

**MASSACHUSETTS BAR EXAMINATION
SECOND DAY FEBRUARY 24, 2011
ESSAY SECTION
MORNING PAPER QUESTIONS**

1. Blackacre was a twelve-acre parcel of land adjoining the Atlantic Ocean. Five acres of Blackacre were tidal saltwater marshland adjoining the ocean. Since at least 1930 there has been a large house on Blackacre. In 1985, Alice bought Blackacre, and then sold it in 1993 to Bob. In 2009, Bob sold Blackacre to Carl.

There was a small private dirt road on Blackacre that ran from a state highway to the edge of the marshland. Since 1980 there has been a sign saying “No Trespassing” at the beginning of this road near the state highway. Bob and Dave (who did not know each other) each used this dirt road several times every year since 1988 to drive alone to the Blackacre marshland in order to shoot waterfowl such as ducks. Bob and Dave did their hunting by shooting the waterfowl from small row boats that they transported on their pickup trucks and then launched into the tidal water of the marshland at high tide. Alice, Bob and Carl never gave anyone permission to use this dirt road. Every five years, Dave, who worked for a local newspaper, wrote an article about his hunting trips across Blackacre.

In 2010, Carl put a large log across the dirt road to block any access. When Bob and Dave saw the log, they each pushed it aside and went hunting. When Dave went hunting in 2010, five of Dave’s friends joined him and drove their vehicles on the dirt road in order to go hunting.

After Eddie heard from Bob in 2010 about how great the hunting was in the Blackacre marshland, he decided to drive his small powerboat from the ocean into the marshland at high tide and shoot waterfowl from his power boat. Carl saw Eddie hunting, and yelled at him with a bullhorn to leave as he was on private property. Eddie ignored Carl.

In 2010, the state environmental agency passed a regulation that for the first time prohibited any building on, or filling in of, tidal marshland in the Commonwealth of the specific type found at Blackacre. Nevertheless, in early 2011, Carl began to fill in part of the Blackacre marshland with sand in order to make a beach. This was part of Carl’s plan, when he bought Blackacre, to make a huge profit by filling in much of the marshland and then selling Blackacre off in four-acre building lots. The day that Carl finished making the beach, but before he did any other filling in of the marshland, Carl received an order from the agency telling him to (i) remove

the sand that he had placed in the marshland to make the beach, and (ii) not to do any other work in the marshland.

What are the rights of Bob, Carl, Dave, Eddie and the state agency?

2. Gloria and Dan were involved in a romantic relationship and lived together in an apartment in Boston. In February 2009, Gloria was diagnosed with a chronic disease. A few weeks later, Gloria's mother Mary moved into Gloria's apartment to help care for her daughter. One night while Gloria and Dan were alone, Dan became enraged because Mary had moved into the apartment with them. Dan struck Gloria numerous times on her face, arms and head. Gloria immediately telephoned Mary, who was busy visiting friends in Cambridge. Gloria told Mary that Dan was "beating" her. Gloria then hung up her call to Mary and frantically telephoned the Boston Police, telling the police dispatcher: "my boyfriend Dan is beating me up, hurry!" The police arrived at Gloria's apartment and found Mary's friend Wanda attempting to administer first aid to an injured Gloria. Dan was not present when the police arrived.

Gloria was rushed to General Hospital. At General Hospital, Gloria was treated for her serious medical injuries. Due to the discovery of an internal injury, Gloria underwent surgery. Gloria died during the surgery.

In a criminal trial in the Superior Court against Dan, as the defendant, the following occurred:

- a. The Prosecutor attempted to introduce evidence through Mary that Gloria stated to Mary that Dan was "beating" her. Defense counsel objected.
- b. The Prosecutor proffered the Boston Police 911 telephone recording in which Gloria is heard telling the police that, "my boyfriend Dan is beating me up, hurry!" Defense counsel objected.
- c. The Prosecutor proffered evidence of Dan's previous conviction of assault and battery ten years earlier upon a former girlfriend. Defense counsel objected.
- d. Prosecutor called Wanda, and Wanda offered testimony that when she found Gloria, "Gloria looked like she had been badly beaten." Defense counsel objected.
- e. Prosecutor attempted to introduce into evidence the treatment notes of the General Hospital doctor who treated Gloria. The notes contained statements from Gloria that Dan was responsible for her injuries. Defense counsel objected.
- f. Defense counsel attempted to introduce records from Gloria's psychotherapist that Gloria had long suffered from paranoid delusions and was on psychotropic medicine to control her delusions. Prosecutor objected.

- g. Defense counsel offered the testimony of Ed, Wanda's previous employer. Ed testified that he fired Wanda a few years ago after Wanda was found to have lied by adding extra hours worked to her office time slips. Prosecutor objected.
- h. The following occurred during the empanelment of the jury venire at the start of the criminal trial. The Prosecutor, during voir dire questioning of potential jurors, attempted to question two jurors about their previous criminal records. The trial judge became concerned that private information about jurors might become public. The Prosecutor then moved that the public be sent out of the courtroom until the completion of juror questioning by the Prosecutor. Defense counsel objected.

In each instance how should the Court rule?

3. Jupiter Holding Company (“Jupiter”) and Pluto Investment Group (“Pluto”) formed a partnership called the Fund to invest in biotechnology companies. The Fund’s principal place of business was in Massachusetts. Smith was hired to manage the Fund on behalf of Jupiter and Pluto.

The Fund entered into an Engagement Agreement (“Engagement”) with Taurus Advisors (“Taurus”), a financial services company with its principal place of business in California. Taurus has employees and offices only in California. Taurus was represented by Owens, a resident of New Jersey, who acted as a financial advisor to the Fund. There was no prior relationship between the partners to the Fund and Taurus. Owens’ initial contact with the Fund was a conversation that Owens had with Smith at a conference in Boston about the nature of services that Taurus could provide for the Fund. The services provided by Taurus were to include the recruitment of prospective investors for the Fund. According to the Engagement, the Fund was to pay Taurus a \$10,000 monthly retainer. All amounts paid would be refunded by Taurus to the Fund if Taurus failed to raise any money for the Fund.

Owens used the Fund’s credit card to pay for hotels, chauffeur services and many first-class air fares. Owens charged expenses allegedly incurred while travelling on business for the Fund, but he was actually travelling with his family on vacation. The Fund spent \$700,000 for travel-related expenses and \$300,000 for non-business expenses incurred by Owens.

The Fund discovered Owens’ personal expense charges and requested reimbursement. Owens agreed to reimburse the Fund for all of his personal expenses, but Owens never made any repayment, making excuses for his delay despite the Fund’s repeated demand for repayment. It was only after Smith told Owens that Fund was dissatisfied with Taurus’ performance that Owens told Smith, during a meeting in Boston, that Venus Investors (“Venus”), a Delaware Corporation with its principal place of business in New York City, would invest in the Fund. Owens sent an e-mail to Smith confirming Venus’ commitment to invest \$2,000,000 in the Fund.

Owens then sent the Fund a letter stating that Taurus would also invest \$1,000,000 of its own money in the Fund. Owens prepared a document called “The Fund Fundraising Memorandum” (“Memorandum”) dated September 17, 2009, stating that Venus would invest \$2,000,000 by October 8, 2009 and that Taurus would invest \$1,000,000 by November 1, 2009. Then Venus and Taurus entered into a separate Agreement with the Fund, drafted in Massachusetts, wherein Taurus invested \$1,000,000 and Venus invested \$2,000,000. Each Agreement contained the following provision:

This Agreement shall be construed in accordance with, and its validity, construction, and performance shall be governed by, the laws of the State of Delaware without regard to any choice of law doctrine that would require or permit application of the laws of any other jurisdiction. Each party hereby irrevocably consents to the exclusive jurisdiction of any federal or state court sitting in the State of Delaware for purposes of any proceeding relating to this Agreement and waives any objection to the convenience of any such court.

The Fund never received any of the money from either Venus or Taurus. Smith learned that Owens was the sole investor behind Venus but he never disclosed this to anyone. Relying upon its agreements with Taurus and Venus, the Fund made investment commitments to several biotech companies. To honor these commitments, Smith personally paid \$3,000,000 into the Fund. Owens also represented that there were other potential investors. During these times there were many emails between Taurus in California and the Fund in Massachusetts about potential investors. Owens told Smith that Quorum Investment (“Quorum”) would invest \$5,000,000. However, Smith learned from Quorum that it never committed to invest in the Fund. Owens also told Smith that he had meetings scheduled with other potential investors but such meetings were not arranged. No investors ever materialized.

Plaintiffs Jupiter, Pluto, Smith and the Fund filed a Complaint against defendants Taurus, Owens and Venus in the United States District Court for the District of Massachusetts. The plaintiffs served each of the defendants with a copy of the Complaint by certified mail.

What are the common law and procedural rights of the parties?

4. Hank and Wendy married in August 1998 and were happily married for several years. Their son, Sam, was born in 2002. In February 2006, Hank and Wendy experienced marital problems and met with a marriage counselor for several months. At the end of the counseling sessions, Hank told Wendy that she needed to sign a marital agreement if their marriage was to continue. Wendy responded that she would not sign any agreement and the thought of signing an agreement made her ill. Unable to resolve their marital problems, Hank and Wendy separated.

Several months later, Hank promised Wendy that he would “recommit” to the marriage if she agreed to sign a marital agreement. Wendy ultimately agreed to Hank’s proposal in order to preserve their marriage. Soon thereafter, Hank and Wendy each retained counsel who began negotiating the terms of the marital agreement which included the full and complete disclosure of each spouse’s income and property including Hank’s interest in several trusts and business entities established for him by his grandmother in the 1960s. Several draft agreements were exchanged and both Wendy and Hank were kept informed of the progress of the negotiations by their respective attorneys.

In March 2007, Hank and Wendy executed the marital agreement “settling all rights and obligations arising from their marital relationship in the event of a divorce.” The terms of the marital agreement provided that it was “valid and enforceable” and “limits the rights that otherwise arise by reason of the marriage.” In the event of a divorce, the agreement provided that “wife disclaims any and all interest she now has or ever may have” in the “trusts and business entities” created by Hank’s grandmother. Under the agreement, Hank agreed to pay Wendy \$2 million and 10 percent of the appreciation of all marital property from the time of the execution of the agreement to the time of divorce. The marital agreement also provided that in the event of a divorce Hank would have sole custody of any children.

As of the time of the execution of the marital agreement, the value of the combined assets of Hank and Wendy was \$12 million including Hank’s interest in the “trusts and business entities” created by his grandmother valued separately at \$8 million. During the negotiations, Hank told Wendy that one of the main reasons he wanted the marital agreement was to protect his interest in these “trusts and business entities” in the event of a divorce.

After signing the marital agreement, Hank and Wendy resumed living together and went on a “second honeymoon.” In January 2009, Hank and Wendy had a daughter, Danielle. They also purchased a second home for \$1 million and paid \$400,000 for its renovation. By July 2010,

however, Hank and Wendy argued frequently. Hank drank heavily and he suspected that Wendy was romantically involved with another man. In November 2010, Hank filed a petition for divorce in the Massachusetts Probate and Family Court. At the time of filing the petition for divorce, the value of Hank's "trusts and business interests" alone had increased to almost \$20 million.

Hank seeks to enforce the terms of the marital agreement in the divorce action.

What are the rights of the parties?

5. Sam borrowed \$10,000 from Bank to buy a boat. Sam signed a Security Agreement and a Promissory Note for the loan. The Security Agreement listed the boat as collateral and prohibited Sam from transferring “ownership or possession of the boat by sale, lease, or other means” without Bank’s written permission. Upon a default, the Security Agreement also (i) gave Bank the right to repossess the collateral and (ii) required Sam to repay the loan balance. The Promissory Note defined a default as a “breach of any significant term or condition of the Security Agreement.” Sam obtained a certificate of title for the boat that listed Bank as first lien holder. Bank did not file a financing statement in connection with the loan.

The following year, Sam advertised the boat for sale in the local paper. Andrew, the owner of “The Salty Dog,” a boatyard on Cape Cod, contacted Sam in response. Andrew told Sam that Andrew would find a buyer for the boat in return for a commission of ten percent of the purchase price. Sam agreed, and towed the boat to The Salty Dog’s boatyard. Andrew put a “For Sale” sign in the boat’s window that set forth an asking price of \$15,000.

Betty made Andrew an offer of \$12,000 after driving by and seeing that the boat was for sale. Betty intended to use the boat at her family’s vacation home. Andrew told Betty that Sam, as owner of the boat, would need to approve the offer before Andrew could accept. Andrew then contacted Sam, who accepted Betty’s offer. After communicating Sam’s response to Betty, Andrew prepared a Purchase and Sale Agreement (the “P&S”) and a Bill of Sale. Betty searched the Massachusetts Secretary of State’s office for any financing statements that might be active against the boat, but found nothing.

Andrew subsequently asked Betty to come to The Salty Dog’s office for a closing. There Betty signed the Bill of Sale and the P&S, which stated that Sam was to deliver the boat “free and clear of any liens or mortgages,” and that any commissions would be deducted from the sale proceeds. Betty delivered the purchase price by check payable to The Salty Dog. Betty also gave Andrew a check payable to the Commonwealth for the boat’s sales tax, title and registration. Because Andrew had not informed Sam of the closing, Sam did not attend. The next day, Betty took possession of the boat. Betty never asked for, or saw, the certificate of title that had been issued to Sam.

A week later, Andrew faxed Sam the Bill of Sale and P&S. Sam signed both, along with a document from Andrew setting forth the boat’s sales price, the amount of Andrew’s commission, the payoff amount to be wired to Bank, and the balance due Sam. After Sam returned the signed

documents to Andrew, Andrew paid Sam pursuant to their agreement. Instead of paying Bank, however, Andrew fled the country with the remaining sale proceeds, and was never seen again.

What are the rights of the parties?

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6. Tom was the Vice-President of Marketing for Corporation, a Worcester-based company that manufactured a line of very expensive bicycles. In October 2009, Tom told Bill (who owned a small bike store in Boston) that if Bill bought ten bicycles from Corporation, that Corporation would send its promotional team to Bill's store the week before Christmas to help boost Bill's sales. Bill bought the ten bicycles, but Corporation never sent any promotional team to Bill's store. As a result, Bill only sold two of the ten bicycles.

In January 2010, Bill complained to Tom and demanded that Corporation repurchase the eight unsold bicycles. Tom refused to do so, and instead sold ten bicycles at half the normal price to Chris, who owned a bicycle shop across the street from Bill's shop.

When Corporation's President Sam learned in February 2010 what Tom had done to Bill, Sam called some of Corporation's major customers and told them that Tom was "mentally unbalanced." Sam then terminated Tom's employment with Corporation. Sam knew that Tom had a mental illness under control with medication. When Tom learned what Sam had called him, Tom became very depressed and unable to seek a new job.

Tom wrote to his state legislator in March 2010 expressing anger that Corporation was being considered for a large tax break. Tom's letter claimed that Corporation was, in his opinion, "not an ethical company that could be trusted." When Sam learned from the state legislator what Tom had written, Corporation filed suit against Tom for defamation. Tom responded by filing a motion to dismiss, an answer, and a counterclaim for wrongful discharge from employment at Corporation in violation of Chapter 93A.

What are the rights of the parties?

7. Waterfront Park (“Park”) is a 5.5 acre public park located on the waterfront in the Historic District of City. Park has walkways, benches, fountains, trees and a playground and is used for jogging, walking, picnics, biking and recreation. Park also contained 13 permanent displays donated by private groups or individuals. These displays included an historic statue, a wishing well, a veteran’s monument, a September 11th monument, and a Ten Commandments monument donated by a fraternal organization.

The Society of Shepherds (“Shepherds”) was a religious organization founded in 1995 and located in several towns outside of City, although many members of Shepherds live and work in City. The Shepherds’ church incorporated elements of Christianity, teaching that through devotion comes revelation. In 2003, Shepherds’ leader wrote two letters to City’s mayor requesting permission to erect a permanent stone monument in Park. The monument would be similar in size and nature to the Ten Commandments monument. Shepherds’ monument would contain “The Five Teachings of the Shepherds.” City denied Shepherds’ requests, stating that it was City’s practice to limit monuments in Park to monuments or displays that either (1) were directly related to the history of City or (2) were donated by groups or individuals with longstanding ties to City. In 2008, City passed a resolution putting City’s policy regarding the erection of monuments and displays in Park in writing. The resolution also contained other criteria for a monument or display, such as public safety, cost, finances, aesthetics and maintenance.

In 2009, Shepherds’ leader again wrote to City’s mayor asking permission to erect a monument at Shepherds’ expense but the request did not describe the monument, its historical significance or Shepherds’ connection to City. City’s Historical Commission, which oversaw the use of all public parks in City, denied Shepherds’ request. Then, Shepherds applied to City and its Historical Commission for a permit to march and demonstrate in Park protesting City’s denial of Shepherds’ application to build a monument in Park, but City’s Historical Commission denied the permit on the grounds that there were no available funds to pay police and other public safety personnel overtime to work the demonstration and march.

In 2010, Shepherds filed an action claiming that the rejection of Shepherds’ request to construct a monument in Park, and City’s denial of Shepherds’ application to march and demonstrate in Park, violated Shepherds’ rights. Shepherds sought an injunction permitting it to construct a monument in Park and an injunction to allow it to march and demonstrate in Park.

What are the rights of the parties?

8. Greg and Marissa met while in college, dated for several years and, in 1979, began living together in Boston. Greg and Marissa were inseparable and enjoyed annual vacations in exotic places. They also trained together and competed in several marathons over the years. Greg and Marissa had a son, Sean, and a daughter, Donna. Greg and Marissa never married.

In 1995, Greg hand wrote a document entirely in pencil setting out how he wanted his estate to be distributed in the event of his death. Greg signed the last page of the handwritten document and initialed each page. The next day, Greg took the document to Bank and asked two Bank employees to witness his earlier signature which he acknowledged to be his. The Bank employees duly witnessed Greg's earlier signature in Greg's presence. The document provided as follows:

- Article I. I give 1000 shares of Corporation stock and my savings account at Bank to my wife, Marissa, if she survives me, otherwise to my friend, Frank.*
- Article II. I give my 1956 Chevy Corvette and my prized baseball card collection to my son Sean.*
- Article III. I give my Cartier diamond necklace to my daughter Donna.*
- Article IV. I incorporate the document entitled "Instructions and Directions to Executor" located in Safe Deposit Box No. 311 at Bank.*
- Article V. I give the rest, residue and remainder of my estate to my wife, Marissa, if she survives me, otherwise to my son, Sean.*
- Article VI. I nominate Earl as executor.*

In 2007, Greg sold his 1956 Chevy Corvette and used the money from the sale to buy a 1969 Jaguar convertible. At no time during Greg's life did he own more than 500 shares of Corporation stock and in 2008 Greg sold all 500 shares of Corporation stock and put the proceeds from the sale into his savings account at Bank.

In 2010, Greg died, survived by Marissa, Sean and Donna. Soon after Earl was duly appointed executor, Earl went to Bank and opened Safe Deposit Box No. 311. Inside Safe Deposit Box No. 311, Earl found a memorandum entitled "Instructions and Directions to Executor" which provided as follows:

The entire contents of Safe Deposit Box No. 311 shall be sold and all proceeds from the sale of the contents of this box shall be given to "The County Home for Wayward Boys."

Safe Deposit Box No. 311 contained \$100,000 in cash, a Honus Wagner rookie baseball card and several pieces of jewelry including the Cartier diamond necklace. Appraisals obtained by Earl of the Honus Wagner baseball card and the Cartier diamond necklace determined their value to be \$300,000 and \$350,000 respectively.

What are the rights of the parties?

9. Victor owned Giant Grocery in Boston along with his wife Wilma. Each morning, Victor and Wilma counted the money earned from the previous days' receipts and then bundled the money with red rubber bands and placed it in three paper bags for deposit at a local bank. On Monday morning, Wilma gave Victor \$5,000 in cash to deposit in the bank. At the same time, Andy, Brad and Charlie were parked next door to Giant Grocery in a brown van with tinted windows. While sitting in the van, the three men discussed their long-standing plan to rob Victor of his daily deposit money by threatening him with baseball bats.

As Victor drove his car to the bank, his car was blocked by the van driven by Charlie. Andy and Brad got out of the van wearing stocking masks and carrying baseball bats. They approached Victor's car and demanded the money. Victor quickly complied and handed over one of the bags of money to Andy. Andy ran back to the van with the bag of money. Brad, agitated, shouted at Victor to hurry up and "hand over the rest of the bags!" Brad then produced a handgun from his pocket and Victor grabbed the handgun. The gun went off and Victor was shot dead.

Wilma heard the commotion and ran out of the store to witness two men with baseball bats getting into a brown van. The van quickly sped away from Giant Grocery. Wilma later told the police she thought she noticed the van had a yellow decal in its left rear window.

The Boston Police Department quickly broadcasted a report to police patrol cars to be on the lookout for a dark colored van with tinted windows and a yellow decal. Shortly thereafter, Police Officer, who was working a road construction detail, spotted a van matching the broadcast description. Police Officer radioed for assistance. The police quickly surrounded the vehicle, and Andy, Brad and Charlie were ordered out of the van. All three were handcuffed. Police Officer asked Charlie for his driver's license. Charlie said it was in his coat located inside the van. Police Officer then entered the van and found Charlie's coat on the floor next to a couple of red rubber bands. While retrieving Charlie's coat, Police Officer discovered a handgun wedged in between the two front seats of the van.

All three men were then placed under arrest. At the police station, Andy was placed in an interview room and was given his Miranda rights. Andy waived his rights. Police Officer then began to interview Andy in a friendly manner, stating, "I know your family, Andy, you are a good man, just level with me, this is your chance to get ahead of this." Andy was despondent but he continually denied involvement in Victor's death. After three hours of interviewing Andy, Police Officer began to question Andy more forcefully and then accused him of causing Victor's

death. Andy said he “wanted a lawyer.” Police Officer then stated, “this is your last chance to tell me what happened, Andy.” Andy said, “I am tired and confused. Victor is dead because of me. I want my lawyer.” The interview then ended.

What crimes have been committed and what defenses can be raised?

10. Marie, a businesswoman, and Ted, a well-known silversmith, agreed to form what they called a “limited partnership.” The business would manufacture and sell high-end silverware. Marie, as limited partner, agreed to contribute \$25,000 for working capital, and an additional \$25,000 if needed. Ted agreed to be the general partner, with full authority, and to use his own custom tools. It was also agreed that profits would be split 60 percent to Marie and 40 percent to Ted until Marie was returned her capital contribution plus interest at 10 percent. After that, profits would be split equally.

Marie and Ted never put their agreement in writing. Marie gave Ted \$25,000, which Ted used to buy materials needed to make the products. The business quickly became successful, eliminating the need for any additional funds. After three months, Marie was repaid her capital contribution and accrued interest.

To accommodate the growing business, Ted signed a lease for the 6th floor of a new building still under construction. Around the same time, Omega Partners (“Omega”) signed a lease for the 7th floor and three-fourths of the 8th floor. Prior to the building’s completion, Ted realized that the 6th floor was more than the business needed. Meanwhile, Omega wanted to reconfigure its lease space and discussed this with Ted and another tenant who had signed the lease for one-half of the 3rd floor. With the landlord’s consent, the three parties entered into new leases with the landlord to swap spaces. The result was that Ted ended up with the smaller 3rd floor space; Omega ended up with the 6th and 7th floors; and the tenant previously on the 3rd floor ended up with three-fourths of the 8th floor.

Because Omega was concerned it might end up with empty office space, Omega and Ted, as general partner, entered into a side letter which stated in part:

- (i) Omega intends to offer for sublet approximately 1,000 of its 4,000 square feet of space constituting the 6th floor (the “Sublease Space”) to a third party for a term of one year. Should this space be sublet for less than \$10 per square foot annually, your business will pay to Omega the difference between the actual rent and \$10 per square foot, up to an aggregate amount not to exceed \$100,000.
- (ii) There shall be no obligation to make payments to Omega pursuant to the terms of this side letter if Omega occupies the Sublease Space.

As a result of unforeseen architectural issues, Omega was forced to switch its plans for the 6th and 7th floors. Thus, the space that was to have been built on the 6th floor was instead

built on the 7th. The rent, physical features and other financial terms of the 7th floor space to be subleased remained identical to what they would have been in the Sublease Space.

Omega was unable to find a subtenant for the 7th floor sublease space by the time it had moved in and started paying rent to the landlord for the 6th and 7th floors. Omega sent a payment demand letter to Ted for the shortfall. Ted then told Marie that he wanted to end the business relationship at the end of the business's one-year lease term. Marie claimed that if Ted did so, he should pay her 50 percent of the business's cash of \$200,000, her share of the goodwill, and an amount equal to 50 percent of the value of the tools, which are worth \$50,000.

What are the rights of Marie, Ted, and Omega?