

SALES FINAL EXAMINATION

**GOLDEN GATE UNIVERSITY SCHOOL OF LAW
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QUESTION # 1



Alex Lustanov, a Ukrainian citizen, is a professional timpanist. While most timpani (“timps” or kettle drums) are made of copper, some newer models are made of lightweight fiberglass. The premier U.S. producer of fiberglass “timps” is the Ludwig Drum Company, which was founded in Chicago in 1909 and is celebrating its 100th anniversary this year. This occasion, plus the weak U.S. Dollar, convinced Alex that 2009 was the right time for him to look into buying himself a set of Ludwig fiberglass timps.



While on holiday in September 2009, Alex visited Ludwig Drum’s main store in Chicago, Illinois. Alex spoke at some length with Tom Trommel, one of Ludwig’s employees in the Chicago store. Alex expressed his admiration for the Ludwig timps and said he had dreamed of owning a set ever since he was a young boy first learning to play percussion instruments. Tom provided Alex with a number of brochures pertaining to the newest line of fiberglass timps, which sell for around \$8,000 for a set of five drums, consisting of one drum in each of the following sizes: 20", 23", 26", 29" and 32". (These sizes refer to the diameter of the drums, as depicted above.) Alex is an unusually tall man, and he asked how much more it would cost to have the timps made for someone his

size. Tom estimated that it would cost an additional \$1,500 for the taller timps, and thus that the F.O.B. Chicago price for the set of fiberglass timps would be \$9,500.

Alex said "I must think about this" and walked away from Tom. Alex spent another half-hour wandering through the store, then asked Tom how soon the timps could be ready. Tom said that they could be ready to ship (airfreight) by mid-December 2009. Alex said, "That would be perfect, because then I would have the new timps in time for the winter symphony season starting in January 2010." Alex also told Tom that he would have to sell his old timps in order to be able to afford the new ones. Alex then placed a pair of bamboo timpani mallets on the counter, said "I will take these today," and laid down his credit card. Tom charged the price of the mallets (\$100) to Alex's card. Alex gave Tom a card with Alex's name and contact information on it, and asked Tom to place him on Ludwig's mailing list. Tom said "thank you," and Alex walked away.

After Alex left the store, Tom did a little 'victory dance' to celebrate the sale. Business had been slow in recent months, owing to the difficult economic times, and Tom was elated to have a new order for a full set of five timps. Tom promptly wrote up an order receipt form stating "Sold to Alex Lustanov, one full set 'extra-tall' Ludwig fiberglass timpani (20", 23", 26", 29" & 32"), estimated price \$9,500, for delivery F.O.B. Chicago on 15 December 2009." Tom wrote Alex's credit card information on the order receipt form, then put his own initials on the form (so that he would get credit for the sale), affixed the official Ludwig Drum Company stamp, and mailed the form to the address on Alex's card. Tom then forwarded a copy of the form to Ludwig's production department, so that they could get started making the drums for Alex. Neither Tom nor Ludwig Drum received any reply from Alex.

Ludwig Drum Company promptly started to manufacture the set of timps for Alex. On 20 November 2009, Tom sent an e-mail message to the address on Alex's card, in which Tom informed Alex that his order for a set of timps would be ready to ship during the first half of December, and asked Alex to provide details about the airfreight shipping arrangements. On Monday, 23 November, Tom received an e-mail message from Alex that read "What order? I never ordered anything from you. All I bought was a set of mallets."

Tom immediately informed his manager, Willibald Ludwig, who promptly calls you for legal advice. Willibald tells you that the 3 smaller timps are nearly finished, but that considerably more work is needed to complete the 2 larger drums. Willibald is very upset about Alex's repudiation of the contract, and wants to know what options Ludwig Drum Company has in this situation. In

particular, Willibald asks you what you think he should do in order to preserve Ludwig's rights under the contract with Alex.

Please provide a thorough analysis of all legal issues presented, keeping in mind the goal of identifying options for your client, Ludwig Drum Company. Be sure to consider the arguments that you expect Alex to make, and to identify any weak points in Ludwig Drum's case. You should also identify any additional facts necessary to complete your analysis, and explain why those facts are important. At the very least, your analysis should address the following issues: What law governs? Is there an enforceable contract between Alex and the Ludwig Drum Company? If there is an enforceable contract, what (if any) steps should Ludwig take at this point in time, and what remedies could Ludwig pursue against Alex?

QUESTION 2

Polly Packrat is a collector. She collects teapots in all shapes and sizes, and also collects anything that has a penguin on it or is shaped like a penguin. Polly regularly shows her collections at the annual state fair, and two years ago, her penguin collection won first prize. Polly's house and garage are overflowing with teapots and penguins. She has decided to get organized.

On 9 November 2009, Polly paid a visit to the Hold It Store in San Francisco. Polly was enchanted by the countless shelves, boxes, crates, and other items available for organizing and storing stuff. She spoke at length with the very friendly salesperson, Fredsel, who answered her numerous questions. Polly explained that she needed very stable shelving to protect her fragile teapot and prize-winning penguin collections, and that she was very worried about earthquakes because she'd heard that "the big one" was coming.



Polly had heard about Hold It's Super Sturdy Shelves™ on TV, which advertised the stand-alone shelves as "so sturdy, they will remain standing, even if your house collapses around them." She asked Fredsel if the Super Sturdy Shelves™ were really that sturdy, and he said, "These shelves are designed and built to withstand earthquakes up to 8 on the Richter scale." Fredsel also stated that the Super Sturdy Shelves™ were guaranteed to bear weight up to 100 pounds per shelf. Polly was not able to examine any shelves at the Hold Everything Store, so Fredsel gave her a brochure containing information about

prices, colors, and sizes. Polly told Fredsel that she needed to measure her living room at home, and that she would send her order once she had figured out what size shelves she needed.

Two days later, after determining that she had enough wall space to accommodate 20 feet of shelving, Polly listed the items she wanted to purchase on a sheet of her own personal letterhead, as follows, and FAXed the list to Fredsel at Hold It:

“Four (4) Super Sturdy Shelf™ Units, each 5 feet long and 10 feet high, color off-white, at \$250 each, for a total of \$1,000. Please send promptly. Charge to my credit card ...”

Polly’s order also contained her credit card information and signature. Fredsel received Polly’s FAX, prepared an order acknowledgment on Hold It’s standard form, and FAXed it to Polly. That form provides *inter alia* as follows:

“Sold to Polly Packrat four (4) units Super Sturdy Shelves™, size 10' x 5' , color off-white, at \$250 each, for a total of \$1,000, plus tax and shipping. Some assembly required.

SELLER MAKES NO EXPRESS OR IMPLIED WARRANTIES WHATSOEVER. In the unlikely event of product failure, Seller will repair or replace the goods, in Seller’s sole discretion.

This writing contains the entire agreement of the parties with respect to the subject matter hereof, and supersedes all prior negotiations, understandings, and agreements between the parties, whether oral or written.”

On 16 November 2009, Fredsel shipped the order to Polly, and charged her credit card in the amount of \$1,200, which sum included the cost of the goods (\$1,000), taxes (\$100), and shipping (\$100). The goods were delivered to Polly’s home by UPS on 23 November 2009.

When Polly started unpacking the shelves, she first discovered that she did not like the color. She’d expected the shelving to be a dull off-white, which she thought would highlight her collectibles nicely, but instead they were bright and shiny and likely (she thought) to detract from the items she wanted to display. Despite this disappointment, Polly went ahead and assembled two of the shelf units in her apartment, and then loaded them with her entire teapot collection. (Assume that Polly assembled the shelves correctly, and that she used plenty of ‘Earthquake Wax’ to secure the teapots to the shelves, in order to prevent the teapots from sliding off.) Polly did not have time that day to

assemble the other two shelf units or to unpack her penguin collection, but planned to do so the next day.

During the night, Polly was awakened by a terrible crash. She jumped up and discovered that one of the new shelf units had collapsed, and that the 100 teapots she had placed on the shelves in that unit were shattered. (Assume further that Polly had not overloaded the shelves, and that the most weight she had placed on any one shelf was 75 pounds.) Polly cried herself back to sleep, only to be awakened a few hours later by an even louder crash. This time, it was an earthquake measuring 6.8 on the Richter scale, and the remaining shelf unit had fallen down, leading to the total destruction of Polly's collection of 200 teapots.

Two days later, after tearfully cleaning up the mess, Polly called Hold It. Since no one answered the phone, she left the following message on voice mail:

“This message is for Fredsel. I have no use for the shelves you sold me. The shelves are not as you told me they would be. My teapots are destroyed, thanks to your shoddy product. Please come get what's left of your not-so-sturdy shelves, and refund my money.”

Since Polly's urge to get organized was even stronger after the disaster with the shelves from Hold It, she promptly contacted her cousin Vic, and asked him to build her some wall-mounted shelves to hold her penguin collection. (Polly could easily have purchased more Super Sturdy Shelves™ from Hold It, but understandably did not want to repeat that mistake.) Vic picked up the supplies he needed to build shelving 10 feet high by 25 feet wide in Polly's living room (see picture).



The supplies (consisting of shelves, brackets, and special bolts for attaching the brackets to the wall) cost \$1,800, and Vic charged Polly only \$200 for the installation, which took him two days.

Polly is your great-aunt, who invited you over for Thanksgiving and to admire her new shelves and penguin collection. She tells you tearfully about her demolished teapot collection, and asks you for legal advice. Polly had heard from Fredsel, who told her that Hold It would not refund her money for the Super Sturdy Shelves™ because she had no legal basis for a claim. Polly tells you that she has receipts showing that she paid a total of \$10,000 for the 200 teapots that she had collected over the course of many decades, but that her collection had appreciated in value and was worth “much more than that” at the time of its destruction. Polly wants to sue Hold It

for breach of contract, and wants to know what remedies would be available to her.

Please provide a thorough analysis of all legal issues presented, except that you should assume that the UCC governs. Lay out the arguments you would make for Polly in her suit against Hold It. Be sure to consider the arguments that you expect Hold It to make, and to identify any weak points in Polly's case. You should also identify any additional facts necessary to complete your analysis, and explain why those facts are important. At the very least, your analysis should address the following issues: Can Polly successfully sue Hold It for breach of contract? What remedies would be available if Polly were successful in her action against Hold It?

QUESTION 3

Saratoga Trunk ("ST") sells fine clothing and hats for ladies. ST is the place to go for fancy hats for the horse racing season, as well as for ornate beaded gowns and headgear. ST purchases some of the items it sells from other designers, but most of its inventory is designed and made locally, in the vicinity of Saratoga Springs, New York. ST is owned by Clio Dulaine, who also designs most of the gowns and hats manufactured under the ST label.

Clio's designs are especially popular for the New Orleans carnival or Mardi Gras season, which is characterized by many fancy balls and parties, in addition to the parades and street debauchery. The Mardi Gras season runs from January 6, which is the Feast of the Epiphany or "Twelfth Night" in the Western Christian tradition (also known as "Three Kings Day" in some countries to commemorate the visit of the Magi or wise men), through Ash Wednesday, which is the Wednesday that falls 46 days before Easter. Mardi Gras itself is the raucous "Fat Tuesday" preceding the somber Ash Wednesday, which kicks off the period of fasting (Lent).



Long-time New Orleans residents may end up as members of one of the dozens of carnival social clubs that are called 'krewes'. It is the krewes that organize most of the balls and parades during the carnival season. One very special krewe is called the "Krewe du Vieux" (see logo). This krewe is the only one that is allowed to march through the old French Quarter of New Orleans. Krewe du Vieux, which aims to preserve the ancient traditions of Mardi Gras, specializes in adult themes and political satire. The 2009 parade,

for example, was devoted to the theme “Stimulus Package”, while the theme for the parade scheduled for 30 January 2010 is “All Fired Up”. Each year, Krewe du Vieux picks a king and queen for the parade. In 2010 the king will be musician Dr. John, and his queen will be Mother Miriam of New Orleans’ Voodoo Spiritual Temple.

Captain Viv, who organizes Krewe du Vieux events, contacted Clio Dulaine at Saratoga Trunk to inquire about ordering beaded hats for the upcoming parade. Captain Viv sent the following FAX to Clio on 15 October 2009:



“Hi Clio! I want to order 50 beaded “Flame Head” hats as shown on your website (see picture), at \$100 per hat, C.I.F. New Orleans. This offer is good for 30 days. Can you give us a price discount this year? Thanks. Viv”

After hearing nothing from Clio at ST for over a month, Captain Viv decided to search for another supplier of hats for the krewe, since she was eager to secure a supply of hats in time for the January carnival season. She discovered that The Mad Hatter offered flame-themed hats that were nowhere near as fabulous as those from Saratoga Trunk, but acceptable for the krewe’s needs. On 19 November 2009, Captain Viv ordered 50 substitute hats from The Mad Hatter, at a price of \$80 each, C.I.F. New Orleans, for prompt shipment. The Mad Hatter had the hats in stock, dispatched them on the same day it received Captain Viv’s order, and charged the total price to Captain Viv’s credit card.

On 20 November, Captain Viv received the following e-mail message from Clio at Saratoga Trunk:

“My Dear Viv, Sorry for the long silence. We’ve been so busy with the horse racing and opera seasons that I did not have a chance to respond to your order. I know that your carnival season is coming up, so I rushed to get your order ready. I sent your 50 “Flame Head” hats via UPS on 18 November 2009. The hats I sent have nice beaded fringe around the brim, in lieu of the fur depicted on the website, since I know you are a strict vegan and that you do not want products with animal fur on them. You should have them in a few days, please let me know when they’ve arrived safely. Attached to this e-mail message is the invoice. I’d be grateful if you would pay as soon as you can, since cash flow is tight. Clio”

Clio had indeed shipped 50 beaded “Flame Head” hats via UPS. Captain Viv responded immediately via e-mail, as follows:

“Dear Clio, I’m so sorry for this misunderstanding! I’ve already purchased hats elsewhere for our 2010 parade, since you had not gotten back to me within 30 days. I will not be needing your 50 hats after all, so regret that I will not be paying your invoice. I’m sure you can find someone else who will want the hats. Best, Viv”

Clio is upset and contacts you to find out what legal options Saratoga Trunk has in this situation. Clio tells you that Saratoga Trunk is operating on a very tight budget this year, and that if Captain Viv does not promptly pay the invoice for the hats, Clio will not be able to purchase the supplies she needs to make party dresses and hats for New Year’s Eve, and thus that ST stands to lose up to 20% of its annual revenue.

Please provide a thorough analysis of all legal issues presented, but assume that the UCC governs. Be sure to consider the arguments that you expect Captain Viv to make, and to identify any weak points in Clio’s case. You should also identify any additional facts necessary to complete your analysis, and explain why those facts are important. At the very least, your analysis should address the following issues: Is there an enforceable contract between Saratoga Trunk (ST) and Captain Viv? (Assume that Krewe du Vieux is unincorporated and thus has no legal capacity to enter into contracts on its own behalf.) If there is an enforceable contract, what (if any) steps should Clio take at this point in time, and what remedies could she pursue (on behalf of ST) against Captain Viv (on behalf of Krewe du Vieux)?