

Santa Clara University School of Law - SPRING 2001

CAMPUS ID: _____ **COURSE:** _____

PROFESSOR: _____

THESE EXAMINATION QUESTIONS MUST BE RETURNED AT THE END OF THE EXAMINATION.

THE EXAMINATION RULES STATED IN THE CURRENT STUDENT HANDBOOK GOVERN THIS EXAMINATION.

Contracts May 8, 2001

Professor Neustadter 3-1/2 hours

2 essay questions Limited open book

Instructions

1. This examination is limited open book. You may bring to the examination and refer to all course materials, hard copy or electronic (including Selections for Contracts), and all notes, outlines, or other work product, hard copy or electronic, that you have produced alone or together with other persons registered in the course. You may not refer to anything else.

2. You may use a computer for reference to electronic materials, or for writing answers to the examination, or for both. You must use ExamSoft if you are writing the examination with a computer. If your computer crashes, contact the proctor for a backup or continue hand writing the exam. If a computer that you are using in the Toso room crashes, contact Professor Neustadter in his office. In either event contact the proctor after the examination period is over to arrange for retrieval of what you had written on the computer before it crashed.

3. Answer both of the questions in this examination. Provide analysis supporting your conclusions. Conclusions without supporting analysis will not receive credit. Both will be given approximately equal weight in the grading process.

4. If you believe that additional facts are needed before reaching a conclusion, describe the kind of facts or give examples of facts that you would seek.

5. If you believe that there is a mistake or ambiguity in a question, identify what you think to be the mistake or ambiguity and the assumptions that you are therefore making in answering a question. Do not attempt to contact Professor Neustadter. For an unforeseen difficulty affecting the administration of the exam (e.g. a missing page), contact the proctor.

Question 1

Cullen Funds (hereafter "Cullen") is an investment firm that invests and manages billions of dollars in employee retirement funds.

Early in 1999, by means of a five-year written employment agreement signed by both parties, Cullen hired Roberta Mendoza (hereafter "Mendoza") to manage Cullen investments in a high technology group of mutual funds. The written agreement reserved to Cullen the right to terminate Mendoza for unsatisfactory job performance or if, in Cullen's judgment, management consolidation was warranted. Mendoza's salary was to be \$100,000 per year plus, for any year in which the value of the high technology group of mutual funds grows more than \$500,000, 2% of any growth in excess of \$500,000.

A few days after both had signed the agreement, Mendoza began to second-guess her decision. To take the job, she would have to relocate from one coast to another. Given that big change in her life, she worried about the discretion that the agreement gave to Cullen to terminate her if Cullen decided to consolidate management. Moreover, her 10-year-old daughter, with firm roots in their present location, became extremely upset when informed about the move.

When Mendoza called Cullen to discuss her concerns, Cullen sweetened the deal. He offered Mendoza a corner office with a magnificent view (office location not having been mentioned in the written agreement). In addition, because Mendoza's daughter was an accomplished young tennis player, Cullen offered payment of membership for Mendoza's daughter in a popular children's tennis club (\$50/month) for the term of the contract. These offers convinced Mendoza to take the job and she so informed Cullen. Cullen then signed and sent Mendoza a written amendment to the original agreement. The amendment identified the two additional benefits and also extended the term of the employment agreement to 5 years and 1 day. Mendoza signed and returned the amendment.

Cullen's investments in the high technology group of mutual funds were spectacularly successful for about 18 months. Late in 2000, however, the value of technology investments began to plummet and, coincidentally Cullen later claimed, Cullen began to find fault with Mendoza's performance. Early in 2001, Cullen relocated Mendoza to a less desirable office and discontinued paying membership fees for the tennis club. Mendoza was angered by these changes but, feeling somewhat responsible for the fate of the technology investments, did not complain. Moreover, Mendoza's daughter, deciding to focus on soccer instead, quit the tennis club shortly thereafter.

In the early summer of 2001, Cullen fired Mendoza, relying on the clause in the written agreement permitting termination for unsatisfactory job performance. Mendoza, sick of the highly competitive environment of the investment business, secured a job as a kindergarten teacher starting in the fall of 2001. She also sued Cullen for breach of

contract.

Early in 2002, Cullen and Mendoza settled the litigation. Mendoza's incentive to settle came from Cullen's insistence on Mendoza's unsatisfactory job performance. Cullen's incentive to settle came from its fear that a jury might find Mendoza's job performance to have been satisfactory and because Mendoza told Cullen that unless Cullen settled she would volunteer some damaging testimony in a pending employment discrimination suit recently initiated against Cullen by other employees of Cullen. The Cullen-Mendoza settlement stated that Cullen was to pay Mendoza \$200,000 in two installments, \$100,000 upon her dismissal of her lawsuit "without prejudice" and \$100,000 a year thereafter. (Dismissal of a suit "without prejudice" means that the party dismissing the suit may re-file the lawsuit at a later time. Dismissal of a suit "with prejudice" means that the party dismissing the suit agrees not to re-file the lawsuit. The form that a party uses to dismiss a lawsuit provides a space to indicate whether the dismissal is with or without prejudice.)

Mendoza dismissed her suit without prejudice and Cullen paid her \$100,000. Shortly thereafter, Cullen settled the employment discrimination suit that had been initiated by other Cullen employees. Because it no longer feared Mendoza's potential testimony, Cullen refused to pay her the remaining \$100,000 when it became due.

Mendoza sued Cullen again. In her first cause of action, she sought damages of \$100,000 for breach of the settlement agreement. In her second cause of action, in the alternative, she sought the same damages that she had claimed in her original lawsuit against Cullen. Cullen filed an answer denying liability on both causes of action and filed a cross-complaint seeking return of the \$100,000 it had paid her. Assume that a jury would find that Mendoza's job performance had been satisfactory and did not give cause for termination. Evaluate the likely success of each of Mendoza's two causes of action, the amount of damages under each to which she would be entitled if successful, and the likely success of Cullen's cross-complaint.

Question 2

Notes:

- You should assume without discussion that UCC Article 2, supplemented where appropriate by common law (UCC 1-103), governs this transaction.
- Do not discuss recent federal or state legislation governing the use of electronic records and electronic signatures. If important to the analysis, you may simply assume that an electronic record will suffice as a writing and an electronic signature will suffice as a signature.

Golden State Hardware, Inc. (hereafter "Hardware") owns a chain of retail hardware stores operating in the Western United States, including California.

In January 2001, Hardware received an advertising brochure from Lightyear Ahead, Inc. (hereafter "Lightyear") promoting the sale of fluorescent lights for the home (designed for use in lamps and ceiling fixtures) as energy saving alternatives to traditional

incandescent lights. The advertising brochure included reference to a California State Energy Commission Report issued in December 2000 that described the coming energy crisis and predicted significantly increased consumer demand for energy efficient products.

In February 2001, Hardware decided to order 1,000,000 fluorescent lights from Lightyear for resale largely to Hardware's California customers. Monica DeShea (hereafter "Monica"), acting as an authorized agent of Hardware, located the Lightyear website and decided to place Hardware's order over the Internet by using the order form posted on Lightyear's website.

The form on the website listed the model numbers and prices of Lightyear's products. Monica filled in the quantity 1,000,000 in the space provided next to the model number of the lights that it wished to order. She also filled in the blank for desired delivery date as "April 16, 2001, in time for annual spring sale." She also provided other pertinent information on the website order form: Hardware's name, billing address, contact person, phone, e-mail address for confirmation of the order, warehouse delivery location.

The top of the first page of the website order form contained a conspicuous link entitled "Terms and Conditions". A reader of the form can only read the Terms and Conditions by clicking on the link. Three of the Terms and Conditions read as follows:

- "Your order subject to approval by Lightyear."
- "Payment due 30 days after receipt."
- "Lightyear will not be responsible in damages, consequential or otherwise, for defective products, but will accept return of defective products within six months of receipt for exchange or credit."

The bottom of the website order form contained a conspicuous link entitled "Place Order Now." Prior to selecting this link, Monica selected the "Terms and Conditions" link at the top of the page. In response, the website displayed a new page with the following notice:

"Terms and Conditions temporarily taken off line. Please try again in one hour. You will be returned to your online order form in one minute. If you prefer, order now and we will send the terms and conditions with your confirmation. We apologize for the inconvenience."

Monica didn't wish to wait so she selected "Place Order Now." In response the website displayed the following message: "Thank you for your order. If we are able to fill your order, we will confirm by e-mail."

A few hours later Hardware received an e-mail from Lightyear reading as follows: "Order for 1,000,000 fluorescent lights received. We confirm delivery no later than end of April 2001." An attachment to the e-mail contained the "Terms and Conditions" that had been temporarily missing from the website. Monica read the Terms and Conditions and sent a

reply e-mail to Lightyear that referred to the confirmation and said, in relevant part: "Because of the volume of our order, which will be stocked on store shelves periodically over a period of time, we will need as much as one year for return of defective lights and would like the option of refund for defective products."

Monica, in turn, received a response to her e-mail, referring to the confirmation and to Monica's reply to the confirmation, which stated, in full: "Refund option not available."

Lightyear shipped the order and it was delivered to Hardware on April 25, 2001. Hardware accepted the lights and timely paid for them.

Nine months after receiving the fluorescent lights from Lightyear, Hardware returned to Lightyear 10,000 defective lights (that had been returned to Hardware by its retail customers) with a request that Lightyear refund the purchase price of those 10,000 lights. Hardware also returned to Lightyear 500,000 lights that it had not sold to customers with a request for a refund both because "Lightyear delivered the lights late" and because "a recent article in the New England Journal of Medicine claiming a small but statistically significant risk of cancer due to prolonged exposure to fluorescent light has reduced consumer demand below that which we expected." Lightyear responded in a letter that said that no refunds would be issued but that Hardware could either choose to receive 10,000 new lights to replace the defective ones returned or choose to credit the purchase price against their next order from Lightyear.

Hardware consults you for advice. It wants to know whether it is entitled to a refund for the 10,000 defective lights and whether it is entitled to a refund for the 500,000 lights. What is your reply and why?

End of examination