Professor Sullivan
Contracts
Spring 2009- Final

"Honesty is the first chapter
in the book of wisdom."
Thomas Jefferson

Question One
(worth 15 points)

The Upper Crust was founded in May 2007 to produce a deep dish pizza. The initial directors were Paul Smith, William Hewick, Betty Kraft, Roberta McWilliam, Sam DeBuice, and Anthony Passa. Passa, who was already the personal attorney for Kraft and McWilliam, was appointed corporate attorney and secretary. McWilliam, an accountant with contacts to a number of investors, had the responsibility of obtaining start-up financing for the company. Passa made no investment in the company and owned no stock.

Upper Crust needed $1,000,000.00 to put a deposit with a flour company by August 1, 2007, so dough would be available for the inaugural run of pizzas planned for December. However, as of July 26, 2007, the company had not obtained financing. To make matters worse, McWilliam was demanding more stock in return for the financing he was supposed to obtain. Board members instructed Passa to demand the return of McWilliam's eleven percent stock if she would not change her demands.

When Passa found out McWilliam would not be coming up with the money he told his law partner, Andy Pendi that "there was really no hope for the company to make it".

Pendi asked Passa if he should talk to his brother, who was a doctor and might be able to make a loan. Passa told Pendi to call his brother, who said that he "was in a position to loan the money and would do so". Both Passa and Pendi spoke to Kraft concerning the availability of "those funds." They told Kraft "that the funds were available".

Kraft then requested that Passa come to a special board meeting to be held on the evening of July 29, 2007, "in order to talk to the other shareholders about the loan." Kraft said she wanted the other shareholders to be a party to the loan, and because the shareholders would be guaranteeing the repayment of the funds, Kraft "wanted to be sure she had the agreement of her co-shareholders for that type of an arrangement".

Dr. Kevin Pendi wired $1,000,000.00 to an account controlled by Kraft just a little after 11:00 a.m. on July 29, 2007, though Passa still understood that if the board did not approve the loan "it wasn't going to be made".

At the board meeting that evening, Passa told the assembled board members (assembled without notice to McWilliam) "about the availability of the funds." He asked them "if they would be interested in obtaining the money from Dr. Pendi." The board members agreed.

The board members were "all quite excited about the availability of those funds." Kraft "brought up the idea that the board should consider giving Passa some ownership interest if he got the loan, and Herwick said, "Look , if you can get the money for us then I think you are entitled to 3 percent of the company." There was "general agreement" among the board members "that would be the case." Passa said, "okay, we'll do the loan," and then went back to his office.

Passa drafted a note which did not have an interest rate on it. However, at Kraft's insistence, an extra $50,000 was paid to Dr. Pendi for the 180 day loan.

The day after the deadline, the board members were "quite happy people." At a meeting held that day, the board members discussed how McWilliam's "percent would be divided." It was determined that Passa would get 3 percent from McWilliam's eleven percent and Kraft would receive the 8 percent balance.

Passa's 3 percent, however, was "to be held by Kraft." The idea was that Kraft would hold Passa's interest in the company until McWilliam's returned his stock certificates, and when a new investor was brought in and new certificates were issued, Passa would receive his stock.

But the Upper Crust still needed financing, and after an unsuccessful attempt to enlist a Boston firm, Kraft told Passa that maybe McWilliam should be brought back. Passa told Kraft that he "should do whatever is necessary to make the company go forward".

What Kraft thought necessary was to contact McWillliam. Kraft told Passa about Kraft's conversation with McWilliam. McWilliam it seemed, was extremely upset at Passa because of what had occurred. Accordingly, McWilliam would only "invest in Upper Crust" on the condition that Passa "not participate as owner of the company." Kraft told Passa that "in order to get the company going" Kraft would hold Passa's 3 percent for him and "wouldn't tell McWilliam or any of the other shareholders about the interest." After McWilliam cooled off and everything was "smooth again" Kraft would discuss Passa's 3 percent interest and either "get a stock certificate representing that interest from the corporation or Kraft would at

least make sure Passa "obtained the benefit of that 3 percent through him" by way of profit distributions from the company.

McWilliam came back into the company. McWilliam soon brought in Kugh, a Boston investor. As a result, the shares of the company were re-distributed, leaving Kraft, McWilliam, and Kugh each with 26 percent. After Kugh made his investment, Passa was fired as corporate attorney because Kugh wanted the company represented by someone else. Kraft told Passa that he need not be concerned about the 3 percent - that Kraft "had it and would take care of it" for Passa. However, last month, Kraft told Passa that he wasn't going to get his 3 percent. In essence, Kugh had been given Passa's 3 percent in the re-distribution of stock.

Passa filed a lawsuit. Andy Pendi was also named as a plaintiff because Passa told him, after the August meeting, that "because of his being so instrumental in obtaining the million dollar loan, half of whatever [Passa] got was his".

What result? Fully discuss all issues presented.

Question Two
(worth 10 points)

Molly Esquire needed a new computer so she checked online at Dell's website. Molly ordered a computer online. Dell called the next day and quoted a price with delivery of $3,000.00. Molly agreed and, at Dell's request gave her credit card number in payment. The charge was processed. Five days later the computer arrived by U.P.S. In the box taped to the computer was an envelope containing three pages of standard terms. On page two was a clause excluding Dell from all consequential damages. A term on page three obligated Dell and Molly to arbitrate any disputes. At the bottom of page three, the following appeared in bold print:

> **PLEASE READ THESE TERMS. IF YOU DO NOT ACCEPT THEM, YOU MAY RETURN THE COMPUTER TO US AT OUR EXPENSE. USE OF THE COMPUTER WITHOUT OBJECTION WILL CONSTITUTE ACCEPTANCE OF THE TERMS.**

Molly did not read the terms and used the computer. Later a non-conformity appeared causing Molly to lose important work she was doing for a client. Molly complained to Dell and was told about the exclusion and arbitration clauses which Dell claims she had agreed to by using the computer. Are these terms part of a contract?

Fully support your answer.

Question Three
(worth 20 points)

Defendants, owners of a two-acre parcel in Suffolk County, on October 16, 2006 contracted for the sale of the property to plaintiff, a real estate investor and developer. The purchase price was fixed at $750,000 - $25,000 payable on contract execution, $225,000 to be paid in cash on closing (to take place "on or about 2006), and the $500,000 balance secured by a purchase-money mortgage payable two years later.

The parties signed a printed form Contract of Sale, supplemented by several of their own paragraphs. Two provisions of the contract have particular relevance to the present dispute – a reciprocal cancellation provision (para. 31) and a merger clause (para. 19). Paragraph 31, one of the provisions the parties added to the contract form, reads: "The parties acknowledge that Sellers have been served with process instituting an action concerned with the real property which is the subject of this agreement. In the event, the closing of title is delayed by reason of such litigation it is agreed that closing of title will in a like manner be adjourned until after conclusion of such litigation provided, *in the event such litigation is not concluded, by or before 6-1-07 either party shall have the right to cancel this contract whereupon the down payment shall be returned and there shall be no further rights hereunder."* (Emphasis supplied.) Paragraph 19 is the form merger provision, reading: "All prior understandings and agreements between seller and purchaser are merged in this contract [and it] completely expresses their full agreement. It has been entered into after full investigation, neither party relying upon any statements made by anyone else that are not set forth in this contract."

The Contract of Sale, in other paragraphs the parties added to the printed form, provided that the purchaser alone had unconditional right to cancel the contract within 10 days of signing (para. 32), and that the purchaser alone had the option to cancel if, at closing, the seller was unable to deliver building permits for 50 senior citizen housing units (para. 29).

The contract in fact did not close on December 1, 2006, as originally contemplated. As June 1, 2007 neared with the litigation still unresolved, plaintiff on May 13 wrote defendants that it was prepared to close and would appear for closing on May 28; plaintiff also instituted the present action for specific performance. On June 2, 2007, defendants canceled the contract and returned the down payment, which plaintiff refused. Defendants thereafter sought summary judgment dismissing the specific performance action, on the ground that the contract gave them the absolute right to cancel.

Plaintiff's claim to specific performance rests upon its recitation of how paragraph 31 originated. Those facts are set forth in the affidavit of plaintiff's vice-president, submitted in opposition to defendants' summary judgment motion.

As plaintiff explains, during contract negotiations it learned that, as a result of unrelated litigation against defendants, a lis pendens had been filed against the property. Although assured by defendants that the suit was meritless, plaintiff anticipated difficulty obtaining a construction loan (including title insurance of the loan) needed to implement its plans to build senior citizen housing units. According to the affidavit, it was therefore agreed that paragraph 31 would be added for plaintiff's sole benefit, as contract vendee. As it developed, plaintiff's fears proved groundless - - the lis pendens did not impede its ability to secure construction financing. However, around March 2007, plaintiff claims it learned from the broker on the transaction that one of the defendants had told him they were doing nothing to defend the litigation, awaiting June 2, 2007 to cancel the contract and suggesting the broker might get a higher price.

The trial court granted defendants' motion and dismissed the complaint.

What result on appeal? Fully explain your answer. Discuss all issues presented.

Question Four
(worth 20 points)

The jury could have reasonably found the following facts: During the summer of 2007, Conda was informed that certain managerial employees were engaging in illegal activities at their plant. The employee relations manager, Paul and a security investigator (Eb) were requested to investigate in order to ascertain whether managerial employees were involved, and if so, how many? The investigation focused upon James Della, the yard foreman, and Jerry Most, the Chief Financial Officer. Eb had been told that Della had been providing certain managerial employees with company tools, lumber, and gas, all at company expense. Paul and Eb also discovered that a refrigerator originally purchased by Conda for use in Conda's store had been located at Most's former residence.

Marcella, a purchasing agent for Conda and the original custodian of the refrigerator, told Paul and Eb that sometime in February of 2006, Della had informed Marcella that the refrigerator was needed in the boiler house.[1] Marcella, further stated that on the following day Della and the plaintiff, Magnan who was working temporarily in the yard under Della's supervision, came to the company

[1] At trial Marcella admitted that he had originally lied to Paul and Eb when he told them that Della had requested the refrigerator for the boiler house. Marcella stated that Della had requested the refrigerator for "the big man" who Marcella thought was Dillon, a managerial employee at Conda.

store and picked up the refrigerator. Marcella did not know, however, where the refrigerator was eventually delivered.

Aware that they would need Magnan's cooperation in order to establish Della's complicity in the theft of the refrigerator, Paul and Eb approached Magnan on July 20, and questioned him concerning its removal. Thereafter, on July 23, Paul requested that Magnan sign a statement admitting his own complicity in the theft of the refrigerator and implicating Della. Paul, who had drawn up the statement claimed that statement was merely a summary of what Magnan had told Paul and Eb three days earlier. Magnan disagreed, however, and refused to sign the statement, even though he was told he would not be prosecuted, because he believed the statement did not accurately reflect what he had told Paul and Eb. He was suspended from work on July 27 for refusing to sign the statement, and was discharged.[2]

We must assume in reviewing the verdict for the plaintiff on the first count, that the jury accepted Magnan's version of event.

The first count of the complaint alleges that the plaintiff had been employed by the defendant under an oral contract at an annual salary since March 1, 1987, that he was discharged on August 16, 2008, for "alleged dereliction in the performance of his duties," and that his dismissal constituted a breach of oral contract of employment. The claim that Magnan was fired because he refused to sign a false statement as requested by the defendants is contained in the second count, which the jury resolved against him.

What result on appeal? Fully explain your answer. What would plaintiff have argued?

<u>Question Five</u>
(worth 5 points)

Fill in the Blanks

A sells and delivers goods to B who promises to pay the price at some future time. Assume A needs cash before B's duties mature, so A assigns his rights to a bank.

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[2] In a signed statement prepared by Magnan and his attorney, and submitted to Paul on July 24, Magna stated that after a long period of questioning and in an effort to get out of there (the office) I finally said to Mr. Eb, "well, if you say I did, I must have".
After the hours of questioning I stated that I guess I did go there with the refrigerator, but I was nervous and I had been questioned for a long time. I did not want to lose my job over something I really did not know anything about, so I said what they wanted to hear in order to get out of there.

A) A is the ____________________________.

B) B is the ____________________________.

C) Bank is the ____________________________.

D) Unless otherwise agreed between the promisor and promisee, a beneficiary of a promise is an ______________________ ____________________ if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (A) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance.

E) A ____________________ beneficiary is not an intended beneficiary.

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Professor Sullivan
Final Examination
Contracts - Spring 2008

QUESTION ONE
(worth 15 points)

American Sellers is a Massachusetts Corporation authorized to do business in Massachusetts. It has sales offices in Boston, Worcester, and New Bedford. Its only office in Indiana is located in Indianapolis. American Sellers engages in the sale of shipping room supplies and equipment. The business is highly competitive with approximately twenty competitors in the Indianapolis market. The articles which it sells are not unique and approximately 90% of its business consists of repeat orders from established customers.

James Camp began working for American Sellers in February, 2007 in the Boston office as a tape specialist. Glenn Camp also began working for them in 2007. On December 22, 2007, the Camps executed ten year employment contracts with American Sellers which contained the following paragraph:

> NONDISCLOSURE OF INFORMATION CONCERNING BUSINESS
>
> (a) Employee further specifically agrees that he will not at any time, in any fashion, form or manner, either directly or indirectly, divulge, disclose or communicate to any person, firm or corporation in any manner whatsoever any information of any kind, nature or description concerning any matters affecting or relating to the business of Employer, including, without limiting the generality of the foregoing, the names of any of its customers, the prices it obtains or has obtained or at which it sells or has sold its products, or any other information of, about, or concerning the business of Employer, its manner of operation, its plans, processes, or other date of any kind, nature or description without regard to whether any or all of foregoing matters would be deemed confidential, material or important, and gravely affect the effective and successful conduct of the business of the Employer, and its goodwill, and that any breach of the terms of this paragraph is a material breach hereof. (b) Employee agrees that he will not for a period of one (1) year after the termination of his employment by Employer with cause, or one (1) year after his own termination of his employment, and within the radius of sixty (60) miles of where Employee's had his place of business or center of operation in Indianapolis, Indiana, compete with said Employer in any fashion, form or manner, either directly or indirectly, including, without limiting the generality of the foregoing; selling of packaging and shipping supplies and

equipment or act as principal, agent, employee, employer, stockholder, co-partner or in any other individual representative capacity, or engage in a like business, or solicit, serve, or cater to, or engage, assist, be interested in, or connected with any other person, firm or corporation so engaging with, or soliciting the customers served by him or any other employee of American Shippers Supply Company, or any of its branches, during his employment with the company. Any breach of the terms of this paragraph is a material breach hereof.

The Camps were paid a base salary in addition to commissions with their sales. American Sellers opened its Indianapolis office in December of 2007 and the Camps were transferred to it. The Camps are responsible for soliciting sales for shipping room supplies and equipment throughout Indiana.

The Camps offered to buy the Indianapolis operations of American Sellers in April of 2008, but their offer was rejected. The Camps mailed their resignations to American Sellers headquarters in Boston of May, 2008. The Camps proposed May 15 as the date of their resignation. Since May 16, 2008, the Camps have been employed by Indy shipping Supplies, Inc. a competitor of American Sellers.

American Sellers is seeking an injunction and will introduce evidence establishing the Camps have contacted former customers of American Sellers indicating they are now employed by Indy and were willing to serve them.
What result? Fully analyze and support your answer.

QUESTION TWO
(worth 10 points)

The Massachusetts School of Law ("MSL") decided to build a sports complex. Plans and specifications were prepared, and various firms were invited to submit bids. Among those contacted was Harry. The latter in turn, determined to submit a bid, proceeded to contact potential subcontractors relative to various parts of the project.

Subcontractor A telephoned in a bid to do the excavation work. Because subcontractor A's bid was lowest, Harry used A's figure in computing his bid to MSL. Subcontractor B submitted a bid for the electrical work, which Harry also used in computing the general bid since B's price was the lowest of the electrical subcontractors.

Subcontractor A refused to perform. Harry found a lower subcontractor to do the electrical work. Harry sues subcontractor A, and subcontractor B sues Harry.
What result? Fully support your answer.

QUESTION THREE
(worth 20 points)

In the latter part of April 2007, the Liquor License Board of Andover voted to issue a liquor license to the Plaintiffs "to be exercised upon certain premises." The Plaintiffs made application to the board to transfer this license to premises controlled by the defendant. While this application for transfer was pending the plaintiffs and the defendant executed a lease of the fixtures and furniture on the premises to which the plaintiffs wished to have their liquor license transferred. This was a lease dated April 28, 2007, for the term of one year from the first day of May, 2007. The rent stated in the lease as $3,500, to be paid in advance.

The plaintiff's were allowed by a judge to introduce evidence that at the time when Plaintiffs signed the lease the plaintiff's attorney said to the defendant, "What if we don't get our transfer?" to which the defendant answered pointing to the lease, "If you don't get your transfer that don't go. You will get your money back." To this one of the plaintiffs said "Do we get our money back?" The defendant answered, "I think you know me well enough to trust me." The plaintiffs' attorney further testified that it was not suggested that the lease be held in escrow. The lease was then signed and delivered by the defendant to the plaintiffs, and the plaintiffs paid the defendant the $3,500.00. The defendant testified that no such conversation took place. Later the board refused to grant the transfer of the liquor license for which the plaintiffs had asked. Thereupon the plaintiffs asked for repayment of the $3,500.00. On the defendant's refusal, this action was brought.

The case was tried before a judge sitting without a jury. The judge found for the defendant and filed a "memorandum of decision," in which he found the oral agreement testified to by the plaintiffs was in fact made but that "it was not agreed that the lease was to be held in escrow, or delivered upon condition, or that the money paid there under was to be held upon condition." He further stated in the memorandum: that the defendant objected to the admission of the oral testimony "as to what took place at the time of the execution of the lease." Trial judge ruled as a matter of law that the plaintiffs cannot recover and directed a finding for the defendant.
Discuss fully whether the trial judge committed judicial error.

QUESTION FOUR
(worth 20 points)

This is a diversity action by Polly Products Company against Evermore Paints Company for breach of contract in Evermore's sale of paint to Polly. Defendant denies liability, claiming disclaimer and liability limitation.

In the fall of 2007, Polly began getting price quotes for paint. As part of this process, Polly's contract administrator contacted various sellers of this product. Evermore was one of the manufacturers contacted and was the supplier that quoted the lowest price for this material.

Polly sent a written purchase order to Evermore on April 11, 2008, for the paint. In the purchase order, Polly did not make any reference to warranties or remedies, but simply ordered the paint specifying the price, quantity, and shipping instructions. On April 15, 2008, Evermore sent an acknowledgement to Polly stating on the reverse side of the acknowledgement and in boilerplate fashion, that the contract of sale would be expressly contingent upon Polly's acceptance of all terms contained in the document. One of these terms disclaims all warranties and another limited the buyer's remedy by restricting liability if the paint was defective.
Query: What are the terms of the contract? Fully support your answer.

<u>QUESTION FIVE</u>
(worth 5 points)

Fill in the Blanks

A sells and delivers goods to B who promises to pay the price at some future time. Assume A needs cash before B's duties mature, so A assigns his rights to a bank.

A) A is the __________________________.

B) B is the __________________________.

C) Bank is the __________________________.

D) Unless otherwise agreed between the promisor and promisee, a beneficiary of a promise is an ____________________ ____________________ if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (A) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance.

E) A ____________________ beneficiary is not an intended beneficiary.