Question MEE 2 – July 2021 – Selected Answer 1

1 - Ethan likely will not be able to block the merger.

Mergers of corporations are considered fundamental changes. Under the corporate laws, what is required to successfully merge two corporations is (1) resolutions passed by both board of directors of the corporations; (2) disclosures and proposals sent to the shareholders; (3) approval by the shareholders (typically majority vote of eligible voting shares); and (4) filings with the Secretary of State (here, merger filings).

Here, Ethan will not be able to stand in the way of the merger of Winery Inc. and Organic Wines Corp. Both corporations have Carlos, Diana, and Ethan as equal shareholders (the only shareholders) and all 3 as directors.

As to the resolutions of all boards, the board of each corporation must approve the resolution for merger be either an unanimous writing or by majority vote at a board meeting if a quorum is satisfied (here, 2 of the 3 directors must be present). Ethan may be able stop a board action to stop utilizing the unanimous writing method, but he will not be able to stop the board vote. Whether he participates in the vote, the resolution would pass (if he shows up, the vote is 2-1 and even he does not show up, Carlos and Diana can still make a quorum since only a majority of board members is required and vote for the merger 2-0). As long as Ethan has appropriate notice of the board meetings, he cannot stop the resolution being passed at either corporation.

Ethan will run into the same issue at the shareholder meeting. In general, once the resolution is passed, the shareholders of both corporations must approve of the merger. Here, the stocks of both Winery Inc. and Organic Wines Corp. are owned equally by Carlos, Diana, and Ethan. Most states typically require approval by majority of shares eligible to vote to approve of fundamental changes like mergers. As long as Ethan has notice of the shareholder meeting, Diana and Carlos have 67% of the votes in favor of merger in both corporations. Ethan will not be able to stop the shareholder vote either.

Thus, Ethan cannot stop the merger by voting against it.

2 - Ethan likely does have the right to demand payment for his shares.

In close corporations, shareholders who disagree with fundamental changes (including mergers have a right of appraisal in which the disagreeing shareholder will have the right to have his shares appraised and purchased by the corporation. This right however does not exist if there are over 2000 shareholders and the shares may be traded on a national stock exchange. However, this exception is not applicable since both corporations only have 3 shareholders and the stocks are not publicly traded on a stock exchange (this is a close corporation). Thus, Ethan does have a right to demand payment of cash equal to the fair value of his shares in Winery, Inc.

However, to exercise this right, Ethan must comply with the following steps. He must first make a writing expressing his intention to exercise his right of appraisal following

the merger. Then, he must either vote against the merger or abstain from voting at the shareholder vote. Finally, following the shareholder approval, he must make another written demand on the corporation exercising his right.
-only really applied in closely held corp.

3 - Ethan likely will not be able to successfully sue Organic Wines Corp. in State A.
While corporations may operate in multiple jurisdictions at the same time, manners regarding internal affairs and what law governs the organization apply the laws of the state of incorporation.
Here, while the decision to run the business as a benefit corporation in which Organic Wines Corp. will promote sustainable and organic practices at the expense of maximizing shareholder profits violates the laws of State A, it does not violate the laws of State B. State B expressly allows for the benefit corporation form and specifically insulates directors from liability for claims that they did not seek to maximize shareholder profits.
While the initial Winery Inc. was incorporated in state A, the new Organic Wines Corp. is incorporated in State B. Thus, matters pretaining to internal affiars and how the business operates under its articles of incorporation must be governed under the corporate laws of State B (where it is incorporated). It is irrelevant that the new business is still having operations in State A.
Thus, Ethan will have no claim.

Question MEE 2 – July 2021 – Selected Answer 2

Can Ethan block the merger.
The issue here is whether Ethan (E) can effectively block the merger by voting against it. Under the MBCA, for a fundamental change in the corporation to take place, the change must be adopted by the company's board of directors, introduced to the shareholders for them to cast a vote, a vote by the shareholders must be made, and any changes made to the articles of incorporation must be filed with secretary of state. For a vote of the BOD or shareholders to adopt a fundamental change, a quorum or majority of those entitled to vote must be present at the meeting. Further, a majority of the BOD must vote in favor of the change and a majority of the shares actually voting must vote in favor of the change for the change to be adopted.
Here, Carlos (C), Diana (D), and E are the only shareholders of Winery Inc. (WI), each holding equal shares and equal responsibilities as board members and officers. Merger of a corporation into another is a fundamental change that requires a majority vote by the board as well as the shares to be implemented. Therefore, only two are required to participate in the vote to create a quorum and C and E can effectively vote

to adopt the change. Thus, regardless of whether E votes against the adoption in attempt to block the merger, C and D can override his decision.

Right to Appraisal.

The issue is whether E has a right to demand payment in cash rather than shares in Organic Wines Corp. (OW). In a closely held corporation, the shareholders have the right to demand an appraisal of their shares if certain fundamental changes are passed that the share holder does not agree with. A closely held corporation has a small number of shareholders (not more than 2,000) and is not publicly traded. Appraisal requires the board give notice to the shareholders of the proposed change, the shareholder send a notice of demand to the board members before the shareholder voting takes place, and the shareholder must vote against the change. If the change is adopted, the board must then notify the shareholders within 10 days of adoption, and the shareholder must send a written demand for payment of fair value of the shares.
Here, WI is a closely held corporation if they are not publicly traded because there are only three shareholders. Thus, E would be entitled to a right of appraisal if he followed the required steps outlined above.

Ethan's suit against Wines Corp.

The issue is whether E could sue OW for promoting sustainable and organic prices at the expense of of maximizing shareholder profits. E would not likely be successful in a suit against OW. A director has the duty use the care of a prudent person in a like position would and must reasonably believe that his actions are appropriate under the circumstances. A company's internal affairs are governed by the state law of that in which it is incorporated.
After the merger, OW would be incorporated in State B. State B, unlike State A, permits the benefit corporation structure and insulates its directors from liability for making business decisions in favor of it's social or environmental purpose, even if it negatively effects shareholder profits. The stated purpose for OW is to promote sustainable and organic vineyard, winery, and production practices. Therefore, because this purpose promotes a social and environmental cause, it is in accordance with State B law. Acting in according with the law is compliant with the duty of care. Thus, because OW is incorporated in State B, E will not be successful in a suit for a breach of the duty of care or for failing to comply with State A law.

Question MEE 2 – July 2021 – Selected Answer 3

I. Ethan cannot block the merger of Winery Inc. into Organic Wines Corp. by voting against it.

At issue is under what conditions may a corporation undergo a fundamental change. Merging into another corporation is a fundamental change. To complete it properly, two conditions must be met: (1) the Board of directors must recommend the change to the shareholders; and (2) the shareholders must vote to adopt the Board's recommendation. Ethan cannot prevail at either step.

(1) *The Board of directors must recommend the change to the shareholders.*--To recommend a fundamental change to the shareholders, most states require a supermajority of the board to agree. Usually that figure is two-thirds of the directors must vote for the change. Here we know that only Ethan opposes the change, and he's only one of three directors. Thus he cannot block the recommendation to the shareholders.

(2) *The shareholders must vote to adopt the Board's recommendation.*--To adopt the Board's recommendation to undergo a fundamental change, there's a split in authority on the voting standard. Most states require a majority of all shares "eligible" to vote to adopt the change. The modern trend, though, is to simply require what's required for ordinary matters. In other words, a a majority of the shares that vote at a properly noticed shareholder meeting with quorum. Here we have a corporation with only three shareholders and each owns 1/3 of all voting stock. Thus even if Ethan votes against the merger as a shareholder he does not have enough votes to block it assuming a proper shareholder meeting with notice and quorum and both Carlos and Diana vote their shares to adopt the Board's recommendation.

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Because Ethan cannot prevail at either step he cannot block the merger.

II. If Winery Inc. merges into Organic Wines Corp., Ethan has a right to demand that he receive payment in cash equal to the fair value of his shares in Winery Inc.

At issue are the rights of a dissenting shareholder. In a publicly traded corporation a dissenting shareholder's remedy is to sell his shares. However, this is not a publicly traded corporation, with Ethan, Diana, and Carlos controlling all shares with 1/3 of the shares going to each. In such a case a dissenting shareholder has a right of appraisal, which is the right to payment from the corporation for the fair-market-value of his shares.

To exercise his right of appraisal he must notify the corporate secretary, in writing, of his intent to exercise his right of appraisal. The notice must take place prior to the shareholder meeting considering the issue he's dissenting from. Then he must either not attend the meeting or attend and vote against it. After the meeting he must again make written demand to the corporation for the fair-market-value of his shares and surrender the shares to the corporation. After then the corporation and Ethan must negotiate the fair-market value. If they cannot agree a court can decide the issue.

III. Assuming Ethan becomes a shareholder of Organic Wines Corp, Ethan cannot successfully sue the Organic Wines Corp. directors in State A for promoting sustainable and organic practices at the expense of maximizing shareholder profits.

At issue is what law governs a corporation. The rule is known as the internal-affairs rule, and it provides that the law governing the internal affairs of a corporation is that of the state of its incorporation. Here the facts tell us that Organic Wines Corp. will be incorporated in State B as a benefit corporation. Once Winery Inc. merges into Organic Wines Corp. it will cease to exist as a legal entity and thus the state of Organic Wines Corp.'s incorporation will govern it's internal affairs. That state will be State B, which allows for benefit corporations and thus shields directors from liability for making business decision that serve its defined social or environmental purpose, even when its decision may negatively impact shareholder profits. Thus Ethan cannot maintain a suit against Organic Wines Corp.'s board on the theory that it should maximize shareholder value, and his case will be dismissed.