

EXAMINATION COVER SHEET

Student Examination Number: _____

**Final Examination
December 17, 2010
Fall 2010**

Time Allowed: 3 hours

Allowed Materials:

The exam is limited open book. At your option, you may consult one sheet of paper (8.5 x 11 inches) with your own annotated material, handwritten or printed, front and/or back. Your annotations may not include any material copied directly from our textbook or other commercial treatises or outlines. You also are allowed to bring in your required supplement, *Contract Law: Selected Source Materials*, in any book form edition (i.e., not printed by you from the internet). Your supplement may be tabbed, highlighted and reasonably annotated from class use only.

Special Instructions:

1. The exam will be graded blindly. Do not identify yourself in your answers in any manner—doing so is an honor code violation and will be treated accordingly. If you are using blue books, please start each answer in a new blue book, write legibly and skip lines throughout.
2. The exam consists of two (2) questions. Some of the questions may include subparts. Any ambiguity regarding where one answer ends and another begins will be construed in my favor. Please identify each question and subpart as clearly as possible within your exam so that I can give you as much credit as possible for your answers. The questions are each worth a maximum of 100 points (for a total raw score of 200 points). Points are assigned to individual subparts as indicated within the question itself. You should allocate your time (3 hours) as you wish.
3. If you have time, there is a bonus question worth 15 points.
4. Please answer all questions based on your knowledge of general principles of common law and the Uniform Commercial Code. You may assume that the current version of the U.C.C., as provided in your supplement, and the common law are in effect in all relevant places at all relevant times, unless specifically noted otherwise. When dealing with issues that are treated differently in different jurisdictions, unless instructed otherwise, assume that the question is one of first impression in your jurisdiction.
5. You will be graded on your ability to spot the issues of law, fact, and policy presented and on the quality of your analysis of those issues. Organize your answer before you

begin to write. Concise expression and clarity of analysis will be rewarded in grading. You may use abbreviations, provided that they are clear and unambiguous.

6. Read each of the questions carefully before you begin your answer. Because the exam is constrained to three hours, you may find yourself with less time than you would prefer to answer the questions fully. I expect that you will do your best within the constraints.
7. If you discover that any of the questions require more information, please identify what information is required and how it would help you answer the question.
8. There are 9 pages to the exam, not including this cover sheet.

GOOD LUCK!

GENERAL INSTRUCTIONS FOR ALL EXAMS:

1. Exams do not leave the exam room! Write your exam number on your copy of the examination questions, and return it to the proctor at the end of the exam.
2. Students may NOT take any bluebooks or scratch paper from the examination room, whether blank or used. Return to proctor.
3. If you are using a bluebook print your exam number, the title of the course and the instructor's name on the front of each bluebook.
4. Number each bluebook (1 of 3, 2 of 3, 3 of 3, etc.) and place all bluebooks and examination questions inside the first numbered bluebook.
5. If the examination utilizes a computer answer sheet (Scantron):
 - You must use **BLACK** or **BLUE INK** only; no pencils
 - You may use **CORRECTION TAPE** only; no liquid paper
 - Print your examination number in the box found in the lower left-hand section of the form. Write the number in the first 4 spaces, and zero-fill any remaining spaces.

For example, if your examination number is 2983:

IDENTIFICATION NUMBER

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Fill in the bubbles corresponding to the numbers written.

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QUESTION ONE (100 Points)

You have recently been hired by the Sheinhardt Wig Company (“Sheinhardt”) as an associate in its General Counsel’s office. Sheinhardt is a worldwide conglomerate that owns General Electric Company (“GE”), which in turn owns NBC Universal (“NBC”), a leading global media and entertainment company. Bravo, a division of NBC Universal, is a fast-growing cable television entertainment network known for its critically acclaimed series, including Emmy-award winning shows *Top Chef*, *Inside the Actor’s Studio* and *Kathy Griffin: My Life on the D-List*. The general counsel office handles legal questions that arise in all of the subsidiaries and companies affiliated with Sheinhardt, including GE, NBC and Bravo.

Your first call comes from a major executive at GE. GE manufactures a revolutionary pocket-sized microwave oven called, for now, the Fun Cooker. The Fun Cooker contains very intricate wiring circuits that are purchased from The Wirehouse (“Wirehouse”), an outside supplier. As GE needs wiring circuits, it sends a purchase order to Wirehouse requesting the required number of wiring circuits. Wirehouse responds to the purchase order with an acknowledgement form and then ships the requisite number of wiring circuits. The following statement is printed on the back of Wirehouse’s form:

Wirehouse disclaims all liability for consequential damages. Wirehouse’s liability for defects in purchased products shall be limited to the refund of the purchase price or replacement or repair of the product. Wirehouse’s acceptance of purchaser’s offer or its offer to purchaser is hereby expressly made conditional to purchaser’s acceptance of the terms and conditions of this acknowledgment form.

In addition, the front of the form has the following statement in bold capital letters: SEE REVERSE SIDE FOR TERMS AND CONDITIONS OF SALE. GE has been purchasing wiring circuits from Wirehouse for approximately ten years. In the past ten years, on at least one occasion, an executive at GE discussed the limitation of warranty and disclaimer of liability terms with an executive at Wirehouse. Specifically, GE told Wirehouse that GE objected to the terms and conditions and tried to convince Wirehouse to amend the terms. Wirehouse did not. After these discussions, GE continued to buy wiring circuits from Wirehouse.

GE sold several Fun Cookers to a local school district that installed them for student use in high schools throughout the district. In September 2010, at least four Fun Cookers exploded during lunchtime at four separate high schools. Although no students were hurt, the explosions caused considerable damage to the high school cafeteria, forcing them out of operation for several months. As a result, the school district was required to provide, for perhaps the first time ever, nutritious lunches brought in for all students during that time. The city fire department determined that the wiring circuits caused the explosions and the school district has sued GE for damages arising out of the Fun Cooker disaster.



Just as you are setting your phone down, you receive another call. An executive producer of *Flipping Out*, a wildly popular Bravo reality show featuring obsessive-compulsive real estate flipper and renovator Jeff Lewis. Jeff has a problem on his hands. In June 2010, Paula Abdul, singer and former *American Idol* judge, hired Jeff and his team to remodel her kitchen, dining room, hallway and bathroom for a total price of \$65,000. The written contract set out the major aspects of the project but lacks certain design and workmanship details. Jeff insisted that his clients are always happy with his own design work and that he does not like being locked into specific design details when taking on remodeling projects. Besides, he is known for superior workmanship. Paula appears assuaged by Jeff's confidence. She makes only one demand of him: the renovation must make J. Lo green with envy.

Accordingly, the written contract describes the general work to be done and anticipated that the project will be completed by November 30, 2010. With regard to costs, the contract stated that the fixed price of \$65,000 included the costs for labor and materials for the custom kitchen and bathroom cabinets, sustainable hardwood floors, new appliances and a china hutch to be custom built by Jeff's design company for Paula's dining room. Paula agreed to pay the \$65,000 as follows: \$20,000 at the signing of the contract, \$15,000 to be paid directly to appliance retailers for the new appliances, and \$30,000 to be paid upon completion of the project.

When construction began in July 2010, Paula was out on tour and thus not living at the home regularly, but she did stop in occasionally to oversee the work. In mid-July, Jeff discovered that the renovations and new appliances required that the kitchen be brought up to the current electrical code. Jeff hired an electrician to upgrade the wiring to code. He also assumed that the electrician sought approval from Paula for the work. However, the electrician denied ever talking to Paula about the work. The additional electrical work cost \$9500.

In August, Jeff learned that his flooring subcontractor, Star Gimbel Co. ("SG"), submitted a mistaken bid as to the square footage of flooring needed. SG underestimated the amount of flooring needed by over one-half. As a result of the mistaken bid, Jeff will need an additional \$3000 worth of flooring (and associated labor) to complete the project to his design specifications. SG also conveniently skipped town, so Jeff found another subcontractor to install the remaining flooring for \$3000.

While the remodeling continued in August, Paula moved back in. On September 1, 2010, she arranged for the purchase and delivery of the new appliances for \$15,000. On September 15, 2010, Paula told Jeff that she would not be at home on September 25th and, because she now had her personal belongings back in the house, she did not want any of Jeff's workmen there while she was gone. (Paula is a bit paranoid about her possessions from her years on *American Idol* and from dating Charlie Sheen's brother.) Unfortunately, and unbeknownst to Jeff (who, literally, would have flipped out), one of the workmen entered the home through a window to complete some work while Paula was gone. This so upset Paula that she angrily confronted Jeff and told him that neither he nor his workmen were to ever set foot in her house again. Paula refused all further requests by Jeff and members of his team to enter the home and to continue work on the project.

On October 1, 2010, Jeff submitted a "final" bill to Paula for \$36,000, claiming this amount represented the contract balance he was owed. Jeff decided to credit Paula with \$6500 for the hutch to make up for the cost of the additional electrical work. Therefore, in his itemized invoice, Jeff arrived at this final bill total as follows:

\$65,000 (contract price)
+ \$9,500 (electrical work)
+ \$3,000 (extra flooring)
- \$20,000 (initial payment)
- \$15,000 (appliances payment)
- \$6,500 (hutch credit)
\$36,000

Paula, not surprisingly, refuses to pay the invoice from Jeff. She claims that Jeff's workmanship was substandard, that the incomplete project is not at all what she wanted and that Jeff did not respond to her repeated requests to improve his workmanship and to alter his designs to her personal taste. Moreover, she told Jeff to forget about the hutch because it was so hideous that she did not want it cluttering up her dining room.

On December 15, 2010, Paula is supposed to be hosting a large holiday party at her new house to launch her new television show, *Got To Dance!*, also on Bravo. As a Bravo television star, Jeff is on the guest list as are his staff members. In advance of what could be a highly contentious party, Jeff sues Paula for breach of contract and unjust enrichment. Paula counterclaims against Jeff for breach of contract. In her court filing, Paula claims that it will cost about \$50,000 to complete the project to her specifications in time for the party. Jeff, in turn, claims that the cabinets could be finished for about \$8,000 and that the flooring defects, the only workmanship issues he concedes, could be remedied for about \$6,000. The executive producer at Bravo is not sure what to make of the legal issues.



To make matters worse, after receiving her invitation to the party, Paula's neighbor, Shirley MacLaine, ran over to tell Paula that the house was possessed by poltergeists, reportedly seen by the previous owners and their children for the entire decade they lived there. Shirley frantically exclaimed, "I would not set foot into your house if my life depended on it! In fact, my future lives all depend on not ever being around such troublesome spirits!" Paula learned from Shirley that the house was built over an old Native American gravesite; Shirley got this information from her psychic.

Paula is frantic and can't reach her personal lawyer, so she has called you to see what help you can provide. She's deathly afraid of ghosts and wants rescission of her agreement with the Freelings.

You then learn from Paula that she purchased the new home after a stalker (who also happened to have been rejected by *American Idol*) committed suicide outside of Paula's previous home. Paula didn't know much about the house that she purchased, except that it is in a gated community and apparently safe from stalkers.

The sellers, Steven and Diane Freeling, and Paula, were represented by counsel in the sale for 2 million dollars, with Paula taking possession after the closing on April 1, 2010. The agreement contains the following provision:

Purchaser has examined this property and agrees to accept same in its present condition. There are no other or additional written or oral understandings.

In a Google search, you learn that, prior to the Freelings owning the home, it was featured in the 1965, 1968 and 1975 Los Angeles Area Tours of Haunted Homes. The Freelings have not responded to Paula's calls asking for their evidence regarding the existence of paranormal activity.



Exhausted, you hang up your phone, grab a large cup of coffee and begin drafting responses to the inquiries.

- A. Will GE be able to seek indemnification from Wirehouse for any damages awarded to the school district in its suit against GE? (20 points)**
- B. What are Jeff's arguments in support of his breach of contract claim? Does Paula have any defenses? (30 points)**
- C. What are Paula's arguments in support of her breach of contract claim? Does Jeff have any defenses? (30 points)**
- D. Assuming Jeff and Paula present arguments and evidence in line with your previous answers to B and C, what is the likely outcome at trial (including remedy)? (10 points)**
- E. Does Paula have a case for rescission against the Freelings? Why or why not? (10 points)**

QUESTION TWO (100 points)

Marshall Erickson became a lawyer to champion environmental laws that make the world a better place. Unfortunately, Marshall's wife Lily's shopping addiction has forced him into private practice with Nicholson, Hewitt & West ("NHW"), a large Manhattan law firm. Since hiring on in 2004, Marshall has been assigned to a multi-million dollar litigation involving safety violations at Tuckahoe Funland, "the magical factory where dreams are made." Early on in the litigation, Marshall proved himself critical to the litigation team and his work received many accolades from the firm and from the client.

In 2007, Barnes, Lockheart, and Gardner ("BLG"), another high-powered Manhattan law firm, lured away Marshall's boss, Jeff Coatsworth, an NHW partner. Marshall overheard Coatsworth discussing his departure with other partners and learned that the Tuckahoe Funland account was in jeopardy of departing with Coatsworth to BLG. Later, BLG offered a job to Marshall for a salary of \$200,000 per year. After learning of the offer from BLG, Hewitt, the leader of the litigation practice group, asked Marshall what it would take to get him to stay on with the firm. Marshall replied that he wanted to be a partner at NHW. (NHW was eager to not lose the Tuckahoe account and believed that retaining Marshall was essential.) The firm has a policy prohibiting contracts between the firm and associates up for partnership, but Hewitt had an idea for an end-run around that policy. The firm's executive committee (of which Hewitt is not a member) makes partnership decisions based on recommendations from practice group leaders. Hewitt told Marshall that a contract obligating Hewitt to put Marshall up for partnership to the firm's executive committee would have the same effect as a contract with the firm—the executive committee generally always defers to practice group leader recommendations.

On March 26, 2007, Marshall sends the following email to Hewitt:

The terms have changed a few times over the last few days. This confirms your offer as I understand it:

- 1) My salary will increase from \$180,000 to \$200,000 at least as of January 1, 2008;*
- 2) In or around September 2008, you (Hewitt) will present my case for partnership to me and I will make the sole determination whether I will be put up for partnership in the January 2009. Should I choose to be voted upon, you (Hewitt) will give your full support and encouragement in helping me to become a partner, including recommending my partnership to the executive committee of the firm.*

Is this correct?

That same day, Hewitt replied by email as follows:

Your understanding is correct. Thank you for making the right decision!

Marshall, remembering fondly his first year contracts course with Professor Rinehart, sent the following response immediately:

I accept your offer.

Marshall then rejected BLG's offer of employment.

In September 2008, Marshall told Hewitt that he wished to be put up for partnership in January 2009. Hewitt, however, did not put Marshall up for partnership that January. Although Marshall received a salary increase to \$200,000 a year, Hewitt did not appear to give his full support and

encouragement to assist Marshall in becoming a partner. In fact, Hewitt did not do anything that could amount to championing Marshall's cause to the executive committee. Marshall did receive a salary increase to \$200,000 per year.

Around the same time, the firm became engaged in yet another Tuckahoe safety scandal and NHW implored Marshall to work day and night on the resulting litigation ("the Corndog Litigation"). Around the same time, many associates in various practice groups became disgruntled at NHW and talked about leaving for other firms.

Hewitt again feared Marshall's departure during the Corndog Litigation. On February 3, 2009, he sent him the following email:

Marshall, you know that the executive committee gave you an "honorable mention" this past January. I'm sure that your position for partnership in 2010 is even stronger as a result. I just recently spoke on your behalf to Jack Nicholson, a member of the NHW executive committee. Although we chatted after the executive committee had already made its decisions concerning candidates for partnership in January 2009, he indicated your chances for 2010 are quite good. You have a great future here, and we hope that you'll stay on board with us. Keep up the great work on CORNDOG!

As a result, Marshall believed that he had a great future at NHW and stayed at the firm. In fact, things looked so good that in March 2009, he and Lily decided to purchase a new apartment in Dowisetrepla, an up-and-coming neighborhood in New York. The \$500,000 apartment was a bit pricey for them, even more so after Marshall learned about Lily's remaining shopping debt, but he considered it a good investment (it wasn't), he thought the real estate market was really hot (it wasn't), and he believed, because his job was secure, that they were financially stable (they weren't).

After the Corndog Litigation ended in April 2009, Marshall went for long stretches without any work whatsoever. On November 19, 2009, Hewitt told Marshall in person to look for a new job, saying, "Things at NHW have changed and the bar for partnership has become much higher. Unfortunately, you are not partnership material anymore. We'll give you until January 1, 2010 to find a new job." NHW continued to pay Marshall his salary until May 1, 2010. Luckily, Marshall's friend Barney convinced his employer, Goliath National Bank ("Goliath"), to hire Marshall as an assistant general counsel on November 1, 2010 for an annual salary of \$170,000.

One of the things that attracted Marshall to the job at Goliath was not only that it offered him a job when he needed it, but also because he knew from Barney that Goliath was doing really well, at least based on the bonuses its employees received. As a long-time executive employee at Goliath, Barney had received a copy of Goliath's executive employee handbook, which includes the following provision:

Executive employees who elect to participate in the Employee Retention Plan described herein will receive annual guaranteed retention awards, commonly called bonuses, unless the employee has been terminated for cause, resigns without good reason, or fails to meet the employee's performance standards, defined in Part III. The guaranteed retention award will be calculated by multiplying the applicable performance standard multiplier with the employee's base salary.

Part III outlines the performance standards required to obtain bonuses under the plan, with minimum and maximum standards eligible for bonuses. Upon receipt of the handbook,

employees had to execute confirmations acknowledging and agreeing to the terms of the handbook, including the Employee Retention Plan. Barney executed the confirmation in 2005. In 2005-2007, Barney met the minimum performance standard, receiving \$1 million per year in annual bonuses. In 2008 and 2009, Barney met the maximum performance standard, receiving \$2 million dollars per year. In 2010, Barney again met the maximum performance standard and would be eligible for a \$2 million dollar bonus at the end of 2010 under the Employee Retention Plan. He put a down payment of \$100,000 on a suit made out of diamonds, the pinnacle of success for someone in Barney's executive position. He also promised to give \$100,000 to the church lead by his friend, Sam Gibbs.

As a result of its acceptance of TARP funds, Goliath is under extreme public scrutiny regarding its executive bonuses. Goliath worries that paying out bonuses to all eligible employees will deplete its already quite depleted capital stores and jeopardize the existence of the company. Moreover, any payouts would be disastrous in terms of Goliath's good will. After the debt crisis of 2008, Goliath worked to distance itself from the financial meltdown and has improved its reputation in the community. Paying out large bonuses this year would certainly set them back on that front, so they decide to withhold all bonuses, claiming that they are excused from doing so. Barney is devastated.

In the meantime, in order to cheer up Marshall, Lily and Barney from their woes, Ted, Marshall's best friend, and Ted's roommate Robin, decide to subscribe to ROBOTV, a special subscription cable television service featuring 24/7 episodes of *Robots Versus Wrestlers!*, the gang's favorite sporting event. The subscription agreement contains the following clause:

ROBOTV guarantees at least 20% of its programming will consist of the Robots Versus Wrestlers! television series, the series that made ROBOTV famous....

ROBOTV reserves the right to change these terms and conditions at any time and for any reason. If any changes are made, ROBOTV will send you a written notice describing the change and its effective date. If a change is not acceptable to you, you may cancel your service. If you do not cancel your service, your continued receipt of any service is considered to be your acceptance of that change.

Soon after, in an envelope containing the monthly bill, ROBOTV included a new agreement that differed from the old. It includes a clause stating that any claim "arising out of, or relating to this agreement shall be resolved in according to binding arbitration." Ted, who didn't read the enclosure, did not cancel ROBOTV and continued to watch episodes of *Robots Versus Wrestlers!* when anyone stopped by for entertainment. Yesterday, when Ted turned on his television, he discovered that ROBOTV eliminated *Robots Versus Wrestlers!* from their daily lineup due to lack of viewer demand. Ted is fuming.

To get away from Ted, Robin and Barney decided to go to Atlantic City for the weekend to visit the Trump Casino, where they are both Apprentice Club members. The Apprentice Club is a free program that allows members to swipe a card at casino machines and concession stands, presumably to facilitate payment (and to provide information about their gambling habits to the casino). When Barney and Robin entered the casino on December 15, 2010, they immediately were drawn to the Wheel or No Wheel Promotion – Apprentice Club members are allowed one spin of the wheel each day, which offers a chance of winning \$1 million dollars if the wheel lands on the grand prize. Robin swiped her card, pressed the button to activate the wheel and it began spinning. Barney wandered off looking for a drink. Robin claims that while Barney was

away, the wheel landed on the grand prize. Instead of being awarded the grand prize, Robin insists that the Trump attendant immediately swiped another card and reactivated the wheel, which then landed on a lesser prize of 2 free tickets to a Wayne Newton concert.

When Robin confronts the management, the Trump manager is unwilling to budge. He tells her to enjoy her Wayne Newton concert, “It’s a fabulous show!” Robin is heartbroken; she thinks the casino has robbed her of \$1 million by altering the outcome of the wheel—she expected at least to have a chance at winning. Disappointed, Robin and Barney return to New York and contemplate what could have been.

- A. Marshall believes that he has a meritorious case against NHW for the promise of a partnership. Does he? What claims will he bring and what is the likelihood of success for each claim? When answering this question, assume that Hewitt had the authority to act as an agent for NHW. (30 points)
- B. Marshall has requested damages of \$2.5 million dollars based on his projected future income as a partner at NHW and \$500,000 for the apartment purchase price. If Marshall succeeds in his case against NHW, what remedy should be awarded? (20 points)
- C. Does Barney have a case against Goliath for payment of his annual bonus? What defenses might Goliath use? What is the likely outcome of a trial on the merits? (30 points)
- D. If Ted sues ROBOTV in court for breach of contract, ROBOTV will move to dismiss the action claiming that Ted is bound to the arbitration clause. Does Ted have any colorable arguments to help him stay in court? (10 points)
- E. Does Robin have any contract claims against Trump? Why or why not? (10 points)



BONUS QUESTION (15 points)

- A. Wildermuth promises to shovel your driveway in return for \$50 paid in advance. You pay \$50 within a reasonable amount of time. Of course, Wildermuth changes her mind and refuses to take your money and refuses to shovel your driveway. Can you force her to shovel the driveway? (5 points)**
- B. How many children did Sister Antillico move with her to Talledega? (5 points)**
- C. When will a court enforce a promise without consideration? (5 points)**

THE END OF THE EXAM

HAPPY HOLIDAYS!

