

GRADUATE PROGRAM CONTRACTS
 Professor John Orcutt
 Fall Semester 2014
FINAL EXAMINATION—IN CLASS
December 9, 2014

INSTRUCTIONS:

1. This is a closed-book examination. You may not bring any materials to the examination with the exception of ESL students who are allowed to bring and use a Home Language/English dictionary.
2. This is a 3-hour examination and is worth 138 points (or 55% of your final grade). The examination consists of 6 essay questions:

Q1 = 22 points	Q2 = 22 points	Q3 = 17 points
Q4 = 26 points	Q5 = 22 points	Q6 = 29 points

I have written this exam to be a 2 hour and 40 minute exam (160 minutes). ***It is your responsibility to apportion your time appropriately amongst the questions.*** If you base your time on the possible points per question, the time apportionment should be:

Q1 = 25 minutes	Q2 = 25 minutes	Q3 = 20 minutes
Q4 = 30 minutes	Q5 = 25 minutes	Q6 = 35 minutes

To provide some cushion in your taking of the exam, however, I am giving you an extra 20 minutes, so you will in fact have 3 hours for the exam.

3. The grading of examinations is anonymous. So, you must write your examination number on the examination and your blue book. **YOU MAY NOT WRITE YOUR NAME ON ANYTHING – YOU MAY ONLY USE YOUR EXAM NUMBER.**
4. For those of you who are handwriting your exams, please write your answers in a blue book. The only answers that will be graded are the answers written into a blue book. While you are free to use scratch paper, answers written on scratch paper, or anything else other than a blue book, will not be read and will not be counted for any credit. Please write only on the front side of the pages in the blue book.
5. For those of you who are taking this exam on a laptop computer, you will be subject to the laptop exam rules that are provided to you by the Registrar.
6. Please remember that organization, persuasiveness, neatness, and legibility all count in determining your grade on the essay answers. To improve the organization of an answer, you may wish to quickly outline the answer on a separate sheet of paper prior to writing your full answer in the blue book or on your laptop.
7. I have tried my best to write and proofread the exam so that there are no distracting typos or other errors – but I may not have been totally successful. If you believe there is a typo or other error that make it difficult to answer a particular question, please point out the error in your answer and explain any assumption you used to answer the question.

Good luck on the examination!

DO NOT TURN TO PAGE 2 UNTIL THE PROCTOR TELLS YOU TO BEGIN

QUESTION NO. 1 (22 points possible – 25 minutes suggested):

Acme Department Store (“Acme”) published the following ad in a local newspaper before Black Friday:¹

ACME’S BLACK FRIDAY DOORBUSTERS
START AFTER THANKSGIVING DINNER AT
8 PM THURSDAY

3 Sony 60” LCD TVs
(model KDL40BX450)
Regularly priced at \$1,000

\$100 each to the first five persons to present
themselves at checkout counter

Morris was the first to present himself at Acme’s checkout counter and he immediately tendered the \$100. Acme’s manager, Kate, recognized Morris. Morris had been arrested for shoplifting at Acme a number of years ago. Despite Acme never placing any shopping restrictions on Morris after the arrest, Kate told Morris he was not eligible for the offer. Kate said, “We do not provide \$900 discounts to thieves.”

Morris insists that he complied with the ad and therefore formed a contract with Acme. Morris is considering suing Acme.

Your Assignment:

Please analyze whether Morris formed a binding contract with Acme when he presented himself at Acme’s checkout counter and tendered the \$100.

¹ Black Friday is the first shopping day after Thanksgiving and is considered the single biggest shopping day in the United States. Because of the importance of Black Friday to retail businesses, many moved up the start of Black Friday to the Thursday evening right after most families have finished their Thanksgiving dinner.

QUESTION NO. 2 (22 points possible – 25 minutes suggested):

Hayes was a long-time employee of Plantation Steel Co. He began his career as a factory worker, but through hard work and diligence rose to become a general manager. Hayes was one of Plantation's most competent and popular employees. On April 1st, Hayes announced he would retire on June 1st. Hayes was 65 years old and had been working continuously for almost fifty years. On May 1st, Hayes met with Oprah, who was the President of Plantation. At the meeting, Oprah expressed her gratitude for Hayes' hard work and company loyalty. She then told Hayes, "As a token of appreciation for your many years of service, Plantation will pay you a pension of \$2,000 per month for the rest of your life." This conversation was the first and only one concerning payment of a pension to Hayes during retirement.

As previously announced, Hayes retired on June 1st. For the next three years, Plantation sent Hayes a check for \$2,000 each month. After the three years, Plantation notified Hayes it would no longer make any further pension payments.

Hayes believes that Plantation is contractually obligated to pay him \$2,000 per month for the rest of his life.

Your Assignment:

Is Plantation's promise to pay Hayes \$2,000 per month for the rest of his life contractually enforceable? Please explain. In answering this question, please be certain to address the following matters:

- (a) Is Plantation's promise supported by consideration?
- (b) Is there a consideration replacement that could apply to Plantation's promise?
- (c) Is Plantation's promise barred by the Statute of Frauds?

QUESTION NO. 3 (17 points possible – 20 minutes suggested):

Anders works as a salesperson for TelAmeriCorp. (“TAC”). To motivate increased sales, TAC announced a sales challenge (the “Challenge”) on July 1st. Per the Challenge, any salesperson who made 3,000 or more new sales by the close of business on September 30th would receive a \$10,000 special bonus. Anders really wanted the bonus and he worked very hard to make the 3,000 new sales. At the close of business on September 25th, TAC announced it was canceling the Challenge and not paying a \$10,000 special bonus to any employee. At that time, Anders was TAC’s top sales person and had made 2,500 new sales.

Anders is furious and considering whether to sue TAC.

Your Assignment:

Please analyze whether TAC has any contractual obligation to pay Anders the \$10,000 special bonus.

QUESTION NO. 4 (26 points possible – 30 minutes suggested):

Sparky Co. (“Sparky”) manufactures and sells electronic components for smartphones. Sparky entered into a revolving loan agreement (the “Agreement”) with West Bank (“Bank”). The Agreement allowed Sparky to borrow up to \$1 million to be used for operating expenses. To secure the loan, Bank took a security interest (collateral) in Sparky’s accounts receivables.

“Accounts receivable” definition = An accounts receivable is a contractual obligation that customers owe when they purchase goods or services from a business on credit. Customers often do not immediately pay for goods or services. Instead, they receive the good or service and contractually promise to pay the purchase price within an agreed time frame (e.g., 60 days). The customers’ contractual promises to pay are the accounts receivable.

Because of Bank’s collateral interest in Sparky’s accounts receivables, the Agreement included the following clause:

Clause 6.1: If Sparky defaults on a loan payment, Bank may notify Sparky’s customers of Sparky’s default and direct those customers to make payments directly to Bank.

Sparky borrowed \$750,000 under the Agreement. Sometime after borrowing the money, Sparky began to experience some short-term financial troubles and was concerned it could default on a loan payment. As a result, Sparky contacted Bank to negotiate an amendment to the Agreement. Sparky was concerned about Bank sending collection letters to Sparky’s customers, as those letters would undermine customer confidence in Sparky and be very damaging to its business. Sparky asked Bank to provide 10 days’ prior written notice before sending out any collection letters. Katy, who is the President and primary shareholder of Sparky, told Bank, “I will personally provide the money for Sparky to pay off the loan rather than allow Bank to send the collection letters.” Bank agreed and sent Sparky the following email message (the “Amendment Letter”):

Dear Sparky,

Bank hereby agrees to amend our \$1 million revolving loan agreement with you (the “Agreement”). Clause 6.1 of the Agreement is hereby amended to read:

Clause 6.1: If Sparky defaults on a loan payment, Bank may notify Sparky’s customers of Sparky’s default and direct those customers to make payments directly to Bank; provided, however, that Bank will provide Sparky with 10 days’ prior written notice before notifying any such customers.

Thank you for your business.

Sincerely,
West Bank
Kanye West, President of West Bank

On June 1st, Sparky defaulted on a loan payment. On June 2nd, Bank sent collection letters to Sparky’s customers without providing any prior notice. Sparky wants to sue Bank for breaching its notice promise in the Amendment Letter.

Your Assignment:

Please analyze whether Bank's promise to provide prior notice was contractually enforceable. In conducting your analysis, please address:

- (a) The pre-existing duty rule;
- (b) Article 2's approach to contract amendments;
- (c) Promissory estoppel; and
- (d) New York's approach to contract amendments. When discussing the New York approach to contract amendments, please explain the relevance of the Amendment Letter being an electronic communication. You should address UETA in your answer.

QUESTION NO. 5 (22 points possible – 25 minutes suggested):

Acme Corp. (“Acme”) manufactures ultrasound devices (the “Devices”) that are used to conduct eye tests. Acme has shown strength in developing and manufacturing new products, but has struggled to develop an effective sales department. As a result, Acme entered into a sale and distribution agreement (the “Agreement”) with Zeta Inc. (“Zeta”). Under the terms of the Agreement, Zeta paid \$500,000 to become the exclusive U.S. distributor of the Devices for five years. Acme insisted the agreement include a “non-disparagement clause.” A non-disparagement clause restricts individuals from making any comments that negatively impact an organization, its reputation, products, services, management, or employees.

Clause 7.3: Non-Disparagement

Acme’s strong reputation is critical to its future success. It is of the utmost importance that Zeta do nothing to harm Acme’s reputation. Zeta (including its employees and agents) agrees not to disparage or comment negatively about Acme, Acme’s products, or Acme’s directors, officers, or employees. Acme would not contract with Zeta absent this clause.

Jennifer is Zeta’s President and Chief Executive Officer. Roughly three years after entering into the Agreement, Jennifer granted an interview to an industry journal. In the interview, Jennifer made the following statement:

“Our sales of Acme Devices were down this year. A number of competitive products entered the market this year, some of which have better functionality than the Devices. We are working with Acme on improvements to the Devices to address customer concerns.”

Acme was very upset with Jennifer’s comments. Acme would like to cancel the Agreement with Zeta and find a new distributor. When conducting your analysis, please assume Jennifer’s comments violated Clause 7.3.

Your Assignment:

- (a) If the court treats Clause 7.3 as a condition precedent, what are Acme’s rights to cancel the Agreement? Please explain.
- (b) If the court treats Clause 7.3 as a promise, what are Acme’s rights to cancel the Agreement? Please explain.
- (c) Please analyze whether a court should treat Clause 7.3 as a condition precedent or a promise.

QUESTION NO. 6 (29 points possible – 35 minutes suggested):

ABC Co. (“ABC”) is a technology company that is in need of a new Director of Sales and Marketing. Kelsi, ABC’s President, entered into negotiations with Chad to take the position. Chad’s biggest concern in the negotiation was the level of his salary. Kelsi’s biggest concern was stability. ABC will be launching a new, one-year national marketing strategy, and the new Director of Sales and Marketing would be responsible for overseeing that effort. As a result, it was very important for ABC to hire a Director of Sales and Marketing who would stay in the position for at least one year in order to provide consistent oversight to the marketing effort. Kelsi expressed her concern to Chad, and explained that it would cause unknown harm to ABC if Chad left within one-year. It would cost ABC multiples tens-of-thousands of dollars to find a replacement for Chad and immeasurable damage to ABC’s sales and marketing efforts. After Kelsi’s explanation, the parties entered into a written agreement that provided, among other things:

- Chad promised to work for ABC for at least one year (the “One-Year Term”);
- ABC promised to employ Chad during the One-Year Term;
- ABC promised to pay Chad \$20,000 per week during the One-Year Term; and
- ABC promised to pay Chad a \$60,000 bonus if Chad is still employed by ABC in good standing at the end of the One-Year Term.

In addition, the written agreement included the following provision:

Section 7 – Early Termination by Chad: If Chad terminates his employment under this agreement, other than by death or disability, prior to completion of the One-Year Term, Chad agrees to pay a penalty to ABC of \$1,000 per week to compensate ABC for (a) expenses it may incur to seek a replacement Director of Sales and (b) harm that may arise from disruption in ABC’s sales and marketing efforts.

Chad worked for ABC for 26 weeks and proved to be adequate, but not exceptional. With 26 weeks left on the One-Year Term, Chad quit his job with ABC. It turns out that Chad was offered, and accepted, a dream job to do marketing for a Hollywood studio. ABC sought a replacement for Chad, and was able to find one almost immediately. The replacement, Ryan, may even have been better than Chad. ABC’s sales figures increased after Ryan was hired, and many within ABC attribute this improvement to Ryan’s efforts.

Your Assignment:

Please answer the following questions:

- (a) ABC is considering suing Chad to recover the \$26,000 that is due under Section 7 of Chad’s employment agreement. Please analyze the strength of ABC’s claim for the \$26,000.
- (b) ABC did not pay Chad his \$60,000 bonus. Chad believes that he is entitled to 50% of the bonus, because he worked for one-half of the year. Chad is considering suing ABC for \$30,000. Please analyze the strength of Chad’s claim for the \$30,000.

*** * * * * END OF EXAM * * * * ***

Have a wonderful break! I look forward to seeing you next semester.