

FINAL EXAMINATION: SALES
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Golden Gate University School of Law
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1. You have **two (2) hours** in which to write your answers to this examination.
2. This is an **open-book** examination, meaning you may use your course text and supplement, handouts, notes and outlines, as well as a language dictionary (e.g., English-Spanish/Spanish-English). No other materials (commercial outlines, etc.) may be used during the examination. It is forbidden to speak with other students during the examination.
3. This examination consists of **one basic fact pattern** and a number of related scenarios containing additional facts. In all there are **three (3)** essay questions, and you should answer every one of them. The recommended time for each question indicates the relative importance of that question.
4. Please write your response in the blue books provided. Please write as legibly as possible. Write your answers in *blue* or *black* ink – not in pencil or in other colored ink. You may write on every line; it is not necessary to skip lines. You may write on the back side of each page in your blue books, *unless* the ink from your pen soaks through the paper and makes the back side of the page difficult to read. In that case, please write only on one side of each page. Typists should double-space their answers.
5. Please start each answer on a separate page, and clearly label which question you are answering. If you use more than one blue book, please label them accordingly (e.g., 1 of 2, 2 of 2).
6. Please write your exam number on your exam envelope, at the top of each page of this exam, on each blue book you use, and on each page of your exam answer. **DO NOT** write your name, student ID number, or Social Security number on any exam materials.
7. At the conclusion of the exam, return all test materials – including blue books, scratch paper, and this exam packet – to the envelope and submit it to the proctor. **DO NOT** seal the envelope. Students who do not return all exam materials at the end of the exam may not receive a grade for the course.
8. You may apply either the 2000 or the 2004 version of the UCC in your answers, but please designate at the start of your exam which version you intend to use. You are free – indeed, encouraged – to note particular issues where the analysis would differ if the other version of the UCC were applicable to the transaction in question.

BASIC FACT PATTERN

Vincent Neuf du Pop (“Vinnie”) is the son of an old French grape-growing and wine-making family. Much to the dismay of his illustrious family, Vinnie decided to attend college in the United States, and to study oenology – the science of all aspects of wine-making – at the University of California, Davis. Like many before him, Vinnie became so enchanted with California that he decided to stay. He is now a permanent resident of the U.S. – a green card holder – but remains a citizen of France. Vinnie has set himself up in business as a *négociant*, which is a person who purchases grapes grown by other persons, then presses, ages, blends, and ultimately bottles and sells the finished wine under his own label – the Oui Oui Winery (“Oui Oui”). Vinnie has purchased a nice old property near Healdsburg in Sonoma County, where he also lives, to house the Oui Oui Winery and Tasting Room. Vinnie is the owner of Oui Oui Winery and has full authority to act on its behalf.

QUESTION #1 (30 MINUTES)

Vinnie may love California grapes and sunshine, but he still prefers to use French oak barrels for aging his wines. Vinnie’s family has dealt for many years with a traditional manufacturer of oak barrels, Tonneau S.a.r.l., which is a French company. Tonneau’s owner, Marc du Chêne, is Vinnie’s godfather. Vinnie called “Tonton” (Uncle) Marc in late March 2008 to wish him a happy Easter, but also to ask how soon Tonneau could have 20 oak barrels ready for delivery to the Oui Oui. Altogether, they chatted for a half hour, and during that conversation agreed that Tonneau would deliver the 20 barrels, F.O.B. Bordeaux ¹, on May 15, 2008, at Tonneau’s standard price in € (EUROS) on the date of delivery. A few days later, Vinnie sent Tonton Marc an e-mail message, which included the following text (here translated from French):

It was a pleasure to hear your voice the other day, and I am happy that Tonneau could deliver the 15 barrels on 20 May 2008. Please make sure to send extra large barrels. OK?

QUESTION #1 CONTINUES ON NEXT PAGE

¹ Bordeaux is not only a French wine growing region, but also city in France with an ocean port.

After the telephone conversation with his godson, Marc du Chêne instructed his employees at Tonneau S.a.r.l. to begin building 20 oak barrels for Oui Oui. However, Marc never responded to Vinnie's subsequent e-mail message. It is later discovered that Marc never read Vinnie's e-mail, because the message was caught in Tonneau's spam filter.

It is now early May, and Vinnie has contacted you for advice. He informs you that he no longer wants to purchase the oak barrels from Tonneau S.a.r.l., because the cost has risen too much in view of the U.S. dollar's steady and dramatic decline against the EURO. Vinnie wants to know if Oui Oui is bound to accept delivery of the barrels when Tonneau tenders them, and why (or why not). In your answer, please analyze all arguments you see for and against your client's position, and identify Vinnie's best argument(s) for walking away from the "deal". Please do not neglect to address the issue of applicable law.

END OF QUESTION #1

QUESTION #2 (60 MINUTES)

Oui Oui Winery has been in business for 5 years. At first, Vinnie chose to rent a bottling line, rather than to buy one. A “bottling line” is a largely mechanized production line that rinses bottles to prepare them for filling, pumps wine from holding tanks into the bottles, then corks and seals and labels the bottles, and finally places the finished bottles in a case. Late last year, Vinnie decided it was time to purchase his own bottling line for Oui Oui, and he found just what he wanted from Vitro Bottling Company (“Vitro”).

Given the number of functions that must be performed on a bottling line, it should come as no surprise that a bottling line consists of numerous different machines made by numerous different manufacturers. Vitro’s special market niche is putting together a package deal for an entire bottling line, and selling it as a unit with a single purchase price. Vitro also installs the bottling line on the buyer’s premises and trains the purchaser’s to operate it.

In October 2007, Vinnie ordered a state-of-the-art wine bottling line for Oui Oui Winery from Vitro, to be delivered by December 1, 2007, for a total price of \$150,000. The written contract divides the seller’s performance into stages – delivery of equipment, installation of equipment and training, and performance testing – and provides that the buyer shall pay seller \$50,000 at the conclusion of each of these three stages.

During their negotiations, Vinnie told Vitro that he intended to use the new plastic corks, rather than natural cork, to close the bottles. Vitro told Vinnie that the bottling line “should definitely run faster” with plastic corks than it would with natural cork. The written contract between Oui Oui Winery and Vitro states that the bottling line will bottle at least 100 cases per hour. The written contract also contains the following language:

Seller makes no warranties, express or implied, and expressly disclaims the implied warranties of merchantability and of purpose.

This writing contains the final agreement of the parties.

The machine that puts the bottles into cases at the end of the line arrived two weeks late, thus the delivery stage was not completed until mid-December, and the installation and training stage was not completed until January 15, 2008. Vinnie paid two-thirds of the purchase price (i.e. \$100,000) on January 31, but has not paid the final one-third (i.e. \$50,000).

QUESTION #2 CONTINUES ON NEXT PAGE

The reason that Oui Oui has not yet paid the last one-third of the purchase price is that numerous problems have arisen since the bottling line was installed in mid-January. First, there have been problems with the corking machine, with the result that nearly 20% of the bottles have been broken while being corked. It appears that this is related to the use of plastic corks. Despite numerous attempts by Vitro to adjust the corking machine, the problem remains. After a few weeks, Vinnie went out and bought a supply of natural corks (for \$8,000) to replace the plastic corks (\$3,000) that appear to be unusable with the bottling line supplied by Vitro. Second, even after switching to natural corks, the bottling line has only produced an average of 90 cases per hour, and Vinnie has repeatedly insisted that the bottling line was warranted to produce more than 100 cases per hour.

On April 25, Vinnie lost his cool and told Vitro to come and take the bottling line away, that Oui Oui had no use for the “stupid thing”. Vinnie also demanded the return of the \$100,000 that Oui Oui had already paid to Vitro.

Vitro refuses to return the \$100,000, and has threatened to sue Vinnie for the remaining \$50,000 due under the contract.

On April 30, lightning struck the Oui Oui Winery and burned it to the ground, destroying everything (including the bottling line).

Vinnie has contacted you because he wants you to file suit against Vitro. Prepare a memorandum outlining your complaint for the trial court. What remedies would you seek, and what arguments would you make on behalf of Oui Oui Winery? Please identify any counterclaims that you expect Vitro to make, and anticipate any counter-arguments you expect from the seller. Be sure to note any missing information that you would need to build your case, and explain why that information is relevant. Finally, what further advice, if any, would you give your client at this point in time?

END OF QUESTION #2

QUESTION #3 (30 MINUTES)

On January 31, 2008, Oui Oui entered into a written contract with Ferkel, a popular New York restaurant, to deliver 50 cases of Oui Oui Winery "Mai Oui!" premium red wine per month for 24 months, F.O.B. seller's place of business, commencing on March 1, 2008, at \$300.00 per case. Thus, each shipment is valued at \$15,000, and the total contract price is \$360,000.

Oui Oui delivered the first two installments, but they were delayed because of the problems described in Question #2 above.

To make matters worse, in April 2008 there was – despite some lovely warm days – a freeze that wiped out substantial portions of this year's grape harvest. Prices for California grapes immediately started to rise.

Ferkel called Vinnie on April 24 to ask if the May 1 installment would be shipped on time. Vinnie replied, "We will do our best, but the freeze has made a mess of things out here. Prices have started to rise and there is no telling where they will stop. I am not sure where we will get the grapes we need, or what they will end up costing." Under the circumstances, Ferkel felt nervous and left Vinnie a dozen phone messages that week, asking Vinnie to confirm that the May and subsequent deliveries would be forthcoming. Vinnie never responded.

A very worried Ferkel sent Vinnie an e-mail message on Monday, April 28, in which Ferkel repudiated the contract. Ferkel followed up a few hours later with a second message stating that Ferkel had entered into a substitute transaction for comparable wine from an Oregon winery, at a price of \$750 per case, for the remaining 22 months of the term of Ferkel's contract with Oui Oui (i.e., from May 1, 2008 through February 28, 2010). Ferkel also mentioned in that second message that he intended to file suit the next day for breach of contract against Oui Oui Winery.

An even more worried Vinnie contacts you, once again, for legal advice. Please outline the arguments you would make to defend Oui Oui Winery against Ferkel's anticipated claims for breach of contract and damages.

END OF QUESTION #3

END OF EXAMINATION