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THE UNIVERSITY OF BRITISH COLUMBIA

FACULTY OF LAW

FINAL EXAMINATION – DECEMBER 2021

LAW 459/508D Business Organizations

SECTION 003

Professor Maziar Peihani

TOTAL MARKS: 100

TIME ALLOWED: 2 HOURS

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NOTE:

1. This is an open book examination. Students may take any materials they wish into the examination room except library books.

THIS EXAMINATION CONSISTS OF ONE QUESTION.

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## Question 1

Ultra Energy Products Inc. ("**Ultra**") is a CBCA corporation that has historically focused on the biomass energy sector (i.e., sourcing plant-based energy). It has one class of common shares which are publicly traded on the Toronto Stock Exchange Venture Exchange ("**TSXV**"). Ultra's board of directors consists of Ashley Pederson, Bradley Glass, Corey Wang, Dalton Camp and Ekvir Gutierrez. Ashley is an expert in fertilizer and mining, Bradley is a retired accountant whose career was in the lumber industry, Corey is an engineer with experience in wind energy, Dalton is an environmental impact consultant and Ekvir is a marketing expert on solar power.

In 2018, Ultra encountered challenges in identifying and developing suitable biomass projects. Ultra has always tried to be a "green" company. It aims to pursue environmentally sustainable projects. Unfortunately, Ultra discovered from several scientific reports that biomass energy was not as "green" as the company had once hoped. At its annual general meeting, Ultra disclosed to its shareholders that it would shift its business mandate from biomass energy to "pursuing a broader range of other opportunities that could replace or lessen dependence on fossil fuels". By 2019, the company sold off its biomass energy assets and now sits on a pile of cash to invest in new projects. Assume that Ultra properly obtained board and shareholder approval for all of the above. At the end of 2019, Wise Investments Limited ("**Wise**") purchased 18% of Ultra's common shares and became the largest shareholder of the corporation.

On January 3, 2020, Ashley, on behalf of Ultra, entered into discussions with Florian Gamper, the President and Chief Executive Officer of Southern Fertilizer Corporation ("**Southern**") regarding a possible merger transaction (the "**Merger**") between the two companies. Southern is a closely-held CBCA corporation, the only significant asset of which is a right to extract deposits of fertilizer in Peru (i.e., fertilizer that has yet to be mined) ("**Southern Rights**"). Ashley happens to be a 7% shareholder of Southern (she acquired the shares in 2016). Ashley has also provided consulting services to Southern since 2015, for which she has been paid \$50,000 per year.

At a directors' meeting of Ultra on January 15, 2020, Ashley raised the possibility of a transaction with Southern. A special committee of independent directors was appointed during the directors' meeting consisting of Bradley, Corey, Dalton and Ekvir. Ashley did not disclose her interest as a shareholder of Southern to her fellow directors. Nonetheless, Ashley thought that it would be best if she was not part of the special committee. The special committee did not immediately retain its own legal counsel or other advisors. In fact, it was Ashley who recommended that the special committee retain Mattias Erik to review the information on Southern's properties. Bradley, on behalf of the special committee, took Ashley's recommendation and hired Mattias on January 25, 2020 to review the potential transaction and to provide a fairness opinion. Mattias has experience in assessing mining properties and in the financial valuation of extractive businesses. However, Mattias has limited experience in the fertilizer industry. Mattias began to review the information disclosed by Southern on January 20, 2020.

The day before, on January 19, 2020, Southern and Ultra signed a letter of intent. After the letter of intent was made public, Wise immediately contacted Ashley, expressing its concern as a

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(Question 1 – continued)

significant shareholder on the direction Ultra was taking, asking for a meeting with representatives of the Ultra board to discuss other alternative strategies. Ashley rebuffed Wise's approach, saying that any such discussions with Wise would be problematic under Ultra's confidentiality agreement with Southern and that Ashley was not prepared to share with Wise information not made equally available to its other shareholders

On February 5, 2020, Mattias delivered his report to the special committee. The report included the following points:

1. The Southern Rights have not been commercially exploited since 1894;
2. Southern has not yet received a definitive report on the recoverable quantities of commercially valuable nutrients subject to the Southern Rights;
3. Southern has not yet commissioned an engineering study on development and extraction of such nutrients from the Southern Rights;
4. Southern has obtained only preliminary advice on environmental mitigation issues, including minimizing interference with active seabird nesting sites; and
5. The Southern Rights have been a recent topic of political controversy in Peru and the concession held by Southern has been called by the main opposition party a "neo-colonial relic" that should be cancelled without compensation.

Nonetheless, Mattias recommended that the Merger proceed after concluding that Southern Rights are "realistic and capable of being exploited on a commercially viable basis" and that the transaction is fair from a financial point of view to the existing Ultra shareholders.

On February 10, 2020, the special committee met and considered Mattias's report. The special committee decided that the Merger was in the best interests of Ultra's shareholders. In approving the Merger, however, only a majority of the special committee voted in favour of it. Ekvir abstained on the basis that Southern's business was highly speculative and untested. In addition, Ekvir was uncertain if the transaction aligned with Ultra's business mandate as there was no evidence that mining fertilizer would be a "green" initiative. Ekvir's concerns were not further discussed.

The full board of Ultra met on February 15, 2020 and the Special Committee orally reviewed with the board its recommendation of the acquisition and its reasons for it. There was discussion whether the full board should also vote on the acquisition, particularly given that the Special Committee had not unanimously endorsed the acquisition. Ashley declared that she fully intended to vote and there was nothing precluding her from voting. A vote was then held, four directors voting in favour of the acquisition with Ekvir abstaining.

The material terms of the deal as outlined in the board resolution were as follows:

- Ultra would issue a private placement of 5,000,000 shares in order to raise gross proceeds of \$2,500,000 (the "**Private Placement**")

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(Question 1 – continued)

- Ultra would acquire 100% of the outstanding shares of Southern by issuing to Southern's shareholders 50% of the issued and outstanding shares of the post-Merger Ultra, resulting in Ultra's original shareholders owning 38% of post-Merger Ultra, Ultra's Private Placement subscribers owning 12%, and the Southern shareholders owning the remaining 50%;
- Ultra's board would be increased to eight directors, Ashley and Bradley would resign from the board and the four vacancies would be filled with nominees of Southern;
- Ultra and its counsel will take the lead in preparing the Definitive Merger Agreement, Ultra's proxy materials and related documents; and
- On completion of the Merger, Ultra would change its name to NaturGrow Inc.

The approval of the acquisition was made public on February 15, 2020. The closing date of the transaction was set for March 15, 2020.

Today's date is February 15, 2020. Wise is furious with the board's approval and seeks to challenge the Merger. Please advise on the issues that arise under the laws of business organizations in this matter.

END OF EXAMINATION