.

The federal Truth in Lending Act does not address whether cardholder negligence removes the statutory liability limit. However, we believe that Transmutual's negligence in not examining its monthly statements from Green Oil removes this case from the statutory limit on cardholder liability.

A cardholder has a duty to examine his credit card statement promptly, using reasonable care to discover unauthorized signatures or alterations. If the card issuer uses reasonable care in generating the statement and if the cardholder fails to examine his statement, the cardholder is precluded from asserting his unauthorized signature against the card issuer after a certain time.

The facts at hand are similar. Green Oil was not negligent in billing Transmutual. If someone at Transmutual other than Smith had examined its statements from Green Oil, he or she would have discovered Smith's fraud. Transmutual had the responsibility to institute internal procedures for the examination of the statements from Green Oil which would have disclosed Smith's

deception. Transmutual had sole power to do so. Transmutual's failure to institute such procedures is the cause of that portion of the embezzlement that occurred following the billing from Green Oil that contained the first evidence of Smith's fraud.

Transmutual's negligence leads us to reexamine whether Smith acquired apparent authority in her use of the GreenPlus card after Transmutual became negligent. In *Farmers Bank v. Wood* (Franklin Ct. App. 1998), we set forth the test to determine whether or not apparent authority exists. The authority must be based upon a principal's conduct which, reasonably interpreted, causes a third person to believe that the agent has authority to act for the principal.

Thus, if a principal acts or conducts his business, either intentionally or through negligence, or fails to disapprove of the agent's acts or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, the principal is bound by the acts of the agent within the scope of his apparent authority as to persons who have reasonable grounds to believe that the agent has such authority and in good faith deal with him.

Farmers Bank, supra.

Green Oil was negligent in issuing Smith the GreenPlus card. However, during Smith's fraudulent use of the card, Green Oil was not negligent. Rather, Transmutual (the cardholder) was negligent in not requiring that someone other than Smith examine its monthly statements. Smith embezzled money from Transmutual for three years through her fraudulent use of the GreenPlus credit card. During this lengthy period of embezzlement, Transmutual always paid its monthly bill to Green Oil.

Transmutual contends that it is not proper for the court to consider the fact that Transmutual paid all the Green Oil credit card charges. That contention is without merit. As a result of Transmutual's acts of paying the charges and its failure to examine its credit card statements so that it could notify Green Oil of the fraud, Transmutual allowed Green Oil to reasonably believe that Smith was authorized to use the credit card.

We conclude under the principles of apparent authority that Transmutual is liable for all of Smith's purchases from the time the credit card was issued.

Reversed.

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

1) MPT1 - Please type your answer to MPT 1 below

Â

When finished with this question, click Â to advance to the next question.
(Essay)

=====
===== Start of Answer #1 (2057 words) =====

Anders, Davis & Waters
Attorneys at Law
6241 Lowell Street
Franklin City, Franklin 33205

To: Bryan Carr
From: Miles Anders
Re: Credit Card Purchase Liabilities
Date: July 28, 2015

Dear Bryan:

I hope this letter finds you well. We have reviewed the applicable law and legal authority regarding your questions concerning your father's purchases on your credit card, and have outlined below your probable liability for each of the purchases. This should hopefully address each purchase in turn, and give you both a general answer for

your liability, as well as a more detailed explanation as to why you are or are not required to pay Acme State Bank for those charges.

I want to first begin by giving you a brief explanation of the sources we are using in order to determine your liability. Because this involves usage of your credit card, issued by Acme, this raises issues under the Federal Truth in Lending Act. Technicalities aside, this Act simply states that you, as a credit cardholder, will not be liable for any unauthorized use of your credit card by someone who does not have some kind of authority--or permission from you--to use your card in such a way. Essentially, this Act was designed to protect credit cardholders from unauthorized use of the card by those who were able to obtain permission to use and possess the card by the original owner (Bak Aviation Systems, Inc. v. World Airways, Inc.). There are certain limits to this blanket exclusion of liability, though. We have to individually assess each purchase of your father's to determine whether or not he had any kind of authority, despite the fact that you limited the scope of the credit card usage orally, in order to fully ascertain your payment of his debts. If any such authority exists, you likely will be liable for that purchased.

1. Are you liable for the March 2015 \$1,850.00 charge to Schmidt Auto Repair?

Yes. Because you gave your father actual authority, represented by the March 12,

2015 letter that you signed, and he had implied authority, represented by a reasonable belief that a higher cost for the van repair was still chargeable on your card, you are liable for the charges incurred at Schmidt's.

The Federal Truth in Lending Act provides that a cardholder will be liable for credit card purchases if the user of the credit card had actual, implied, or apparent authority. Actual authority is simply determining whether the user of the credit card on this particular purchase--in this case, your father--acted as your "agent" in incurring any kind of debt while using your credit card (Bak). This is creating by you, as the credit cardholder, manifesting some kind of consent to the specified purchases that your father made with your credit card. In this case, your letter dated March 12, 2015, gave your father permission to use your Acme State Bank credit card, and it included your signature, account number, and expiration date. This gives your father the actual authority to, of course, use that credit card. Furthermore, you told me during our phone conversation that you told him he could charge the card for the van repairs, but no other purchases would be permitted by you. This also raises an instance in which your father had implied authority for the additional \$350 beyond the original repair estimate.

Implied authority will exist when the agent--here, your father, as the user of your credit card--has any kind of reasonable permission that might be necessary or customary to accomplish the kinds of tasks which you, as the cardholder, assigned (Bak).

Futhermore, implied authority may exist if your father reaasonably interpreted that you would allow such an extended use beyond the original permission given (Bak). In this case, because you gave your father explicit permission to use the credit card *solely* for van repair, it is likely reasoanble that using the card for the additional \$350 that it took to repair the van was permissible through implied authority. Therefore, with regard to the entire van repair, becuase actual and implied authority existed in you permitting such a purchase, this purchase will not be considered "unauthorized" under the Federal

Truth and Lending Act, and, therefore, you will be liable for this entire amount.

2. Are you liable for the April 2015 \$206.50 charge to both Friendly Gas Station and Corner store? Yes. Because your father had apparent authority to enter into these transactions, based on the reasonable belief of these two vendors, you are liable for the charges incurred at both Friendly's and Corner's.

Importantly, your father had no actual authority to enter into these transactions. He had written authority to use the credit card; however, your oral manifestation to him means that he knew he had no reasonable belief he could use the credit card outside the scope of the van repair. Furthermore, no implied authority exists either. As discussed earlier, implied authority is what an agent reasonably believes a principal--here, you--would allow the agent to do within the scope of the assignment. While an additional \$350 cost for van repair might be necessary to achieve the purpose of repairing the van, as you expressly allowed, making purchases of gas and groceries is not reasonably allowed.

If no actual or implied authority exists, apparent authority might exist, in which a third party, such as a store clerk, reasonably believes the user of the card has the cardholder's permission. If a third party reasonably believes in good faith and without any kind of negligence that the card usage is privileged, then apparent authority will apply, which means that you, as the cardholder, will incur liability for that purchase (Transmutual Insurance Co. v. Green Oil Co.). This may be created by words or actions spoken or committed by you that are reasonably interpreted by a third party to indicate that the user of the credit card at that time has your consent (Bak).

Specifically, apparent authority cannot be the means of establishing credit card purchase liability if the transfer was involuntary--in other words, if the credit card was obtained through theft, loss, or fraud (Bak). However, when the transfer of the card is *voluntary*, as in cases in which the cardholder voluntarily relinquishes his credit card to another person to use, whether under specific guidelines or not, courts have tended to apply apparent authority, which would, in turn, require the original cardholder to be liable for the purchases. If a third party vendor has no reason to consider usage of a credit card for a typical purchase is suspect, the purchase is within normal limits, and the vendor has no notice that the purchaser does not have express permission to use that credit card for that particular purchase, then apparent authority will be found to exist. For instance, a case out of our jurisdiction, Bak, provided that a pilot who was given a credit card by this airline employer to use for fuel only for *charter* flights was found to be acting under apparent authority when he used the credit card for purchases related to *noncharter* flights; therefore, his airline employer was still liable to the bank for the charges, despite its express condition that he shall not use the credit card for those purchases.

In your case, you voluntarily gave your father your credit card. You gave him permission to use it with the letter, and did not express any particular limitations to its use, beyond the oral limit that it can only be applied to the van repair. Similar to the airline company in Bak, while you did limit to your *father* that purchases cannot exceed the van repair, his usage of the credit card for purchases of gas and groceries was not an abnormal purchase, would likely not be suspect to a vendor, considering he used the actual credit card at this time, and the vendors had no notice that he was exceeding the scope of the usage. Additionally, at this time, Acme Bank was not notified that there

were any unauthorized purchases, the card was a normal credit card that your father was using in ordinary business transactions. Therefore, it is highly likely that you will be liable for the full \$206.50 charges to these vendors, considering it was reasonable for both Friendly and Corner to believe your father was authorized to make those purchases by the ordinary possession and usage of the credit card.

3. Are you liable for the May 2015 \$45.70 charge to Rendell's Book Store? Yes. Similar to the Friendly and Corner purchases, because your father had apparent authority to enter into these transactions, based on the reasonable belief of Rendell's, you are liable for the charge incurred at Rendell's.

The charge at Rendell's for your father's purchase of his books follows a nearly identical analysis as our preceding discussion regarding the charges at both Friendly's and Corner's. Similarly, no actual or implied authority exists. You merely gave your father express authority to repair the van. However, because your father was in possession of the credit card, it is reasonable to believe that the clerk at Rendell's believed your father was not acting outside any normal usage of the credit card; therefore, because he was not on notice, and it was reasonable to believe your father was acting within the normal scope of business in making this purchase, your father had apparent authority to make this purchase, and you likely will be liable for the full \$45.70 amount.

4. Are you liable for the June 2015 \$1,200 charge to Franklin Hardware Store? Likely, no. Because there is no actual or implied authority, nor was apparent authority

reasonable in these circumstances, and, additionally, because Acme Bank is on notice that there was an unauthorized use, you are likely not liable for this purchase.

Once more, no actual or implied authority exists for this purchase. It was not in the scope of the van repair; therefore, those are not means of establishing your liability. Furthermore, apparent authority is not necessarily an issue here. In Transmutual, the court found that the vendor party was negligent in issuing an unauthorized party a credit card without independently verifying her authority to obtain a credit card. Furthermore, apparent authority, while it does require a third party's reasonable belief, additionally requires that that belief is in good faith and without negligence (Transmutual). Here, when your father made the purchase of the hardware, he had already returned the credit card to you, and simply gave the store clerk a piece of paper with the credit card information on it, which the clerk immediately took and charged. This is not customary practice in stores, and, furthermore, is rather irresponsible; therefore, it is likely we can establish that Franklin Hardware was negligent in failing to not request your father to produce the actual credit card for the transaction. Because of this, you are likely not liable for this \$1,200 purchase.

5. Will your failure to discover the charges on your credit card statement preclude any liability? No. Courts have held that a cardholder's failure to examine his credit card statement properly will not preclude liability of an allegedly unauthorized credit card use.

Under Transmutual, the court held that "a cardholder has a duty to examine his

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credit card statement promptly, using reasonable care to discover unauthorized signatures or alterations." If a cardholder does fail to do this reasonable inspection, he is "precluding from asserting his unauthorized signature against the card issuer after a certain time." (Transmutual). Unfortunately, while you did not think much of these purchases considering you also shop at these locations, courts likely will not excuse that failure to thoroughly examine. Courts will likely hold that, had you properly examined your credit card statements, you could have notified the Bank of the unauthorized uses of your credit card earlier, thus precluding your liability. Therefore, your lack of knowledge on the March-May payments will not preclude your liability.

I certainly hope that these explanations have better helped your understanding of your situation. We will be more than willing to further assist you regarding this matter, and are happy to have your business. Please take care, Bryan, and contact us further with any questions or comments.

All my best,

Miles Anders

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=====
===== End of Answer #1 =====

Applicant Number

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In re Franklin Aces

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In re Franklin Aces

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FILE

Franklin Arts Law Services
Pro Bono Legal Services for the Franklin Arts Community
224 Beckett Avenue
Franklin City, Franklin 33221

MEMORANDUM

TO: Examinee
FROM: Eileen Lee, Esq., Executive Director
RE: Al Gurvin
DATE: July 28, 2015

We have agreed to offer legal advice to Al Gurvin concerning a claim he may have against the Franklin Aces professional football team. The relevant materials are attached.

Our engagement by Mr. Gurvin recognizes that, as a pro bono service, we do not have the resources to represent him in litigation. Rather, we have been retained solely to provide legal advice about his potential claim. If he decides to pursue litigation, we will help him find counsel.

Mr. Gurvin has asked for 1) our evaluation of the likelihood of success should he litigate his claim against the team, 2) our assistance in seeking a settlement (we have done so and received an offer), and 3) our recommendation as to whether he should litigate or accept the settlement offer that the team has made.

Please draft a letter to Mr. Gurvin providing your recommendation as to whether he should accept the settlement offer. Your recommendation should factor in your assessment of the likely outcome of litigation, the recovery he might realize should he prevail, his goals in pressing his claim, and any other factors you think relevant. You should fully explain your reasoning as to why he should accept or reject the settlement offer.

Do not separately state the facts, but include the relevant facts in support of your legal analysis and recommendation as to the settlement offer. Remember that Mr. Gurvin is not an attorney. Your letter should explain the law and recommendation in language that, while encompassing a full legal analysis including citations to relevant legal authority, does so in terms a nonlawyer may easily understand.

FRANKLIN SPORTS GAZETTE

REJOICE, FRANKLIN FOOTBALL FANS, THE ACES ARE COMING!

By Ben Jordan January 27, 2014

FRANKLIN CITY, Franklin—Franklin’s long and unrequited longing for professional football is about to be satisfied. The Olympia Torches, after years of unsuccessful attempts to get support for a new stadium in Olympia, have announced that, starting in July of 2016, they will relocate to Franklin City.

ProBall Inc., the team owner, says that years of declining attendance in our neighboring state of Olympia—a result (in its view) of an aging, one could even say decrepit, stadium—have made a move imperative. Although many cities around the country sought to win the team, the owner chose Franklin City for several reasons, including the proximity of a good portion of the team’s fan base (without a team of their own, many Franklin residents followed the Torches) and—probably more importantly—the financial support of the Franklin State and Franklin City governments to underwrite the construction of a new, state-of-the-art stadium.

That new stadium will be built in the existing Franklin City Sports Complex, run by the Franklin Sports Authority. The Sports Complex currently includes the Omnidome, where Franklin’s pro basketball and hockey teams play, and Franklin Memorial Stadium, where the baseball Blue Sox play. The new stadium will be configured for soccer as well as football.

The team has also announced that it will change its name to the Franklin Aces. The new team logo and uniforms, yet to be created, will be announced in due course according to the team owner.

Transcript of Interview between Eileen Lee and Al Gurvin (June 29, 2015)

Lee: Mr. Gurvin, nice to meet you. How may we help you?

Gurvin: They've stolen my design for the new football team's logo, and I need a lawyer.

Lee: Perhaps we'd better start at the beginning. I've read your intake application, and I know you qualify for our pro bono services given your income level, but tell me about yourself and how all this got started, from the beginning.

Gurvin: Okay, sorry, let's see. I work as a janitor at the Franklin Omnidome, the hockey rink and basketball facility used by our pro teams. I got real excited last year when they announced that the Olympia pro football team was moving to Franklin City.

Lee: Why were you so excited? Are you a big football fan?

Gurvin: I'll say—more than a big fan. I'm nuts about football, and I've been rooting for the Torches for years and years. I watch every game on TV, and I'd give my eyeteeth to be able to afford tickets to see games in person.

Lee: What happened after you saw the news reports of the move?

Gurvin: Well, I'm an amateur artist—no real training, but I like to doodle. When they announced that the team was moving, they also announced that it was changing its name to the Franklin Aces. They also said that they didn't yet have a logo or uniform designs. I didn't give it a second thought. But several months later, I started to think about a design and then one day it hit me. I realized that a real good design for a logo would be a hand holding the four aces from a deck of cards, fanned out like you hold cards. So I sketched that design, and it looked pretty good. I showed the sketch to my boss, and he liked it too.

Lee: Who's your boss? What's his position?

Gurvin: Dick Kessler—he's the work crew supervisor at the Omnidome. Anyway, he suggested that I send it to Daniel Luce, the CEO of the Franklin Sports Authority. So I took a drawing of the logo and faxed it to Mr. Luce with a note.

Lee: When did that happen, and what did the note say? Do you have a copy?

Gurvin: It was 10 months ago. Here's a copy of the note, and my original sketch [see attached note and description].

Lee: What happened then?

Gurvin: Nothing—I never heard back from anyone. Then, about a month ago, the team made a big announcement with a press conference and everything at which they announced

the new uniforms and logo, and it was mine, exactly! Here's a copy of their logo and the press release they issued with it, which was in the local newspapers [see attached press release and logo description]. I think they stole it from me, and I should be entitled to something for it—they should pay me something like \$20,000.

Lee: Have you registered the copyright in your design with the United States Copyright Office?

Gurvin: No—should I?

Lee: Well, a copyright exists from the moment a work is created, and you don't need any government action to grant it. But registration with the Copyright Office is a good idea for many reasons—for example, for our purposes, should you decide to litigate, you must have registered your claim before you can take the case to court. Even though the infringement you allege has already occurred, you can still register, but let's see what route you wish to pursue. Registration isn't expensive, and it won't hurt to wait to register for a few weeks in any event. Let me look into it. I happen to know José Alvarez, the General Counsel of ProBall Inc., the team owner—he's an old classmate and friend of mine. I'll contact him to see if we can work something out short of litigation, and get back to you.

Gurvin: Okay, great.

Lee: You should understand, Mr. Gurvin, that, while we'll be happy to evaluate your claim and help you seek a quick settlement, we're in no position to represent you if you decide to litigate it. As a pro bono service, we simply don't have the resources to undertake litigation on behalf of any client. So if litigation is ultimately the route you wish to follow, we'll try to help you find counsel, but our representation of you must end at that point.

Gurvin: Sure.

Lee: We'll draft an engagement letter for you to sign. I hope we can help you resolve this.

Copy of Fax from Al Gurvin to Daniel Luce (September 25, 2014)

Dear Mr. Luce: I'm a janitor in the Omnidome, and a big, big football fan. When I read that the Torches were moving to Franklin City, and that the team would become the Aces, I had a great idea for a logo for the team. I made a sketch, and it's attached to this note. I'd be honored if the team would consider and use my logo, and I wouldn't want anything from them if they did, except maybe some tickets to games in the new stadium. Thanks, Al Gurvin

[Actual sketch omitted]

* * *

[DESCRIPTION OF GURVIN SKETCH: Mr. Gurvin's sketch consists of an outline of a hand from the wrist up, without any other features, holding four cards fanned out, in order from left to right, the ace of diamonds, ace of clubs, ace of hearts, and ace of spades.]

Press Release Announcing New Franklin Aces Logo

[Franklin City, May 28, 2015] The Franklin Aces football team is delighted to announce its new logo and uniforms. After consideration of many designs, we believe this one will be most appealing to the fans and players. Later this year we will begin discussions with various merchandise manufacturers, and we expect that our fans will be able to purchase their Franklin Aces gear next year.

[Picture of Franklin Aces logo omitted.]

* * *

[DESCRIPTION OF NEW FRANKLIN ACES LOGO: Although the outline of the hand is somewhat different, the Franklin Aces logo presented in the press release is otherwise identical to Mr. Gurvin's sketch.]

ProBall Inc.

José Alvarez, General Counsel
Franklin City Sports Complex, Suite 520
Franklin City, FR 33221

July 24, 2015

Eileen Lee, Esq.
Franklin Arts Law Services
224 Beckett Avenue
Franklin City, FR 33221

Dear Eileen:


Thanks for your phone call of July 7, 2015, explaining Mr. Gurvin's claim. I've looked into the matter, and our conclusion is that your client has no basis for any claim against the team.

First, the design he created, whatever its merits, is not copyrightable subject matter. The images of playing cards are familiar designs and common property containing no original authorship. That being the case, any claim he might have must fail.

Second, even if the design were copyrightable, there is no proof that those who designed the new team logo had any access to it. Thus, even if the designs were identical, there could be no copyright infringement, for without proof of access, any claim must fail. To that end, I have attached affidavits from those involved that summarize testimony that would be given in court.

Even though your client has no basis for any claim, the team's owner, in an effort to avoid unhappy publicity, makes this offer: In return for a release of any claims based on your client's design, ProBall Inc. would give Mr. Gurvin a season ticket for a single seat, in a prime location, to all home games for the team's first season. (The retail price of such a season ticket will be \$5,000.) Eileen, we go back a long way, you know I'm good for my word, and I want to be forthright with you—this is the team's final, and only, settlement offer.

With kindest personal regards,


José Alvarez

AFFIDAVIT OF DANIEL LUCE

STATE OF FRANKLIN)
COUNTY OF LINCOLN)

I, Daniel Luce, being duly sworn, depose and say:

1. I am Chief Executive Officer of the Franklin Sports Authority. The Authority is entirely separate from ProBall Inc., the owner of the Franklin Aces football team. The Authority and ProBall Inc. are not under common ownership or affiliated in any way.

2. On September 25, 2014, I received a two-page fax from Al Gurvin, a janitor at the Omnidome facility of the Franklin City Sports Complex. I do not have a copy of the fax, but I know when I received it because I checked the fax log in our office. Although I do not recall the specifics, I remember that the fax had a sketch attached to it, and that Mr. Gurvin wanted the sketch submitted as a possible logo for the Franklin Aces pro football team.

3. I knew that the team had retained ForwardDesigns, a commercial design firm, to design a logo and uniforms for the team. Hence, I did not think any input from the Authority or otherwise was needed. Although I do not remember specifically what I did with the fax, I believe I discarded it in the trash.

4. ProBall was given a suite of offices in the five-story Administrative Building of the Franklin City Sports Complex. Those offices are on the fifth floor. All the Authority's offices, including mine, are on the second floor, as is the fax machine which serves all of the Authority's departments. (The ground floor contains a museum and ticket offices; the third and fourth floors are occupied by the firms holding the parking and food concessions at our facilities.)

5. Other than occasional greetings while passing in the lobby of our building or sharing rides in the elevator, I have had no contact with anyone working for ForwardDesigns.

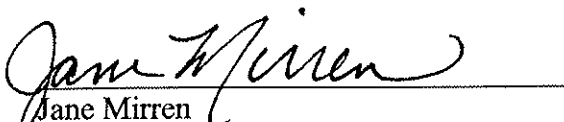
6. I and some of my staff meet occasionally with executives of ProBall Inc. to coordinate details concerning the construction and operation of the new football stadium. Other than that, no one from the Franklin Sports Authority has any dealings with representatives of ProBall Inc., the team owner.

Dated July 22, 2015



Daniel Luce

Signed before me on this 22nd day of July, 2015



Jane Mirren
Notary Public

AFFIDAVIT OF MONICA DEAN

STATE OF FRANKLIN)
COUNTY OF LINCOLN)

I, Monica Dean, being duly sworn, depose and say:


1. I am a commercial artist and designer for ForwardDesigns. Our firm was retained in August of 2014 by ProBall Inc. to design a logo and uniforms for the Franklin Aces pro football team. I was the sole designer working on the project. Our firm was paid \$10,000 for its services.

2. To facilitate my work on the project, the team gave me an office located in their suite of offices on the fifth floor of the Administrative Building of the Franklin City Sports Complex. I have had no contact with employees of the Franklin Sports Authority, other than with Julie Covington, a personal friend who works in the Authority's transportation office and with whom I occasionally have lunch. I have never met Daniel Luce, the Authority's Chief Executive Officer.

3. As I thought about a logo for the team, one obvious choice was a hand holding the four aces from a deck of cards. I had seen many versions of that image, including many on clip art collections on the Internet, none of which were protected by copyright, and which I used for inspiration. About five months ago, I drew that design, along with about a dozen others, and submitted it to ProBall Inc., who chose it as the new team logo. I alternated the suits of the cards in the design so that they appeared as first a red suit, then a black suit, and I made the last and most visible card the ace of spades, as it is the most striking and familiar card.

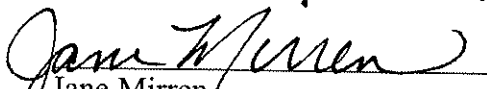
4. I do not recall ever seeing any sketch of any idea for the logo created by anyone else prior to creating my design.

Dated July 22, 2015



Monica Dean

Signed before me on this 22nd day of July, 2015



Jane Mirren
Notary Public

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Oakland Arrows Soccer Club, Inc. v. Cordova
United States District Court for the District of Columbia (1998)

The question of the boundary between copyrightable and noncopyrightable subject matter—that is, what types of works are protected by the Copyright Act, and what types of works fall outside its sphere of protection—arises in the context of this petition for a writ of mandamus against Ricardo Cordova, the Register of Copyrights. All such actions against the Register of Copyrights must be brought here in Washington, D.C., as it is the location of the Copyright Office.

The facts are simple and not in dispute: The Oakland Arrows professional soccer club developed a new logo and wished to register it with the United States Copyright Office. While registration is entirely permissive, 17 U.S.C. § 408(a), and the existence of a copyright does not depend on it, registration confers significant benefits to the copyright owner, not the least of which is that it is a prerequisite to bringing a suit for copyright infringement. 17 U.S.C. § 411.

The Arrows' new logo consisted of an oblique triangle, colored red, white, and blue. The Arrows' explanation for the design was threefold: 1) the triangle conjured up an image of an arrowhead; 2)

the triangle could be seen to be a stylized letter "A"; 3) the colors evoked the United States flag.

The Arrows submitted an application for copyright registration to the Copyright Office. The Office's procedure is to examine each work for which registration is sought and determine if the work qualifies, in its opinion, for copyright protection. In this case, the Office's examiner concluded that the work did not qualify for protection. There is an internal appeals mechanism within the Office, which the Arrows pursued, but without success. Hence, they bring this mandamus action, seeking to compel the Register of Copyrights to register the work.

We review the question *de novo*. While we do give deference to the decision of an expert administrative agency, that deference is not necessarily dispositive.

The standard for copyrightability is easily stated: copyright protects original works of authorship. 17 U.S.C. § 102. That standard, however, is not so easily applied. What constitutes authorship? What constitutes originality? The courts have wrestled with

these questions over the years. Justice Holmes, in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903), stated that “[It] is the personal reaction of an individual upon nature [A] very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright” More recently, Justice O’Connor, in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 345 (1991), stated (internal references and quotations omitted):

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works will make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it may be.

How do we apply these tests to the work at hand? We are assisted, to some degree, by the regulations of the Copyright Office as to the types of works the Office will register. We quote the regulation—which the Office states is based on decades of court decisions—in full, from 37 C.F.R.:

§ 202.1 Material not subject to copyright.

The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:

- (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;
- (b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;
- (c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information;
- (d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources;
- (e) Typeface as typeface.

The Copyright Office, in defending its action, argues that the logo is simply a “familiar symbol or design,” with a “mere variation in coloring,” as in subsection (a) of

the regulation. While the Arrows make many arguments as to the artistic value of the work, the effort that went into creating it, and the connections to the team which it conjures up, none of those arguments can carry the day. The copyright law does not reward effort—it rewards original expression of authorship. What we have here is a simple multicolored triangle. That is a “familiar symbol,” with “mere variation of coloring.” There is not enough originality of authorship in that design to merit copyright protection. In Justice O’Connor’s words, even the “extremely low” “minimal degree of creativity”—the “creative spark”—is lacking here.

The Arrows’ petition for a writ of mandamus is denied.

Savia v. Malcolm

United States District Court for the District of Franklin (2003)

In this action for copyright infringement, plaintiff Joseph Savia, the composer and copyright owner of the song “Perhaps,” claims that defendant Lauren Malcolm copied the melody of his song and used it in her song “Love Tears” without authorization. After extensive discovery, the parties have filed cross-motions for summary judgment. We deny the plaintiff’s motion and grant the defendant’s motion.

Facts

In 1981, Savia wrote “Perhaps” and was successful in having it placed over the closing credits of the motion picture *The Duchess of Broken Hearts*. The motion picture had only a limited theatrical release, playing in a single “art house” movie theater in Franklin City for a three-week run. A dispute among the producers of the motion picture, for reasons not relevant here, has resulted in no further exploitation of the motion picture, either in theatrical release, in home video format, or on television, cable, the Internet, or otherwise. The motion picture was rated NC-17 by the Motion Picture Association of America because of its sexual content. That rating means that no one under the age of 17 will be admitted to a

theater showing the motion picture. “Perhaps” was never commercially recorded, other than for the soundtrack of the motion picture, and no recording of it has ever been released. Savia registered the work with the United States Copyright Office, and there is no dispute about the validity of the copyright in “Perhaps” or that he is the copyright owner.

In 2002, Malcolm, a lifelong resident of Franklin City and a highly successful 25-year-old songwriter, wrote “Love Tears,” which was commercially recorded and released by Remnants of Emily, a well-known rock band. The recording achieved great success, ultimately making number one on the *Billboard* “Hot 100” chart for four weeks. The recording has sold over two million copies, and the song has been widely performed and has been used in commercial advertisements. Malcolm, as songwriter, has, through the end of 2002, earned approximately \$1.5 million in royalties attributable to the song from these various uses.

The parties each presented expert testimony from musicologists. These expert witnesses

agreed, and the court as finder of fact also finds, that the lyrics of the songs are entirely different, but that the melodies are, if not identical, virtually so.

The Standard for Infringement

It is rare that direct evidence of copyright infringement exists. Therefore, the courts have turned to circumstantial evidence in determining whether one work infringes another. In doing so, the courts in this Circuit have uniformly applied a two-prong test for infringement: 1) Are the works “substantially similar”? 2) Did the alleged infringer have access to the copyrighted work? The reasons for these two standards should be obvious: If the works are not, at the very least, substantially similar, there can be no infringement. And if the alleged infringer had no access to the allegedly infringed work, there could be no possibility of copying. Certainly, the more similar the works, the less evidence of access need be adduced. But plausible evidence of access must always be found.

Two cases are instructive. In *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924), the legendary songwriter Jerome Kern was accused of plagiarizing the bass line from a wildly popular earlier work.

Although Kern testified that he did not consciously use the earlier work, the court concluded that Kern, a working songwriter who kept up with current popular music, must have heard it and so had access to it. Kern also argued that the bass line could be found in earlier works which were not protected by copyright; if he had copied from those works, he would not be infringing. But, as Kern could not prove that he was even aware of those works before the lawsuit, his argument failed, and he was found liable for infringement.

In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom ABKCO Music Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983), George Harrison (of the Beatles) was accused of plagiarizing the melody of an earlier popular rock and roll song. He testified that he did not consciously copy the earlier song, and the court believed him. Nevertheless, the court concluded that he had access to the earlier song and so had “unconsciously” copied it; he was found liable for infringement.

Analysis

Here, there is no question that the works are virtually identical. Substantial similarity—

indeed, striking similarity—of the melodies is proven. The question is whether Malcolm had access to Savia’s song. Can access be plausibly inferred from the evidence? We conclude that it cannot.

As noted, Savia’s song was released to the public only in the form of the closing credits of a motion picture, one that had only a limited run in Franklin City. Further, the motion picture had been rated NC-17, meaning that no one under the age of 17 would be admitted to the theater. At the time the motion picture was released, Malcolm was four years old. While we can take judicial notice of the fact that the ratings code is sometimes more honored in the breach than in the observance, we think it implausible that a four-year-old child would be admitted to a theater showing an NC-17-rated movie.

Savia argues that, even so, Malcolm might have had access to “Perhaps” by hearing someone who had seen the motion picture play or sing the song. Without a scintilla of evidence to justify that conclusion, we cannot credit such mere speculation.

Conclusion

We conclude that there is no plausible evidence that Malcolm had access to Savia’s work. For that reason, notwithstanding the virtual identity of the melodies of the two songs, we conclude that Malcolm’s song was original with her and was not copied from Savia’s. We deny Savia’s motion for summary judgment and grant Malcolm’s motion for summary judgment.

Herman v. Nova, Inc.

United States District Court for the District of Franklin (2009)

In our previous opinion, [citation omitted], Nova, Inc., a motion picture producer, was found liable to Herman for copyright infringement of Herman's unpublished screenplay. We now address the question of damages.

Herman, an amateur author, had, unsolicited, submitted the screenplay to Nova. Nova then used the screenplay as the basis for its own screenplay, from which, it announced, it was going to make a motion picture. It issued a press release announcing its intention to make a motion picture based on its own screenplay; the press release included a synopsis of the screenplay. Herman saw the press release and, before Nova took any further action, successfully sued Nova for copyright infringement.

Because Herman had not registered his copyright in his unpublished screenplay with the United States Copyright Office before the act of infringement occurred, his damages are limited to his actual damages and the infringer's profits. 17 U.S.C. §§ 412, 504(b). Had Herman registered before the infringement, he would have been entitled to statutory damages in lieu of

actual damages and profits, and, in the court's discretion, costs, including attorney's fees. Here, as Nova, the infringer, took no action after appropriating Herman's work and realized no gain, direct or indirect, thereafter, there are no profits resulting from the infringement which can be awarded. (The result would be different if, for example, the motion picture had been made and released, but such is not the case here.) The question, then, is what are Herman's actual damages?

As Herman was an amateur author, he had no track record of payments for his work and hence can submit no evidence of his own as to his screenplay's worth. The evidence adduced in discovery, from Nova's records and from third-party witnesses, shows that the range of payment which a motion picture producer like Nova would make for a screenplay of this sort would be between \$15,000 and \$50,000.

Given the unquestioned infringement that took place, we are disposed to award damages at the upper end of that range. Hence, judgment will be entered in Herman's favor for \$50,000.

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

2) MPT2 - Please type your answer to MPT 2 below (Essay)

===== Start of Answer #2 (2615 words) =====

Franklin Arts Law Services

Pro Bono Legal Services for the Franklin Arts Community

224 Beckett Avenue

Franklin City, Franklin 33221

Dear Mr. Gurvin:

This letter is sent to inform you of the law regarding your potential litigation with ProBall Inc., the owners of the Franklin Aces. This letter will discuss the relevant law that may be applicable to your claim against ProBall, and it will also make suggestions as to whether you should pursue a lawsuit against ProBall, what you may earn if you won a lawsuit against ProBall, and whether you should instead accept their settlement offer.

I. Will You Be Able to Successfully Register Your Sketch With the U.S. Copyright Office?

The first issue that must be discussed, Mr. Gurvin, is whether or not your sketch will be

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considered "copyrightable" such that you would be able to successfully register it with the United States Copyright Office. Indeed, you will not be able to pursue a lawsuit against ProBall if you do not successfully register the sketch. *Oakland Arrows Soccer Club, Inc. v. Cordova* (U.S.D.C. 1998). In order to successfully register with the U.S. Copyright Office, you must submit an application for copyright registration to the Copyright Office. *Id.* The Office will then examine your work and determine if your sketch qualifies, in the Office's opinion, for copyright. *Id.*

The standard for "copyrightability is easily stated: copyright protects original works of authorship." 17 U.S.C. Sec. 102. The definition of "original works" and "authorship," however, are not easily stated. In one case, *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903), the U.S. Supreme Court defined an "original work" as something that has a "personal reaction of an individual upon nature...[A] very modest grade of art has in it something irreducible, which is one man's alone." This definition is quite confusing, so the Supreme Court, in a later decision, clarified what counts as an "original work" that can be registered with the Copyright Office. In *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 345 (1991), the Court defined "original" to mean "that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least a minimal degree of creativity..."

As a result, therefore, your sketch may be considered an "original" work if you are able

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to prove that you independently created it without copying it from somewhere else or from some other, similar design. This will be difficult to prove for your sketch. The U.S. Copyright Office has defined certain works as "unoriginal," and this includes "familiar symbols or designs." In the *Oakland Arrows Soccer Club, Inc. v. Cordova* case, the Oakland Arrows professional soccer club developed a new logo and wished to register it with the U.S. Copyright Office. The Copyright Office denied its application for registration, and the Oakland Arrows brought suit to force the Office to allow it to register. *Oakland Arrows, supra*. However, the U.S. District Court for the District of Columbia stated that the Copyright Office was right, and that the Oakland Arrows's proposed logo (which was a triangle that was colored red, white, and blue) was a "familiar symbol or design," a "simple multicolored triangle." *Id.* They held that there was not enough originality of authorship, and that as a result the symbol could not be registered for copyright protection. *Id.*

This case was decided in the neighboring state of Columbia rather than our state of Franklin. As a result, Mr. Gurvin, it does not control any decision that a court here in Franklin might make. However, given the similarity of the facts of that case with your case (you are, similar to the Oakland Arrows, potentially applying to register a sports team's logo), the case will very likely be very persuasive to the court, and it may use the *Oakland Arrows* decision in determining whether or not your sketch will qualify for copyright protection.

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Therefore, it is my opinion, Mr. Gurvin, that you will not be successful if you applied for registration of your sketch with the U.S. Copyright Office. While you may be able to argue that the design came to you originally, whenever it "hit" you while you were thinking about it, there is evidence presented in this case that seems to indicate that countless others have thought of similar designs. Indeed, Monica Dean, ProBall's logo designer, stated under oath that she had seen "many versions of that image, including many on clip art collections on the Internet, none of which were protected by copyright." As a result, Mr. Gurvin, it is unlikely that you will be able to establish that this logo of a hand holding playing cards is not a "familiar design or symbol" as defined by the U.S. Copyright Office. Thus, it is unlikely that you will be able to successfully register your sketch with the U.S. Copyright Office (and therefore you will most likely be unable to bring a copyright infringement lawsuit against ProBall).

II. If the U.S. Copyright Office Does Register Your Sketch for Copyright Protection, Will You Be Able to Bring a Successful Copyright Infringement Lawsuit Against ProBall?

The second issue that must be discussed, Mr. Gurvin, is whether or not you would be successful if you were actually able to bring a copyright infringement lawsuit against ProBall (if the U.S. Copyright Office does register your sketch for copyright protection). In the state of Franklin, courts apply a "two-prong test for infringement." *Savia v.*

Malcolm (D.C. Fr. 2003). First, courts ask "are the works substantially similar?" *Id.* Second, courts ask "did the alleged infringer have access to the copyrighted work?" *Id.* If the two works are not substantially similar, "there can be no infringement." *Id.* Courts in Franklin have found two works to be "substantially similar" whenever they are "virtually identical." *id.* it is likely, in this case, that a Franklin court would find your sketch and the Ace's new logo to be "substantially similar." Both included a sketch of a hand holding out the four aces from the deck of cards. Your design and the team's logo also included, at the far right of the cards, the ace of spades. As a result, it is likely that a court will find these two works "substantially similar," as the only difference would be the order of the first three cards.

It will be much more difficult, however, to establish that ProBall "had access" to your sketch, as it was sent to Daniel Luce, Chief Executive Officer of Franklin Sports Authority, rather than Monica Dean, the actual designer of the team's logo. Courts are willing to hold infringers as having access to copyrighted works, and they have implied this access quite broadly. In *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924), and *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), courts found musicians to have had "access" to past, copyrighted songs based on the fact that they could have listened, or heard, the songs. This was true even if the musician "unconsciously" copied the song. In this case, therefore, it could be found that ProBall (through Monica Dean) copied your sketch even if they did so "unconsciously" (maybe by briefly glancing at the sketch you sent to Mr. Luce).

However, the facts present in this situation make it more likely that a court in Franklin will find that ProBall, and thus Ms. Dean, did not have access to your sketch, and as a result they will likely succeed if you sue them. While Mr. Luce is CEO of the Franklin Sports Authority, and would therefore have access to meet with ProBall executives, he only did so sparingly, whenever it was necessary to discuss the construction of the new football stadium. Also, Mr. Luce's office is three stories down from Ms. Dean's office, where she created the new logo design. Indeed, Ms. Dean testified under oath in her affidavit that she has never met Mr. Luce; Mr. Luce, meanwhile, testified under oath that he only occasionally saw FowardDesigns employees in the lobby or elevators of their office building. Also, Mr. Luce testified that while he does not specifically remember what he did with the fax that you sent him, he testified that he believed he threw it away in the trash. While such statements may be false, they would be hard to disprove in a court. It would be extremely difficult for you to convince a court or jury that they are lying, and it will be even more difficult to produce evidence of such.

Indeed, in *Savia v. Malcolm* (D.C. Fr. 2003), a composer of a song, "Perhaps," brought a lawsuit for copyright infringement against the composer of another song, "Love Tears." In this case, the U.S. District Court for the District of Franklin stated that, while the songs were "substantially similar," it found that no copyright infringement had occurred, and made this decision due to a lack of evidence that the alleged infringer had access to the prior song (the song was only released to the public in the form of the

closing credits of a motion picture, and that motion picture only had a limited run in Franklin City). Similarly, once again, a court will most likely find that while the Aces' logo is "substantially similar" to your original sketch, a court is unlikely to hold that either ProBall or Ms. Dean (the actual alleged infringer) had access to your sketch, as it appears, based on the facts, that she never met Mr. Luce (whom you sent the fax to), and that she never actually saw, even briefly, the fax with a picture of your sketch on it. As a result, it is unlikely, Mr. Gurvin, that you will win if you bring a copyright infringement lawsuit against ProBall, Inc.

III. If You Did Win a Copyright Infringement Lawsuit Against ProBall, How Much Would You Win (i.e., What Amount of Money or Damages Would You Win)?

The amount of damages (that is, the amount of money a winning party in a lawsuit can recover from the losing party) depends on whether or not the alleged act of copyright infringement occurs before or after the person claiming copyright infringement registered his copyright with the U.S. Copyright Office. In the *Herman v. Nova, Inc.* (D.C. Fr. 2009) case, an amateur author had submitted a screenplay to a film publisher for a new movie. The publisher then used the screenplay as the basis for its own, and issued a press release announcing its intention to make a movie based on the screenplay. *Herman, supra*. The author brought suit and successfully won a lawsuit for copyright infringement against the publisher. *Id.*

The court in *Herman* then stated the test for awarding damages to a party whenever it successfully brings a copyright infringement lawsuit. If the copyright holder had not registered his copyright with the U.S. Copyright Office before the act of infringement occurred, "his damages are limited to his actual damages and the infringer's profits." If the copyright holder had registered his copyright with the U.S. Copyright Office before the act of infringement occurred, he is entitled to "statutory damages in lieu of actual damages and profits, and, in the court's discretion, costs, including attorney's fees." *Id.* Statutory damages, Mr. Gurvin, are simply money awards that are provided by state laws in the form of statutes.

In this case, Mr. Gurvin, unfortunately your sketch was not already registered with the U.S. Copyright Office by the time ProBall's alleged act of copyright infringement occurred. They announced their new team logos on May 28, 2015 in a press release, and as of June 29, 2015 (whenever you met with Ms. Lee, our Executive Director), you had not yet registered your sketch. As a result, Mr. Gurvin, you will only be entitled to recover (if you win your lawsuit) actual damages plus any profits made by ProBall. In the *Nova* case, the copyright holder could not recover for any profits earned by the infringer, as the infringer had not actually taken any action after copying (that is, taking) the author's screenplay. Similarly, in this situation you will not be able to recover any damages in the form of any profits made by ProBall, Inc., as they have not yet even

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begun manufacturing team merchandise with the new logo (as seen in their initial press release, which stated that it will not be until "later this year" that they will even start to begin discussions with various merchandise manufacturers, and that fans will not be able to purchase this new merchandise until next year).

It will also be hard for you to recover the \$20,000 you wanted for this alleged copyright infringement, due to your amateur status as an artist. In *Nova*, once again, the author of the screenplay was an amateur. As a result, the court stated that he had no track records of payments for his work and thus could not submit any evidence of his own as to the screenplay's worth. Similarly, you yourself stated that you are an "amateur artist," with "no real training." As a result, it will be difficult, if not impossible, for you to submit any track record of payments for your work regarding any art you draw, and therefore cannot truly submit evidence regarding the sketch's worth. In *Nova*, evidence was presented that established the range of payments which motion picture producers paid amateur authors for screenplays. Similarly, you will have to produce some evidence of similar payments by other sports teams made to people who designed their logos. A good place to look, for example, is how much ForwardDesigns was paid for its services. According to Ms. Dean, they were paid \$10,000 for its services in designing the logo. As a result, you may be able to recover \$10,000 in actual damages if you successfully win your copyright infringement lawsuit, as that is what ForwardDesigns was paid.

IV. Should You Instead Accept ProBall's Settlement Offer?

Mr. Gurvin, it is in my opinion that you accept ProBall, Inc.'s settlement offer, and accept the season tickets estimated to be worth \$5,000. This is certainly in line with your original desire whenever you submitted your sketch to Mr. Luce. In that fax, you expressly requested that, in return for your sketch, you did not "want anything from them [the Aces]" if they did accept your logo, "except maybe some tickets to games in the new stadium." As previously discussed throughout this letter, it will be extremely difficult for you to even successfully register your sketch with the U.S. Copyright Office, let alone actually win a lawsuit for copyright infringement against ProBall, Inc. Even if you did, the amount you might win, \$10,000, is half of the amount you desire.

Here, ProBall has officially offered you, as their settlement offer, a season ticket for a single seat, in a prime location, to all home games for the team's first season. This certainly fits with your original desires whenever you submitted your sketch to Mr. Luce, and its worth is only half (\$5,000) of the amount you might win in a successful lawsuit. Therefore, it is my opinion Mr. Gurvin that you would be best served if you accepted ProBall's settlement offer, rather than pursue a lawsuit against ProBall (as it is unlikely that you will be able to either register your sketch with the U.S. Copyright Office or win a copyright infringement lawsuit).

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If you have any further questions Mr. Gurvin, please let me know.

Sincerely Yours,

Applicant.

===== **End of Answer #2**=====

END OF EXAM