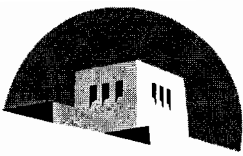

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Examination No. ____________

502 CONTRACTS
Semester I, 1999-2000

UNM School of Law
Final Examination
Four Credits

Professors Desiderio, Hart,
Martin and Moore
Friday, December 17, 1999
1:30 p.m. to 4:30 p.m.

THREE HOURS

INSTRUCTIONS

1. This examination contains two essay questions. Each question will be assigned equal weight, and it is recommended that you spend approximately one and one-half hour on each question.

2. You may bring into the examination any class materials, your own class notes, and other outlines or study aids you had a hand in preparing. You may have no other materials with you.

3. Write concisely and neatly. Remember, it is the quality (analysis and organization, etc.) and not the quantity of your answer that counts.

4. **ALL OF THE UNIFORM COMMERCIAL CODE THAT YOU NEED FOR THIS EXAMINATION ACCOMPANY THE QUESTIONS. MAKE SURE THAT YOU HAVE A COPY.**

Good Luck and Happy Holidays!

(Examination begins on the next page.)

Question #1

Professor Antonio Balderas was having a midlife crisis. After teaching poetry in the English Department at UNM for twenty years, he felt that something was missing. Ever since he had left his native Argentina at the age of 18 to immigrate to the United States, he had entertained secret regrets about abandoning his boyhood dream of becoming a professional dancer. It was his mother who first had taught him to tango as a teenager, and throughout his student years and his academic career in the United States, he had taken dancing classes on the side, mastering various Latin styles, from salsa and merengue, to tango and flamenco. Over the past five years he had been teaching a tango class as an adjunct instructor with the UNM Theatre and Dance Department.

One day in early May, Antonio was driving along Central Avenue in the Knob Hill area, when he saw a prominent sign above a building undergoing renovations: "Coming Soon," it read, "Let's Dance – A Creative Movement Studio. Contact Ginger Stodgers for more information." Intrigued, Antonio took down the number indicated. He knew Prof. Stodgers as a talented choreographer and member of the UNM dance faculty.

Antonio called Ginger, and the two of them agreed to meet the next day to talk about the dance studio. Over pastries and coffee at Starbucks, Ginger described her plans for "Let's Dance," and Antonio expressed his interest in a career change, and described his experience and enthusiasm for dancing. Ginger said she was looking for a business partner, and that if Antonio was willing to take some business classes and invest $5000, she might be able to make him co-director of the studio. At the very least, she conveyed her interest in hiring a qualified dance instructor. When they parted that afternoon, Antonio said he was very interested in going into business with Ginger, and they agreed to keep in touch over the next couple of months.

In June, Antonio enrolled in two continuing education summer courses at UNM for $600 each, one called "Starting a Small Business," and another in Basic Accounting. Later that month, he corresponded with Ginger, who was participating in a dance workshop at the University of Madrid over the summer. Ginger was thrilled that he had followed up on her suggestion to take some classes. On July 15, Antonio met with his financial advisor, who informed him that he could withdraw $5000 from his five-year certificate of deposit, but not without paying a $500 penalty.

On August 1, Ginger returned to Albuquerque, and she and Antonio met again at Starbucks. Ginger reiterated her interest in a partnership with Antonio if he would put up $5000 by September 1. He told her about his certificate of deposit, and she was very pleased. Ginger also said she'd need Antonio to teach five dance classes a week, starting on opening day, August 15. While she eventually planned to pay her instructors $20 per hour under 16-week contracts, initially she would need him to work free of charge, until such time they started turning a profit. Antonio agreed to this arrangement on a temporary basis.

After much thought, Antonio tendered his resignation to the UNM Dean of Arts and Sciences on August 7. His colleagues, incredulous that he was giving up a full professorship at $60,000 a year to undertake a fledgling business endeavor, wished him well. On August 15, he showed up at "Let's Dance" with his dancing shoes on. He was greeted by Ginger, who gave him his schedule for the next sixteen weeks, comprising one hour of class each weekday.

"I'm looking forward to your decision. Shall we dance?" she asked.

Antonio smiled. "Give me the chance," he said. "Like you said, I have until September 1 to decide." A moment later, he added, "I'm also interested in talking with you about my instructor's salary. Dancers with my level of experience normally earn $30 per hour."

"I'd be happy to discuss salary with you at a later date," Ginger responded, and Antonio hurried into his classroom to teach Beginning Salsa.

Antonio's class was filled to capacity, as were most of the other classes offered at the studio during its first session. Ginger was thrilled by the high enrollment. When she asked her new students what had led them to select "Let's Dance," the frequent response was that it was Antonio's reputation as an expert in Latin dance styles.

On August 22, Antonio withdrew $5000 from his certificate of deposit and paid the $500 penalty.

On August 31, after two full weeks of work, Antonio drove to the dance studio, an envelope with a check for $5000 in hand. Ginger and a grinning, athletic-looking man approached him in the parking lot. When Antonio handed Ginger the envelope, she did not take it from him. Instead she introduced him to Fred Astor, "her new business partner and senior instructor."

"Antonio, you waited too long. Fred was able to invest $10,000. I'm sorry to say that you cannot continue to work at the studio. Your dancing style is too avant garde for my tastes, and Fred and I will be unable to pay you $30/hour, even once the studio begins to make money."

"But you gave me an option. Now I'll make a commotion!" retorted Antonio.

"Unfortunately, my dear, you rejected my original offer. If I might give you one piece of advice, Antonio, you're a decent poet, but you're a poor negotiator, and you ain't no dancer."

Stunned, and unemployed, Antonio made his way to the office of the Chair of the UNM Creative Writing Program. While she had already hired his replacement for the academic year, Elizabeth C. Browning was pleased that Antonio had reconsidered. She offered him an adjunct poetry instructor slot for the Spring, which he gratefully accepted for $3000 for the semester. "We hope that you will agree to rejoin the faculty next year, Antonio," she said as their meeting came to a conclusion.

Antonio subsequently learned that in their first year of operation, Ginger and Fred turned a $45,000 profit at the studio, and had been paying their instructors $25 per hour.

The following Spring, Antonio stops by the UNM Law clinic. As his student attorney, he asks your advice about whether he should sue Ginger for failing to make him her business partner and to employ him as a dance instructor. Please evaluate the likelihood that such a suit would prevail under all applicable theories of liability. Include in your analysis discussion of the various types and amounts of damages that a court might award under each theory.

[End of Question 1]

[Question 2 begins on the next page]

Question #2

Rhonda Ramirez was watching her favorite television program one night when an advertisement caught her eye. Onto a beautiful, hilly and tree-filled lawn, with a cute house in the middle, flew Jensen's new multi-tasking riding lawn mower. It landed on a pretty patch of land and rode over a few hills and dales, with its owner happily holding on. A voice in the background announced, "Introducing Jensen's New Multi-Tasking Lawn Mobile. Mowing the lawn was never so much fun. It's like nothing you've ever seen or used before. Cuts hundreds of hours off your lawn-care time, even cuts lawn-care time in half. Jensen's new Lawn Mobile cuts grass, cuts weeds of all sizes, and even prunes, through its various attachments. Unlike other riding lawnmowers, it's perfect for hilly terrain, and can even be used near trees." "As always," finished the ad, "Jensen is the name you trust." As the ad pronounced that the lawn mobile was perfect for use near trees, the mower zipped up a tree and flew off into the sky.

Having had just about enough of her two-acre plot in the Valley, Rhonda was impressed with the Lawn Mobile. The idea of cutting lawn time in half was particularly interesting to her, as her land had started to take over her life.

A few days later, she told her father about the ad she saw and her interest in the Lawn Mobile. During their conversation, her father told her that as long as she graced his Christmas dinner table with her beautiful smile, he'd see to it that she got a Lawn Mobile or something like it anyway. Rhonda and her dad had rarely spent Christmas together in recent years, but at the thought of acquiring the Lawn Mobile, Rhonda said "Great, Dad! I'd be thrilled to cut my lawn time in half, especially if it really worked on hills!"

Sometime before Christmas, Rhonda's dad and his friend Eileen went to look at riding lawn mowers at the local Super-sized home center. They looked at about 30 different models, made by five different companies. Eileen, who had worked in the Sears appliance department for 25 years, asked the salesperson lots and lots of questions. The salesperson was patient but exasperated. Eileen was particularly interested in the details of any warranties that came with the various mowers. The salesperson said that the Lawn Mobile came with a particularly good warranty. The brochure hanging from the Lawn Mobile also said it was perfect for mowing on hilly terrain. At one point, Eileen and the salesperson got into an argument, when Eileen said "you mean to tell me that you could actually use this thing on hills and not tip? I can hardly believe that!" The salesperson responded, "What can I say? You saw the brochure and you read it. What else could I possibly say to convince you?" The salesperson then stormed off. Ultimately, Dad bought Rhonda the Lawn Mobile and stored it in the garage until Christmas.

Rhonda was excited about her conversation with her dad and about using her new tool. It looked like more fun than work. As a result, Rhonda decided to spend her two-week

vacation after Christmas mowing and pruning for people, in order to pay for all her Christmas bills. Rhonda scoured her neighborhood for people with lawns to mow and trees to prune. She also asked friends from work if they needed any lawn work. She managed to find enough work to earn about $800, most of which she figured would be profit, once she bought a little gas and received her Lawn Mobile.

She went to her dad's house for Christmas dinner, and that night, he gave her the Lawn Mobile. Unfortunately, as Rhonda was leaving, they got into an argument and her dad ultimately said, "Rhonda, you still haven't grown up at all. You can forget that Lawn Mobile. It's going back to the store." Without the Lawn Mobile, Rhonda was unable to use it on the lawn work she had planned to do and she did not make any money during her two-week vacation.

A month later, she and her dad made up and he gave her the Lawn Mobile. She happily read the users manual from cover to cover, which repeated that the Lawn Mobile was perfect for hilly terrain, and then contained the following statement:

> All warranties are hereby disclaimed.

She then went out to the lawn to have some fun. One day, Rhonda was using the Lawn Mobile on the side of a hill next to a tree. The Mobile – which was on an angle due to the hill – caught the side of a tree and tipped backwards. Rhonda was badly injured. She lost $4,000, which is a month's salary, because of her injuries, spent $15,000 in medical and hospital bills, and suffered $5,000 in property damage to her yard and her tree. Her left arm and hand are still not back to normal, and as a result, it is unclear whether she will be able to continue working as a computer programmer.

Rhonda has come to your office for legal advice. When asked how she got into that precise position, at an angle, right next to the tree, Rhonda said that "the brochure said it was perfect for hills, plus after watching the ad on TV, it seemed clear that you could take the mobile as close to a tree as you wanted. I mean, the person in the ad even drove the mobile up a tree...so surely I was not too close to the tree." She wants to know if she can recover for her injuries and other losses from the manufacturer or seller of the Lawn Mobile. She also said that, while she probably would never sue him, she and her dad were in a fight again, and she wondered if she could ever recover from him for the $800 she lost when he refused to give her the Lawn Mobile.

[End of Question #2]

[APPENDIX OF UCC PROVISIONS ATTACHED]

Selected Sections of the Uniform Commercial Code

Sec. 2-204. Formation in General.

(1). A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2). An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3). Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

§ 2-205. Firm Offers.

An offer by a merchant to buy or sell goods in signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must separately signed by the offeror.

Sec. 2-206. Offer and Acceptance in Formation of Contract.

(1). Unless otherwise unambiguously indicated by the language or circumstances

(a). an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b). an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2). Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

Sec. 2-207. Additional Terms in Acceptance or Confirmation.

(1). A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2). The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a). the offer expressly limits acceptance to the terms of the offer;

(b). they materially alter it; or

(c). notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3). Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Sec. 2-313. Express Warranties by Affirmation, Promise, Description, Sample.

(1). Express warranties by the seller are created as follows:

(a). Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b). Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c). Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2). It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Sec. 2-314. Implied Warranty: Merchantability; Usage of Trade.

(1). Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2). Goods to be merchantable must be at least such as

(a). pass without objection in the trade under the contract description; and

(b). in the case of fungible goods, are of fair average quality within the description; and

(c). are fit for the ordinary purposes for which such goods are used; and

(d). run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e). are adequately contained, packaged, and labeled as the agreement may require; and

(f). conform to the promises or affirmations of fact made on the container or label if any.

(3). Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Sec. 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Sec. 2-316. Exclusion or Modification of Warranties.

(1). Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2). Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3). Notwithstanding subsection (2)
(a). unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
(b). when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
(c). an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4). Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

Sec. 2-318. Third Party Beneficiaries of Warranties Express or Implied.

Note: ***If this Act is introduced in the Congress of the United States this section should be omitted. (States to select one alternative.)***

Alternative A

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

As amended in 1966.

(END OF EXAMINATION)