1)

Fact Pattern 1

Enforceability

The first issues is whether or not Jones and House's contract would be enforceable under the doctrine of consideration. Under this doctrine, the contract is enforceable if has consideration, or a bargain for a legal benefit to the promissor or a legal deteriment to the promisee. *Hamer v. Sidway.* If we consider House the promisee, there is consideration, because he suffers the legal detriment of losing his land, and this detriment is bargained for because he gave up the land only in exchange for the money. If Jones/Badland is the promisee, there is still consideration because Jones/Badland suffers the legal detriment of giving up the $50,000, and only suffers this detriment in exchange for the $50,000. As such, this promise has consideration and is enforceable. The fact that the value of the land was much higher then $50,000 will not effect the enforceability, because courts generally do not inquire as to the sufficiency of consideration.

Revocation

Since the K is enforceable, the next issue is whether House effectively revoked the K. Revocation is effective anytime after the offer is made but before the offer is accepted. At the point at which House revoked the contract, he had already shook hands with Jones to "close the deal" and he had further signed a written memorandum of the deal. As such, his revocation would not be effective because the deal had already been accepted and turned into a contract. However, House has a number of defenses which may come into play to save him from having to comply with the contract.

Statute of Frauds

Badland will likely argue that since House and Jones "shook hands to seal the deal" House was obliged to enter into the K because he had already agreed. However, this agreement may be covered by the statute of frauds (SoF). Under the SoF, a K for land has to be made in writing to be effective. As such, the initial deal between House and Jones would only be effective if it fell into an exception to the SoF. Badland may argue that the K will be enforceable under the exception for promissory estoppel. Promissory estoppel exists when one makes a promise, which can be reasonably relied on, which is actually relied on, and which would result in an injustice if the promise is not enforced. There is certainly a promise here, made when House and Jones shook hands. However, it is unlikely that buying drinks would be seen as reasonably or actually reliant on the promise. While Badland might argue that if the agreement had not been made, Jones would never have bought the drinks, the drinks were in no way necessary steps in completing the transaction of selling the land, and were more of a social value then anything else. As such, this initial agreement was covered under the SoF and is not enforceable. This leaves the second agreement where House signs the written memorandum.

Mistake

House could try to argue for mistake as a defense, but it would fail. He would argue that he did not know of the existence of coal on the land, and therefore made was mistaken. In order to successfully raise a defense of mistake, he would have to show that the mistake is both mutual and material. *Sherwood.* This mistake is not mutual, because Badland and Jones knew there was coal on the land. As such, a defense of mistake would not prevail. Whether the mistake is material or not is less sure. A mistake is material if it goes to the substance and not the quality of the thing being bargained for in such a way that it affects the consideration. A

court might consider that a contract for land without coal and a contract for land with coal are completely different things being bargained for (*Sherwood*), or they might consider that as long as it was the same tract of land being bargained for there could be no mistake (diamond case). However, it would not reach that point because the defense of mistake would fail as the mistake is not mutual.

Misrepresentation

House can argue as a defense to either agreement that it was obtained via a misrepresentation. For a misrepresentation to be a defense, it must be one of fact and not of opinion. *Dance studios*. However, at common law, silence on an issue is not normally considered a misrepresentation unless it imposes somehow on the other party. Here, House asks Jones if he would tell him if the land had, "for example," gold on it, and Jones agreed he would tell House, and would even sell the land back to him if it did have gold. Additionally, Jones showed house a document claiming that land in the area at that size was valued at about $40,000. House will argue that when he said "gold," he was really just using gold as an example, and that he meant any valuable thing he didn't know existed on the land. As such, when Jones said he would tell House if the land had gold, he was implying that the land had no valuable resources on it and House could safely sell it for the average value of other local tracts of land. Badland will try to hold House to a strict interpretation of what he said, where gold means just gold, and Jones was not implying anything about coal. This would be a close call, but the court should find that because House said "for example," he meant things other then gold as well, and Jones' statement imposed upon House that there was no valuable resources on the land.

Under the restatement, this is clearer. Under the Restatement, there is a duty to disclose if disclosure is necessary to prevent a previous statement from becoming a misrepresentation,

disclosure is necessary to correct a mistake on a basic assumption and non-disclosure is in bad faith, it would correct a mistake as to the contents of a writing evidencing the agreement, or the other person is entitled to know because of a relationship of trust. Here, there is no relationship of trust because it is merely a seller/buyer relationship. House could make the same argument made at common law to argue that disclosure was necessary to prevent a statement from becoming a misrepresentation, but he would also be able to argue that disclosure would correct a mistake as to the contents of a writing evidencing the agreement. House was mistaken as to the value of the land, and Jones correcting him on that value would effect the writing evidencing the agreement. As such, under the restatement House has a defense of misrepresentaiton, under the common law he is likely to have a defense, but may not subject to the desires of the court.

Undue Influence

House can argue that the second, written memorandum is unenforceable because it was obtained via undue influence, which is a defense to contract. Undue influence exists when two factors are present: an undue susceptibility in the servient party (House) and excessive pressure in the dominant party (Badland). *Ordozzi.* Susceptibility is similar to incompentence, but can be present at a much smaller degree then the type needed to void the K for incompetence. Here, House is probably susceptible because he "had a bad hangover" and "was perplexed and confused as to the identity" of Badland's agents. Execessive pressure is considered by several factors: discussion of the transaction at an unusual place or time, insistent demand that business be finished at once, extreme emphasis on the undue consequences of delay, the use of multiple persuaders, absence of third-party advisors, and statements that there is no time to consult advisors or attorneys. Badlands exemplifies several

of these factors. First, they discussed the transaction at an unusual place, House's house, rather than in a business setting. Badland may argue that because the subject of the K was the land, this was not such an usualy place, but it was certainly an usual time, being that it was 5:00AM. Badland was demanding that House sign the contract, when they told him a deal was a deal and that he would be seen as "someone who broke his promises" and would be taken to court if he didn't sign the papers. While Badland might argue the agents did not insist on "signing the papers right now," it seems as though that is implict in their insistent demands. This also puts extreme emphasis on the consequences of delay, threatening that litigation and a bad reputation would follow if he did not sign the contract. Badlands used "20 representatives," showing a large imblaance in the number of persuaders. Finally, there were no third-party advisors and Badland "slammed down the phone" when House tried to call his attorney. As such, even though Badland may argue a few of these factors, there is a large weight against them. A K can be voided for undue influence when there is an imbalance of susceptibility and excessive pressure, so specific amounts of either are not necessary as long as the difference between them is large enough. Here, House is not particularly susceptabile, but Badland is putting a large amount of excessive pressure, with the K being signed at 5:00AM and 20 agents arguing with House and emphasizing the consequences of delay. As such, House will likely be able to void the K for undue influence.

Duress

Even if he cannot void the K for undue influence, House could argue the K is void by duress. Duress makes a K voidable if it is obtained under duress of goods, of person, or of economic duress. House will argue he was under duress of person. Duress is normally only a defense in situations where a legal remedy would not cure the injury threatened. Here, the representative said "if you know what's best for you, I'd sign that writing," and House thought he

saw a sharp metal object in the representative's belt. House could argue that the presence of the object and the statement imply a threat to his person, and an injury to his person would not be fully compensatable by a legal remedy. Badland may argue that this was just forcefully persuasive language, and was referring to the bad reputation and litigation mentioned earlier, and that the "sharp metal object" was never pulled out by the representative and made into a real threat. While this issue could be resolved either way, it is likely that House could also void this K for duress because the conduct of "slamming down the phone" along with the threatening statement seems to imply a stronger physical threat then the aforementioned threats of harm to his reputation.

Unconscionability

Finally, House may say that the contract was unconscionable. In order to be unconscionable, there must be both unconscionability in the bargaining and in the resulting terms of the contract. House will argue that the bargaining was unconscionable because of the use of both duress and undue influence, or if those defenses are not found, because of the conduct similar to both of those defenses, and that the resulting contract was unconscionable because it sells land worth at least $500,000 for a mere $50,000. The success of this defense likely would depend on whether or not the court agreed with the defenses of duress or undue influence. As such, it is unlikely to provide much additional help, as if the court did not believe undue influence or duress were present, it would unlikely find the bargaining was unconscionable. However, since it seems both duress and undue influence are present, it appears that House would succeed on an unconscionability claim.

Remedies

If, however, Badland somehow overcomes all of these defenses, it would be entitled to

specific performance (assuming this is Badland suing to enforce the K, and not House suing for replevin on his land). Contracts for land are presumed unique, and as such grant specific performance by default unless a compelling reason otherwise can be shown. Here, this is a K for land, and there is no apparent reason why specific performance would be refused. As such, if Badland prevailed in the suit, it would be awarded specific performance.

Question #1 Final Word Count = 2036

Question #1 Final Character Count = 11976

Question #1 Final Character Count (No Spaces, No Returns) = 9828

2)

Fact Pattern Essay 2

Hart v. Fences

Hart would likely sue Fences to enforce the agreement to pay $1,000,000 to anyone would could be Weibe's high score.

Mutual Assent

In order for there to be an enforceable contract, there must be consideration and mutual assent. Consideration exists when there is a bargain for a legal detriment to the promissor or a legal benefit to the promisee. *Hamer v. Sidway*. Consideration exists here because Fences

suffers the legal detriment of $1,000,000 and Hart suffers the legal detriment of the time, money, and health lost playing the game. Fences might argue that the time money and health lost were not bargained for, but beating the high score was bargained for in exchange for the detriment of $1,000,000, so if a court considers Fences the promisee (which is likely considering that he made the promisee to pay before being approached by anyone), it will likely find consideration.

Mutual assent exists when there is an offer and acceptance. Here, Hart will argue that Fences made an offer when he declared that he would pay "anyone who breaks Steve Weibe's world-record high score on a classic, coin-operated Donkey Kong machine." Fences may argue that the offer is not reasonable certain to constitute an offer. To be reasonably certain, an offer must establish the terms of a breach and an appropriate remedy. Some terms can be left open, and the court can imply terms, but a court is usually unwilling to imply multiple terms. *Sun Printing*. Here, the term left open that Fences will dispute is that the offer is open to "anyone," and that it does not specify how many people can accept. He would argue that the statement is more like an advertisement, and since it did not specify who it was open to, it should be void for indefiniteness. Advertisements can become offers when they are clear, explicit, definite, and leave nothing open for negotiation. *Pepsico / Lefkowitz*. Hart will argue that it is not an advertisement, and was sufficiently definite to constitute an offer because it establishes the terms of a breach, not paying the money, and an appropriate remedy of $1,000,000. A court should find this to be an enforceable offer, it does not seem to be an advertisement but seems to be a unilateral contract (*infra*), because it does not seem to require coming to Fences and negotiating an additional offer. A court would probably find it reasonable to fill in the missing term that only one person could accept the offer, because this is only a single term missing from the K and it seems likely that Fences only intended to reward the first person to break the record.

Unilateral contracts are contracts that can be accepted by performance. Hart will argue that he accepted the K when he "beat" Weibe's high score. He does not have to notify Fences that he accepted the K. *Carbolic Smoke Ball.* Fences will argue that he never really performed, and therefore did not accept the offer, because his machine was not a "classic" machine. This raises an interpretation issue, which will be discussed below. If a court interprets that Hart did perform, he will have accepted the offer, and if a court determines that Hart did not perform he will not have accepted the offer. If the court does find he accepted the offer, it would make a binding, enforceable contract.

Interpretation: "classic, coin-operated Donkey Kong machine"

There will likely be a dispute between Hart and Fences over the meaning of the offer. Fences will argue that he should not have to pay because Hart used a modified DK machine. Generally, the plaintiff has the burden of showing that his interpretation of the K is correct. *Frigailment.*

Either side may seek to introduce parole evidence supporting his believe that he intended for the offer to refer to an unmodified DK machine. To determine if PE is admissible, the court must determine if the agreement is partially integrated or fully integrated. To become fully integrated, an agreement must be complete and exclusive. Whoever seeks to introduce the evidence would argue that the agreement is not complete, because it leaves out terms such as when the money would be paid, when the K must be accepted by, and other terms. There are two approaches to the parole evidence rule (PER): the "four corners" approach and the corbin-wigmore approach. Under the four corners approach, we look only to the contents of the writing to determine if the K is complete. Here, the K specifies a "classic, coin operated Donkey Kong machine," which a court would likely find presents a complete contract. However, under the C-W approach, a judge would look at all the evidence seeking to be introduced and

determine on a case-by-case basis whether that evidence is admissible to be shown to a jury, based on whether the K is "reasonably susceptible" to the meaning. This would depend upon the type of evidence seeking to be introduced, but it is likely that Fences might be able to introduce, potentially, evidence from "King of Kong" to show that by referring to Weibe in the K, he intended the recipient to use the same type of machine.

However, evidence is always admissible to interpret ambiguity. A term is ambiguous, as opposed to vague, when it refers to two separate meanings, while a term is vague when it refers to meaning distributed around a central norm. The term "classic, coin-operated Donkey Kong machine" is vague, not ambiguous, because the issue in question is not whether Fences meant a different, independent meaning of the word "classic," but whether a modified machine falls within the distributed meaning of the word "classic." As such, under the four corners approach it is likely no PE will be admitted, under the C-W approach some evidence may be admitted if the K is reasonably susceptible to it.

Ultimately, it is likely that Hart will prevail in showing that a modified machine would satisfy the contract. As he is the plaintiff, and therefore carries the burden, he would have to come up with some evidence to overcome the presumption. The court generally looks to try to determine the intent of the parties at the time of K when interpreting contracts. Under the UCC, which may be used as persuasive authority here, there is a hierarchy of interpretation: express terms are the most important, followed by the course of negotiation, course of performance, course of dealing, and usage of trade. The K itself support an unmodified machine, Fences will argue, because it references Weibe, who beat the record on an unmodified machine. There is no real course of negotiation to speak of, and there is no course of performance or dealing between the two parties. The "usage of trade" seems difficult to determine, but it is likely that as it is used by hardcore DK players, a "classic" machine would mean an unmodified machine. As such, it is likely that Hart will succeed in showing that Fences did not perform.

Promissory Estoppel

But, Hart may still have a claim based on promissory estoppel (PE). Under PE, a K is still enforceable if there is 1) a promise, 2) which can be reasonably relied upon, 3) which is actually relied upon, and 4) which injustice would result if the promise is not enforced. There is a promise made, in terms of the offer made by Fences. Hart actually relied upon the promise, because he contracted to give Sarah $500,000 in exchange for the DK machine, got kicked out of law school, lost his job, and spent three days in the hospital where he paid for treatment. However, Fences will argue that these expenditures are not reasonable in reliance on the promise. Hart will argue that the requirements for performance were so great that these expenditures had to be made to succeed, and without the extreme lengths he went to he would not have been able to perform. Fence will respond that they are unreasonable because the contest-like nature of the promise means that Hart may not be guaranteed to collect, even after going through all the expenditures, either because he would still be unable to perform or because someone else would beat the record first. Additionally, he will note that sacrificing one's entire career as a lawyer for the chance of winning $1,000,000 does not seem to be a reasonable trade. As such, a court will likely decline to find promissory estoppel because the expenses are not reasonably in reliance, because the contract does not demand such a commitment and the chance of winning is so slim that one makes such a commitment at their own risk.

Remedies

If, however, Hart were to prevail there would be a question of what remedy he could receive. If the court found that Hart had performed, and that Fences had no defenses, he would be entitled to expectation damages. Expectation damages seek to put the party in the

position they would be in if the contract had been performed. Here, this would entail Fences giving Hart the $1,000,000. Hart would not receive any payment for his expenditures in reliance, because those expenditures were made in order to achieve the consideration, and as such giving him the reliance expditures as well would actually make him better off then if Fences had performed.

If the court found Hart was entitled to promissory estoppel, there are two options for the court. There is disagreement over whether promissory estoppel is a consideration substitue which creates a K, or if it is an alterative cause of action which is separate from a K. Under the consideration substitute theory, expectation damages would be awarded. Under the separation cause of action theory, however, only reliance damages are awarded. Reliance damages seek to put a party back in the place they were in *before* the K. Under reliance, Hart would claim his medical expenses, the $500,000 he owes to Sarah, the wages lost from his summer job, and damages related to failing out of law school. These damages would be awarded subject to the limits on damages.

Most of these damages would be excluded because they are not foreseeable. There are two types of foreseeability, general foreseeability or the types of damages that are always foreseeable in this type of situation (objective), and special foreseeability, damages that the particular parties were actually aware of (subjective). *Hadley v. Baxendale.* Here, Fences will likely argue that the medical expenses, the $500,000 for the DK machine, and the lost wages and failing out of law school are all not foreseeable, because reasonable people seeking to break the DK record would not go to such lengths, they would probably borrow a machine or use a public machine to practice, and they would likely not go to such extents. Hart may argue, however, that Fences had special knowledge of the lengths required to beat Weibe's high score because he had seen the "king of kong" documentary before making the offer. He will argue that because Fences knew the extent to which it was required to beat the record, and should

have special foreseeability. This would depend on what exactly is depicted in the documentary, but it is unlikely that Hart will prevail with such an argument. Even if Fences knew the Weibe had gone to extreme lengths, he could not know that Hart would be a law student and would fail out of school and lose his job. At best, Hart would recover for the DK machine, but even that is unlikely because a reasonable person would not contract to pay $500,000 for the machine.

Even if the damages were foreseeable, some of them are not certain enough. Damages must be established to a reasonable degree of certainty. *Dempsey*. Here, the damages from failing out of law school are most uncertain, as the court cannot tell how good of a lawyer Hart would be, and whether he would be able to obtain a good paying job from his education.

Sarah v. Hart; Hart v. Sarah

Condition / Promissory Condition or Promise

Sarah wil argue that hart did not fulfill the promissory condition he agreed to with her. A promissory condition exists when a duty is conditional, and the party promises that the condition will be fulfilled. Here, Sarah will argue Hart's duty to pay Sarah is conditional upon his beating the record, because he will only pay her "upon" beating Weibe's record. A court might not find this to be an express condition, because a court will only find an express condition if the langugage is very specific. However, Hart did promise that he would pay her and that he would beat Weibe's record. Either way, Sarah would be entitled to (and want to seek) expectation damage for the full $500,000.

Implied Warranty for a particular purpose

However, Hart will respond that Sarah has violated the UCC's implied warranty for a particular purpose. This K is covered under the UCC because it is a contract for the sale of a good, the DK machine. To trigger this warranty, the seller (Sarah) must know the buyer's

particular purpose, must have reason to know the buyer is relying on the seller, and the buyer must actually rely. Hart, the buyer, told Sarah, the seller, that his purpose was to beat the DK record. Sarah also knew that he was relying on her machine, because he was buying the machine from her to use to beat the record. Sarah may argue that she did not know that the modification would be discovered, or that it would make it impossible to perform the K, but it is unlikely this will matter because it seems reasonable that if it was discovered, it would violate the rules of the contest, and it does not seem too unlikely that it would be discovered. Finally, the buyer did actually rely because Hart exclusively used Sarah's machine to beat the DK record.

As such, the implied warranty wil trigger, and the remedy is the difference in value between the warrantied good and the actually good. Hart will argue that the difference in value to him is the full $1,000,000 award from the contest, since the modified nature of the machine will make him unable to claim that reward. Sarah, however, will have a good defense in that that amount in uncertain. Damages are subject to the limit of certainty, and must be reasonably certain. If the machine were not modified to be slightly slower, it is not certain the Hart would have been able to beat the record and claim the full $1,000,000. As such, while Hart may be able to use the implied warranty as a defense to Sarah's claim, he will probably not be able to obtain the $1,000,000 from her.

Question #2 Final Word Count = 2472

Question #2 Final Character Count = 14515

Question #2 Final Character Count (No Spaces, No Returns) = 11910

3)

Consideration

The first issue in the suit between Plaintiff Paula (PP) and Defendant Daver (DD) is whether or not their contract had any consideration. A contract must have consideration to be binding. Consideration exists when there is a bargain for a legal benefit to the promissor or a legal detriment to the promisee. *Hamer v. Sidway.* The court will likely consider DD to be the promissor, because he is the one who promised the $4,000 per month. As such, the court has two options for consideration: the concept of past consideration and refraining from making their affair public.

A court is unlikely to enforce the contract by way of past consideration. Past consideration is governed by the material benefit rule, which says that a promise made after performance is enforceable when there is a material benefit not gratuitously give to the promissor by the promisee. The implication here is that there would have been an implied contract at the time of performance. This is to be contrasted with moral consideration, which generally will not validate a K. Here, PP will argue that there was past consideration because PP had an affair with DD, which was a benefit given to him in exchange for his support of her teenage daughter. DD will argue that the affair was gratuitous, and it was no implied K at the time of the affair, but she entered into the affair because she simply wanted to have an affair with him. The court would need more information to decide if this constitutes consideration, but it is unlikely that it will unless there is evidence that PP was induced to have the affair only beause she believed DD would pay for her child. This would meet the requirement of a bargain, where two things are exchanged only in order to get the other thing.

However, a court is more likely to find consideration based on the fact that PP agreed not to file a lawsuit against DD about their affair becoming pulic. PP will argue that by not filing the suit, she, as the promisee, suffered a legal detriment by giving up her right to sue. Giving up

the legal right to do something can function as consideration. *Hamer v. Sidway*. DD may argue that, because she had no real claim in court, there is no consideration here because she gave up a legal right to do something she had no legal right to do anyway. Giving up something one has no legal right to do would not fulfill consideration. However, there should still be consideration. Even if PP had no chance at prevailing in a lawsuit, she still had the right to file a lawsuit, and she gave up that right. Courts generally do not inquire into the adequacy of consideration, so the court should accept PP giving up her right to sue as consideration, even if the court does not think she could prevail on a claim of making private facts public.

Statute of Frauds

Under the SoF, a promise for a service not to be fulfilled for one year must be in writing. In this K, PP agreed to refrain from telling the press about their affair and DD agreed to support her child until her child graduated or she found a job. This seems to fall into the basic expression of the statute of frauds, however, it is necessary to consider the part performance exception. For some courts, there is an exception to the SoF when part performance has been rendered. Here, DD has already made several payments, although there is some dispute over how much has already been paid. If the Utopia court accepts this exception to the SoF, it is likely that they will find this fits into the exception. Unlike in cases where goods are shipped individually, where adhering to several shipments of goods does not indicate an intent to fulfill the entire contract, here making some payments indicates that DD intended to fulfill the whole K, because he was making monthly payments he had no other legal requirement to make. As such, this contract will probably be exempt from the statute of frauds.

Conditions

DD will argue that PP did not satisfy the condition of finding a keeping a job in her field. A

condition modifies the rights and duties under a contract by making some of them latent or by making latent duties take effect. Here, the langugage states that DD would make payments to PP until she was able to get an keep a job in her field, or in the event she was unable to get and keep such a job, until her daughter graduated. DD will argue this constitutes a condition. Generally, courts will only find an express condition if it is clearly made a condition by the K. This is because if a promise is not fulfilled, a party can only seek damages, but if a condition is not fulfilled, a part can cancel the K. Here, the court is unlikely to find an express condition, because not only is the language not specific enough, but the contract provides for the event that she does not find a job.

However, the court may find that PP has violated an implied best efforts clause or the duty of good faith. Under the best efforts clause, because the contract is subject to PP not getting a job, PP made an implied promise to use best efforts to obtain a job. It is unclear whether or not PP used best efforts, as there is insufficient information in the article to determine what efforts she put forth. A similar argument can be made for a lack of good faith. Bad faith exists when a party exploits the contract by taking advantage of gaps in performance scheduling. Since PP may have taken advantage of the fact that DD had to make payments until she got a job by not seeking a job, DD's duties may be uneforceable due to a lack of good faith on the part of PP. Both of these arguments would depend on the efforts PP put forth.

Mistake

DD may raise the defense of mistake, because he thought that PP had a claim in court against him when actually PP did not have a valid legal claim. For a mistake to be a defense, it must be both mutual and material. The mistake seems to be mutual here, if both PP and DD thought PP had a claim in court. For a mistake to be material, it has to go to the substance of the consideration, rather than the quality. PP would argue that the viability of her claim in court

is merely a quality, while DD would argue that he would not have made the deal for a non-viable claim. DD should win here, under *Sherwood*, because while any claim can be filed in court only a valid one has any real value, but ultimately the court may decide to follow other precedent (*Wood*) and side with PP.

Remedies

PP has asked for $272,000, the sum of missed payments and forthcoming payments. This reflects her expectation damages. Expectation damages seek to put the plaintiff in the position they would have occupied had the defendant performed. This would entail giving PP all the payments she would be entitled to, minus any expenses she avoided by not having to perform. It does not seem that PP missed any expenses. It is possible that if she did bring a suit against DD for the privacy claim, the amount she won in that suit might be deducted from her expectancy, because avoided having to refrain from suit because of DD's beach.

However, her damages would be subject to the limits on contractual damages. DD would argue that she did not satisfy the limit of avoidability. Under the K, DD argues that he would pay her only until she was able to get a job in her field, or until her daughter was out of school and college. As such, he may argue PP is required under the K to seek a job, and she did not put forth adequate effort to obtain one. In these situations, a best efforts clause is generally implied, implying that PP would use her best efforts to obtain a job. It is not clear what efforts PP has put forth to get a job in her field, but if she has not put forth sufficient efforts, a court may limit her damages to the difference between income she could have obtained and the $4,000 a month.

Question #3 Final Word Count = 1433

Question #3 Final Character Count = 7925

Question #3 Final Character Count (No Spaces, No Returns) = 6418

4)

Short Answer Questions

1) Peevyhouse

I would argue that the land has a subjective value to the Peevyhouses that exceeds the objective improvement in value of the land. Courts award diminuition in value as a remedy when the cost of completion is out of proportion to the diminuition in value, as the court in Peevyhouse awarded. However, I would argue that the court in Peevyhouse did not take into consideration the subjective value the Peevyhouses may have attached to the land. The Peevyhouses specifically bargained for the clause in the contract reuqiring Garland to repair the land to the state that it was in before the begun mining on it, which would indicate that they have at least some value to the land.

Second, I would argue that the breach was material, as opposed to what the court found, because the ex ante intentions of the parties were not fully taken into account. According to Cardozo's analysis, to determine if the court should imply a condition, the court should first look to the ex ante intentions of the parties to determine if there is an independant or dependent promise. Next, the court should look to see if there is an insignificant or substantial departure from that promise by looking at the performance ex post. Finally, the court should look back to the ex ante situation to consider factors of justice and intention (assuming intention to be what is reasonable and probable if not otherwise revealed). Here, the court should have looked

more closely at the fact that the Peevyhouses held out allowing Garland to mine on their land so that they could obtain the clause requiring Garland to put the land back the way they found it. This suggests that ex ante, the Peevyhouses considered the promise to be dependent. Next, the court should have looked at Garland's departure from that promise-they made a significant departure by refusing to put the land back the way they found it in any way. Finally, looking back to the factors of justice and intention, the breach seems completely intentional by Garland-unlike *Jacob and Youngs*, no new situation prevented performance, they merely refused to perform. As such, I would argue that the court should have more carefully considered these factors-especially the ex ante intentions of the Peevyhouses-to find that there was a material breach and cost of completion should be awarded.

2) Sherwood v. Walker and Wood v. Boynton

There are several other methods the court could have used. The court could let the risk of loss lie with the party who has superior information, as the dissent argued in Sherwood. The court could let the risk of loss lie with the party who had the better opportunity to collect more information, but failed to do so. The court could do as they did, and "let the loss lie where it falls." I find it to be the most convincing that the court should let the risk of loss lie with the party who had the best chance to collect additional information, but fails to do so. To always penalize the party with superior information in these circumstances would provide a disincentive to collecting additional information, but if a party is penalized for not exercising their ability to collect more information, it will encourge people to inform themselves as much as possible before agreeing to a deal.

3) Computer Sale

This situation would be covered under the CISG, because it is a K between parties from two different countries, the US and Italy, who are both CISG countries. The CISG will find a K if performance indicates a K. *Filanto*. Performance here indicates that both companies thought there was a K. Under the CISG, the "last shot rule" is used, which states that the last writing agreed upon by the parties constitutes the agreement. However, there are major exceptions to this: the additions in the last writing do not become part of the contract if they materially alter the offer, and the definition of material is very broad. As such, a warranty is likely to be considered material, and is likely to be considered not part of the contract, but a proposal for addition to the K. As such, the terms of the K do not include warranties.

Question #4 Final Word Count = 714

Question #4 Final Character Count = 4185

Question #4 Final Character Count (No Spaces, No Returns) = 3434

5)

Conceptual Essay

Practically speaking, Cohen's justifications for enforcing a contract would not be generally lacking when Fuller's formalistic justifications are present. If all three of Fuller's justifications are fulfilled, then it is unlikely that a justification from Cohen would simultaneously not exist, because these formalisms would embody the intent to be bound that would satisfy the will theory. However, in the certain circumstances where the formalistic justifications are present,

but the substantial reasons to enforce a contract are lacking, Cohen's justifications are still relevant to consider whether or not the promise should be enforced.

Cohen provided several theories for enforcing a K. First was the sanctity of promises, or the idea that promises are inherently binding, and should always be kept as a moral duty. Second was the will theory, which postulates that the fact that parties had a "meeting of the minds" and purposefully intended to bind themselves to that meeting justifies enforcement. Next, the injurous-reliance theory argues that promises should be enforced where people rely on the promise to their detriment. The concept of a *quid pro quo* and a contract as risk allocation device also justify enforcement. Finally, Cohen himself mentions formalism as a justification-which lends support to the idea that Cohen, at least, thought formalism alone was not enough to justify enforcement. Fuller, on the other hand concentrated entirely on formalism. He found three functions of formalism-channeling, cautioning, and memorializing-which he found to justify enforcement.

The only time a conflict between the two of these theories might come up is where the formalistic functions are all present, but there is no substantial basis for enforcement other then formalism. This seems to be a situation which would be incredibly rare. Between the sanctity of promises and the will theory, it seems like any promise which the parties were cautioned as to, memorialized in writing, and took care to use a legally recognized channel of speech would be covered by something in Cohen. By using a legally recognized channel of speech, the parties are communicating their intent to be bound, and by being cautioned about their promise, they are taking into consideration the sanctity of promises when they make a deal.

However, there are some situations where it would be relevant, mostly in terms of defenses. Mutual mistake seems to be a situation in which the parties could be cautioned, memoralize their agreement, and use a legally recognized channel, but still make a contract that should not be enforced. The situation where this would come up would be similar to the

majority view in *Sherwood*, assuming that the buyer did not suspect the cow was fertile (this would trigger contracts as a risk allocation device). It would be unjust in similar situations, especially if the facts became more harsh, to where there was less a dispute over the materiality of the mistake, to force the contract to be completed.

Similarly, situations of incompetency and infancy, the formalistic justifications might be present, but it would seem unjust by Cohen's standards to enforce all promises. Like in the infancy case, while the infant was certainly warned that he was making a promise, used a legally recognized channel of speech, and memoralized the agreement, little social good is served by allowing infants to enter into contracts, because they cannot always effectively understand the caution they should take, or the effects of a legally recognized channel of speech.

Finally, a situation of duress is a clear example of when a party would even fully appreaciate all the functions of formalism but a court might still be unjust in enforcing the contract. Like in the case with the navy supplier, the supplier knew that they were making a promise they would have to comply with (cautionary), that they were using a legally recognized channel of speech, and that their agreement was memoralized, but the contract was not an expression of their free will, because they were effectively forced into agreeing.

These three situations do not adequately justifiy enforcement because even though they appear to satisfy the requirements of formalism, when the requirements of formalism are viewed in light of Cohen's factors, it becomes apparent that the formalism factors are only satisfied in a rudimentary way which does not justify enforcement. While you can technicaly caution an infant, it is unlikely that some infants will understand the caution. As such, the contract will not really be a good expression of the will of the infant, nor will the infant really understand the sanctity of the promise that they made. Similarly, a situation of mistake is one where even the parties may think that they have been adequately cautioned, but in reality an

assumption so basic to the agreement was not taken into account. As such, the Cohen factors are still relevant, but they should be used in tandem with the Fuller factors, to determine whether or not the Fuller factors are satisfied in a more substantial way.

Question #5 Final Word Count = 823

Question #5 Final Character Count = 5171

Question #5 Final Character Count (No Spaces, No Returns) = 4317

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