## Exam questions on performance and breach

### Question 1 (1.5 hours)

On May 15, 2003, the International Ice Hockey Federation ("IIHF") issued the following press release:

> With the permission of the International Ice Hockey Federation, two of the eight teams scheduled to participate in the 2003 IIHF Women's World Championship, in the City of Detroit, Michigan, United States of America, have withdrawn from the competition because of their fears of exposure to the SARS pneumonia, an outbreak of which has recently been reported in Detroit. The team from Canada and the team from Norway have withdrawn. The competition, originally scheduled for June 2-9, 2003, has been rescheduled for June 2-7, 2003. Teams from the United States, Russia, Switzerland, Germany, Sweden, and Ireland will participate.

Upon reading this press release, USA Hockey, Inc. (the official governing body of hockey in the United States, hereafter referred to as "USAH") began to consider whether it should withdraw Team USA from the competition. It began to consider this possibility because over the past several years Team Canada and Team USA had been alternating world or Olympic champions. Therefore, a championship won without the participation of Canada would be less impressive. In addition, money from gate receipts and concession sales, 25% of which would go to USAH, likely would be depressed because fewer Canadian fans would buy tickets.

Among the issues that USAH wishes to consider before making a decision is the consequence of canceling hotel reservations that it had made for Team USA at the Hilton Downtown Detroit ("Hilton"). In November 2002 USAH had reserved a block of 20 hotel rooms, and the use of a conference room, at the Hilton, arriving June 1 and departing June 11, 2003.

USAH had requested the rooms in a telephone conversation with Hilton. In that conversation, USAH (through its authorized representative Cowan Puck) told Hilton (through its authorized representative Penelope Waters) that it wanted the rooms because Team USA was going to participate in the 2003 IIHF Women's World Championship. Because of the large number of rooms requested, Hilton had insisted in the telephone conversation that USAH sign a reservation agreement. Hilton then sent a two page letter agreement, typed by Hilton representative Penelope Waters on Hilton stationary. A copy of this letter agreement follows. It contains a handwritten change that is explained on page 5 of this examination.

Hilton Downtown Detroit
1414 South Parkway
Detroit, Michigan 48201
(313) 555-1234

See us on the Internet at: HDD.com

The finest accommodations in the Motor City

Five star rating by American Automobile Association

November 15, 2002

Cowan Puck
United States Hockey, Inc.
222 West Portal Ave.
Colorado Springs, Colorado 80906

Dear Mr. Puck:

Upon your signature on behalf of United States Hockey, Inc. this letter agreement will complete your reservation of 20 one-bedroom rooms at Hilton Downtown Detroit, arriving June 1 and departing June 11, 2003. Each room will be non-smoking, have one queen-sized bed, and be equipped with a refrigerator, television, VCR, and DSL Internet service.

Your reservation will also entitle you to complementary continental breakfast for each of your guests during the period of their stay, free underground parking, and use of the Emerald Conference Room 24 hours/day for team meetings.

Charges for the rooms will be $150 each, per night, plus additional charges incurred (e.g. Internet or room service), plus applicable state and local taxes. Charge for use of the Emerald Conference Room will be $7,500.00.

USAH may cancel this reservation without charge no later than 5:00 p.m. on May 15, 2003. Payment in full is otherwise required.

Modifications of this agreement must be in writing.

We are pleased that you have chosen Hilton Downtown Detroit for your accommodations and look forward to making your stay as comfortable and enjoyable as possible.

Please sign below to indicate your agreement.

Very truly yours,

Penelope Waters

Agreed to:

Hilton Downtown Detroit
by Penelope Waters

__________________

Date: November 15, 2002

United States Hockey, Inc.
by Cowan Puck

__________________

Date: November 22, 2002

When Cowan received the letter from Hilton he noticed and error and called Penelope. They had the following telephone conversation:

> Cowan: "I thought we agreed that the Emerald Room would be $5,000."
>
> Penelope: "You're right. Change and initial that. I'll initial it too."
>
> Cowan: "One other thing. What happens if terrorist activity or something like that interferes with the Women's World Championship? Can we cancel after May 15?"
>
> Penelope: "Just let us know immediately."

After hanging up, Cowan changed $7,500 to $5,000 (but made no other changes) and then signed and mailed the letter agreement to Penelope.

On May 15, 2003, in addition to reading the press release quoted at the beginning of this question, USAH received an email from Hilton stating:

> We have decided to upgrade and refurbish all of our conference rooms beginning June 1, 2003 and the Emerald Conference Room that you reserved will therefore not be available. We have arranged with the Westin Hotel (located a mile away from the Hilton) to substitute its Canasta Conference Room and will shuttle you to and from the Westin as needed any time between 7:00 a.m. and 10:00 p.m. We apologize for this inconvenience.

It is now May 16, 2003. Advise USAH if it will incur liability to Hilton for breach of contract if it remains in the competition but cancels its reservations for June 9 and 10, or if it withdraws from the competition and cancels its reservations for the entire period. Do not discuss damages. Support your advice with appropriate legal analysis.

**Question 2 (1.5 hours)**

In November 2002, in preparation for the 2003 IIHF Women's World Championship mentioned in Question 1, United States Hockey, Inc. (USAH) agreed in writing with Slapshot International ("Slapshot") to purchase new uniforms for each of the 15 players on Team USA. USAH ordered two uniforms for each player plus five spare uniforms, for a total of 35 uniforms, for the price of $20,000. The uniforms had been specially designed for USAH by a Slapshot employee, a design consultant, and were to be specially manufactured by Slapshot.

The written agreement described the style, materials, and construction of the three parts of the uniform (a numbered jersey, pants, and socks), and the design and colors of, and placement of logos on, each part of the uniform. The agreement provided for payment of $10,000 on December 1, 2002 (which USAH paid when that date arrived) and payment of $10,000 upon delivery, prior to inspection. The agreement required Slapshot to deliver the uniforms at USAH offices in Colorado Springs, Colorado by January 15, 2003, in time for a series of pre-championship exhibition games at different U.S. cities, beginning January 20, 2003, that would help Team USA prepare for the championship and build public interest in the team.

The written agreement included a clause "relieving Slapshot of responsibility for delayed shipments and deliveries occasioned by striking employees, fires, or accidents at our plant, delays of common carriers, or other causes beyond our control."

On December 1, 2002, equipment used by Slapshot in the manufacture of uniforms broke down because new Slapshot employees improperly serviced the equipment. The equipment would normally have been repaired and back in service within 48 hours but for the fact that the company with a contract to repair Slapshot equipment could not respond immediately to Slapshot's repair request because the repair company employees were on strike. The strike ended in mid December and the repair company repaired the equipment on December 20, 2002. This delayed Slapshot's delivery of the uniforms to USAH until January 30, 2003, two days before the second of its pre-championship exhibition games.

USAH paid $10,000 to Slapshot upon delivery, as required, and then inspected the uniforms. It discovered that the logo, a representation of the flag of the United States sewn onto the shoulders of each jersey, had 48 instead of 50 stars in the flag.

USAH felt in a bit of a bind. On the one hand it didn't want to use the jerseys with the incorrect logo. On the other hand, it had received considerable bad publicity because Team USA had not worn its new uniforms at the first exhibition game on January 20, 2003 after having heavily promoted ticket sales for all of the team's exhibition games by advertising "come see our new Stars and Stripes uniforms and support Team USA." Moreover, USAH suspected that advance ticket sales for the second and subsequent exhibition games had slumped because of the bad publicity.

USAH decided on the following. At the second exhibition game, Team USA players wore their new uniforms (jerseys, pants, and socks) for a 15-minute pre-game skate-around and warm-up to display the uniforms to the crowd and to a nationwide television audience. The crowd roared its approval of the display, and most of the cheers turned to laughter when it was announced that the team

would not wear the uniforms for the game because they had to be returned to the manufacturer to replace the logo.

Immediately after the game, USAH returned only the jerseys to Slapshot with a written request that Slapshot sew on corrected logos and refund USAH $5,000 in compensation for delay in delivery and in compensation for lost ticket sales. The written request also demanded that Slapshot refund an additional $2,500 if corrected jerseys could not be returned in time for the third exhibition game on February 14, 2003.

Slapshot returned the jerseys on February 15, 2003, accompanied by a letter explaining and apologizing for the original delay in delivery, and apologizing for the error in the logo. The letter offered a $1,000 refund provided that USAH sign a release of all claims against Slapshot for breach of contract. A corrected logo (i.e. one with 50 stars on the flag) had been sewn onto the jerseys. However, the stitching technique (i.e. the method by which the logo was sewn onto the jersey) was different from that required by the written agreement (even though the stitching technique used to sew on the original incorrect logo had been correct).

It is now February 16, 2003. None of the possible changes to the competition discussed in Question 1 has occurred and none is yet suspected. Before deciding whether to sign the release, USAH has asked you to advise it about its other legal options. Furnish that advice, supported by appropriate legal analysis, including but not limited to a discussion of the nature and method of measuring any damages to which USAH might be entitled.

**Question 3 (1.5 hours)**

Reproduced immediately below are excerpts from a written agreement between Rachel Electronics, Inc. (hereafter "Rachel") and Robert Fullerman (hereafter "Fullerman"), covering the same subject matter as your second contract drafting assignment. Both parties have executed the agreement.

## Product Endorsement and Promotional Tour Agreement

The parties to this agreement are Rachel Electronics, Inc. (Company) and Robert Fullerman (Fullerman).

1.0 Recitals

Company is in the business of manufacturing educational learning products suitable for children of elementary school age. Fullerman is a popular television personality, known on television as Mr. Wizard, who hosts a weekly one-hour educational science television program on CBS television aimed at children of elementary school age. To capitalize on recognition of Fullerman by children,

Company wishes Fullerman to endorse and promote Company's products by touring school districts throughout the country and by permitting the use of his name, image, and likeness in advertising of Company's products.

2.0 Definitions

2.1 "Endorsement" or "endorse" means Fullerman's grant of authority to Company for Company's use of Fullerman's name, image, or likeness in any advertising by Company of its products.

2.2 "Promotional tours" or "promotes" means in-person meetings between Fullerman and representatives of school districts in the United States, in which Fullerman describes the features and educational benefits of Company products, demonstrates the use of Company products, and encourages representatives of school districts to consider use of Company products in the elementary school curriculum.

3.0 Endorsement

3.1 Prior to Fullerman's endorsement of Company products, Company will furnish to Fullerman a sample of each product that it wishes Fullerman to endorse, together with such documents (including design schematics, test results, instructions) as Fullerman may reasonably require to examine and evaluate each product. Fullerman may promptly examine and evaluate such products to determine whether such products are safe and educational for age groups to which the products are targeted. Company may use Fullerman's endorsement for a product if but only if Company has not received Fullerman's written statement that he has concluded a product to be either unsafe or not educationally suitable for age groups to which the product is targeted within 10 days of having furnished Fullerman a product and accompanying documents for examination and evaluation.

4.0 Promotional tours

4.1 Reasonably in advance of any promotional tour, Company will furnish to Fullerman a sample of each product it wishes Fullerman to promote during a tour, together with such documents (including design schematics, test results, instructions) as Fullerman may reasonably require to examine and evaluate each product. Fullerman may promptly examine and evaluate such products to determine whether, in his sole discretion, exercised in good faith, he believes such products to be safe and educational for age groups to which the products are targeted. During a promotional tour, Fullerman need not promote any product that he has concluded is either unsafe or not educational suitable for age groups to which the product is targeted.

Some of the other portions of the agreement provided:

- Rachel promises to compensate Fullerman $200,000 in 4 equal quarterly installments beginning on November 15, 2003

- Fullerman promises to conduct two school district tours each month, beginning October 2003 and ending with tours in May 2004

- Rachel may use Fullerman's endorsement from October 1, 2003 through September 30, 2004

The agreement did not mention Fullerman's television program other than in the recital quoted above.

In October 2003 Fullerman performed two tours in which he demonstrated Rachel products to which he did not object. However, pursuant to paragraph 3.1 of the agreement, in late October 2003, Fullerman timely and in writing objected to Rachel's use of his endorsement with respect to another product that Rachel had sent to Fullerman for evaluation. The product included many features, one of which allowed children to access on the Internet Rachel's monthly electronic newsletter for kids, the most recent of which discussed debate in the Massachusetts legislature about whether to adopt a constitutional amendment banning gay marriage. A prominent educational psychologist hired by Rachel writes the newsletter. The product cannot access any other site on the Internet. Fullerman's written objection stated that he disagreed with gay marriage and didn't want his name associated with a product that enabled children to learn about the subject. His written objection also referred to a conversation he claims to have had with Rachel's President at the time the two signed their agreement. Fullerman claims that he referred to paragraph 4.1 at the time and that the two agreed that Fullerman would not have to promote a product in school tours if it contained material on sex education.

In early November 2003, CBS television announced changes to some of its television programming for children. Starting in December 2003, it would shorten and combine three previous hour-long programs (Mr. Wizard's show, a show about geography, and a show about animals) into one half-hour show with three ten-minute segments (one segment featuring Mr. Wizard, one segment about geography, and one segment about animals). It would also change the airtime of the three shows from 9:00 a.m. to noon on Saturday mornings to airtime for the combined show at 7:00-7:30 a.m. on Saturday mornings.

It is now November 10, 2003. The first installment payment to Fullerman, $50,000, is due November 15, 2003. Two more tours are scheduled, on November 18 and 22, 2003. Rachel has not used Fullerman's name, image, or likeness for advertising of any of its products. Based on the events described

above, it is thinking of canceling the contract and saving itself some or all of the November 15, 2003 payment and subsequent payments.

Rachel wants your legal advice on the following two questions: (1) May Rachel cancel its contract with Fullerman without liability for damages for breach of contract? (2) If the answer to the preceding question is "yes", must Rachel nonetheless pay Fullerman something? Do not discuss damages. Rachel doesn't remember whether the differences in language between paragraphs 3.1 and 4.1 were deliberate or unintentional.

**Question 4 (1.5 hours)**

After the vote counting debacle in Florida in the 2000 presidential election, Best County, California (hereafter "County") decided to replace its punch card voting system with a touch screen voting system. In that system, voters cast votes by touching portions of the screen of a monitor, and their votes are then transferred to and recorded on a central computer server that tabulates and reports total vote counts. A touch screen voting system consists of touch screen monitors for polling places, computers at polling places, computer servers at election headquarters, and the necessary software.

California law requires that the California Secretary of State ("Secretary") certify any voting system before it may be used in any election. California law also permits the Secretary to de-certify any voting system that he or she later finds to be defective, obsolete, or otherwise unacceptable for use. State law prohibits a County from using a voting system that has been de-certified.

In 2003, after the Secretary had certified a touch screen voting system designed and manufactured by Cyberlection, Inc. ("Cyberlection"), County agreed in writing to purchase that system from Cyberlection for $20 million. County planned to use the system beginning with California's March 2004 primary election.

Cyberlection delivered all components of the system to County two days before delivery was due. As agreed, County had paid Cyberlection $10 million prior to delivery and paid the remaining $10 million upon delivery. Within a week of delivery, having fully inspected the voting system, County discovered that voters with some forms of disability would be unable to use any of the monitors. This troubled County because, in negotiations preceding the agreement, County had told Cyberlection that at least 10% of the monitors needed to be usable by voters with disabilities. Cyberlection's only response had been: "Oh, that's something that we hadn't considered."

To compound matters, the day after that discovery, the Secretary announced that well respected software engineers had raised credible claims of security flaws in Cyberlection's voting system software, claims that required an

emergency hearing to determine whether the system should be de-certified. The Secretary scheduled an emergency hearing for December 10, 2003.

County immediately contacted Cyberlection to discuss these two problems.

Concerning the monitors, Cyberlection told County that it needed until at least July 2004 to design monitors suitable for voters with disabilities and then it would be willing to exchange those monitors for 10% of the monitors originally delivered to County but that this would cost County an additional $500,000. It also suggested that County use enough of the old punch card system in the March 2004 election to accommodate voters with disabilities.

With respect to the Secretary's announced emergency review, Cyberlection told County that it would send software patches to County immediately and that these patches should solve the problem. Cyberlection also told County that County could show those patches to the Secretary. Cyberlection also told County that it "wasn't inclined" to appear before the Secretary to demonstrate or explain the patches or resist de-certification of the voting system after having spent so much time and money prior to County's purchase securing the certification in the first place.

Assume that it is now December 1, 2003. County election officials, pressed by the imminent March 4, 2004 election and worried about the possibility that the Secretary might de-certify the Cyberlection voting system, are wondering what to do. They see several possibilities.

If the Secretary does not de-certify the voting system, County could use the system but, at a cost of $50,000, it also would have to retrieve from storage and set up a small portion of its old punch card voting system to accommodate disabled voters. If it does this, County wonders whether it should use 100% of the monitors to speed the voting process for voters who are not disabled.

County fears, however, that the Secretary might de-certify the Cyberlection voting system. If that happens, County would have to use all of its old punch card voting system. If County started immediately, it could retrieve from storage and set up all of its old punch card system at a cost of $1 million. If it waited until after the Secretary's decision, which could be as late as the end of December 2003, its costs of retrieval and set up could jump to as much as $2 million because of extra labor that would be needed to perform the job in a shorter period of time. In either case, it would also want to compose and print new instructions for voters, at a cost of $100,000, that would minimize or eliminate earlier problems associated with the punch card system. If County starts this process immediately and then the Secretary does not de-certify the Cyberlection voting system, County could abandon the process but would have incurred some of the above costs and would incur additional costs in returning the punch card

system to storage.

Another alternative is to immediately purchase another touch screen voting system from Votronics, Inc. ("Votronics") for $25 million. The Votronics system has been certified by the Secretary, used successfully in other states, and commended by the same software engineers who claimed security flaws in the Cyberlection system. There is virtually no chance that the Secretary would even consider de-certifying that system. If County purchases the system immediately, it can set up the system in time for the March 2004 election without any extra cost. If County waits until after the Secretary's decision, County would also have to spend an additional $1 - $2 million for extra labor to test and set up the system in time for the March 2004 election.

What legal advice would you give to County to help them choose among alternatives? Include a discussion of damages.

**Question 5 (1.5 hours)**

Michael Merlot ("Merlot") is a wine consultant. He contracts with restaurants to advise them about the types of wines they should serve to customers, taking into account the characteristics of the particular business model of the restaurant (e.g. expensive French restaurant vs. moderate priced family restaurant). Merlot signed a written agreement to advise Vegetarian Delight ("Vegetarian"), a nationwide chain of restaurants specializing exclusively in vegetarian meals, during a two-year period, in exchange for which he would receive $2,500 per month at the end of each month of the contract.

Prior to signing the written agreement, Merlot and the president of Vegetarian talked with each other about Vegetarian's business model, including its target customers, the nature and price of food items on the menu, and Vegetarian's goals for increased profits as a result of choosing the right wines to put on its wine list. In these conversations, Merlot and the president of Vegetarian agreed that except for a very short vacation each year Merlot "would be at Vegetarian's call any day of the week."

Vegetarian was satisfied by Merlot's performance under the contract until the publication, at the beginning of the second year of the contract, of a review by a New York Times wine critic. The review reported that the winemaking process for some wines involves the use of animal derived products (e.g. gelatin, egg whites). It also reported that Vegetarian includes two such wines on its wine list of ten wines. Immediately following publication of the review, Vegetarian dropped the two wines from its wine list, advertised extensively that none of its wines were made with a process involving animal derived products, and distributed thousands of "2 dinners for the price of 1" coupons. Notwithstanding the advertising and coupons, business nationwide dropped dramatically and did not fully recover for six months.

Immediately following publication of the New York Times review, the president of Vegetarian tried to contact Merlot several times by telephone and e-mail to get Merlot's advice about choosing wines to replace the two wines that it had dropped from the wine list and to get an explanation about why Merlot had overlooked the problem identified by the New York Times wine critic. Merlot did not respond for four weeks. He had just begun a two-week vacation abroad at the time the wine review was published and did not check for messages during his vacation. Upon return, he was very ill for one week and then took another week to catch up with his backlog of messages. When Merlot finally called Vegetarian, its president told him that Vegetarian had hired another wine consultant to replace Merlot, that it would not pay Merlot the remaining installment payments under the contract (it had paid the first 12 monthly installments), and that it would hold Merlot responsible for damages for breach of contract.

The 5-page written agreement between Merlot and Vegetarian was drafted by a lawyer for Merlot but was not reviewed by any lawyer for Vegetarian. The written agreement made no mention of the manufacturing processes for wines to be recommended by Merlot, no mention of the accessibility of Merlot to Vegetarian, and no mention of damages for breach of contract. It did include a standard merger clause.

Discuss the potential liability of each party to one another for breach of contract. Include a discussion of the damages that each might recover against the other.

**Question 6 (1.5 hours)**

Vegetarian (from Question 1) orders wines for its restaurants from Premium Wine Distributors, Inc. ("Premium").

Vegetarian and Premium signed a written agreement for the sale to Vegetarian of 500 cases of different kinds of wines, for the total price of $50,000, with shipment of 50 cases to be made to each of Vegetarian's 10 restaurants in the South.

The written agreement was one page long, using the same size font as you see on this examination page. In addition to a caption, recitals, and signatures, it included eight numbered terms, each of which had a bold faced, underlined heading (like the term that you see immediately below). The fourth term read as follows:

4. **Premium's responsibility**

> We acquire bottled wine from wine producers. Wine producers seal their bottles of wine before shipping them to us. We do not unseal or test them. Therefore, we cannot be responsible for the quality of wines that we ship to you.

Each case of wine consists of a cardboard box containing 12 bottles of one type of wine (e.g. Cabernet, Zinfandel). Each box is sealed with packaging tape. The outside of each box identifies the type of wine included inside the box.

Pursuant to the written agreement, Vegetarian paid $10,000 to Premium in advance of shipment. Premium delivered the 500 cases of wine required by the contract, including 50 cases of wine to a Vegetarian restaurant in Atlanta, Georgia. The 50 cases shipped to that restaurant included 5 cases of "Sun Kissed Vineyards Cabernet 2000" and 5 cases of "Sun Kissed Vineyards Zinfandel 2000." Immediately upon receiving the delivery, the manager of that restaurant opened one of the 5 boxes of Cabernet and looked at all of the bottles in the box. He noticed that the name of the winery on the label of 3 of the 12 bottles in the box was smeared such that the name of the winery appeared to read "Sun Missed Vineyards Cabernet 2002." He opened another box of Cabernet and found the same smearing on the label of 1 of the 12 bottles in the box. He was concerned about this because Vegetarian required the waiters at all of its restaurants to show a customer the label of an unopened bottle and get the customer's confirmation that the correct wine had been selected before the waiter opened the bottle. Despite his concern, he stored all 50 boxes in the restaurant's wine storage facility without opening any of the other boxes because he still had plenty of wine left from previous shipments.

The next day, an Atlanta television news station reported a story about a woman who had discovered fingernail clippings in a glass of wine served to her from a previously unopened bottle of "Sun Kissed Vineyards Zinfandel 2000." The waiter had opened the bottle at her table in a Japanese restaurant two weeks before the story broke and a health investigator had confirmed the presence of fingernail clippings in the bottle of wine involved and in one of ten other bottles of the same wine stored by the Japanese restaurant.

Two weeks after that news report, the manager of the Vegetarian restaurant in Atlanta sent an e-mail to his supervisor in the home office of Vegetarian reporting the facts described in the preceding two paragraphs and seeking advice about what to do. In the e-mail, the manager reminded his supervisor that Georgia law prohibited restaurants from serving wine to patrons more than 48 hours after a bottle storing the wine first has been opened.

The home office supervisor forwarded the e-mail to you. You are in-house counsel for Vegetarian. Payment of $40,000 on the contract with Premium is due in a little more than one week.

Identify and discuss Vegetarian's legal options with respect to Premium, and discuss the damages that it could recover from Premium or for which it might be liable to Premium. **Do not discuss** any tort theories or any potential liability of Sun Kissed Vineyards. Also note that I will not award credit for concluding that this transaction is subject to U.C.C. Article 2, because that conclusion is obvious.