This is a three and one-half hour open book exam. You may refer to any and all written materials you have brought to the exam. Bluebooks are not to be distributed until one-half hour into the exam. During the first half hour, you may take notes, outline and prepare your answer.

There are three questions of unequal value. Budget your time accordingly. Plan your answers before writing. Be clear and brief. Credit will be given for organized and concise answers. Avoid repeating yourself. You may incorporate by reference answers previously given.

Please write legibly, on only one side of the page, skipping lines.

You may refer to named parties by initials. If you feel you need to assume any additional facts, state them explicitly. You may assume without notice that all the transactions occur within the State of Euphoria, which has adopted the UCC without revisions.

I. (1 ½ hour, 50%)

Peter Pepper was head coach of the University of Euphoria’s football team. The five coaches previous to him had all quit the football team to take up much more lucrative positions in professional football. Coach Pepper had four perfect winning seasons, but the last two have been less successful. In 2005, the team had a 10-2 record. In 2006, the team had a 7-5 record. On November 15, 2006, Coach Pepper announced that he would leave the team on February 1, 2007. At the same time, the University said, “We regret that Coach Pepper has decided to leave his position as head coach, but are pleased to
announce that he will lead the effort to establish the “Cloud Hall of Fame,” a museum to honor the best players that he and our other coaches have so ably led at the University. We will immediately look for a replacement as head coach and congratulate Coach Pepper on his new job.”

The University and Coach Pepper entered into their second 5-year contract on May 1, 2006. In addition to a $2 million base salary, the contract provided that the Coach would be entitled to various “benefits and perquisites.” These included, among other things, gifts made to him by individual alumni and by the “Cloud Crowd.” (A cloud is the symbol of the Euphoria football team.) (The Cloud Crowd is limited to 100 people, each of whom pay $10,000 annually. They have given $500,000 each year to the Coach for the last eight years.) These benefits and perquisites also include $30,000 in travel expenses to recruit high school players, and $100,000 paid to him by a local TV station for his pre-game show, “Pepper’s Predictions.” The contract also contained provisions that all of Pepper’s rights under the contract could be terminated, without any resulting liability, “for illness, or other incapacity continuing for three months, death, any conduct or activity involving moral turpitude or which in the opinion of the University would constitute an embarrassment to the school.” The contract provided that “should the University terminate Coach Pepper’s employment without cause, then Coach Pepper, in lieu of all other remedies, shall be entitled to $1 million. On the other hand, should Coach Pepper cause the termination of this agreement, then he will be liable to the University for $1 million.” The following language also was contained in the contract, “There are no representations, promises, or warranties other than those contained in this agreement. This contract constitutes our complete agreement.”
At the time of the signing of the contract, Coach Pepper stated, “I will not follow my predecessors into the NFL for at least 5 years. In fact, I’ve promised to pay the U. at least $1 million should I do so.” At the same time, Don Yadayada, the University’s President said, “Coach Pepper has been rehired not for his successes on the field, but for his character that has led to our students improving their characters.”

On November 14, Coach Pepper and the University’s Athletic Director, Alan Dee, met. Alan Dee said, “It is time for new blood in this program. We will fire you, if you do not resign. We thought you were a fine example for the team, but you are to blame for the fight that broke out between your players and those of the State Suns two weeks ago. You spoiled the players and they ended up acting like children. It is not just that fight. I am sick and tired of seeing the players acting like they won the Super Bowl when they make only a decent play and then are not able to sustain that success. It is your choice, resign or be fired. I’ve been around this business for much longer than you. Take my advice: it will be better for you if you resign.”

Coach Pepper responded, “I’ve done nothing wrong. Fights happen. You are just firing me because we lost 5 games this year.”

A.D. Alan Dee responded, “For our University, 5 losses are embarrassing. But, it is the fight that led President Yadayada to ask me to ask you for your resignation. She also said that I could sweeten the deal. If you resign tomorrow, we will announce that we have agreed that we will replace your coaching contract with one in which you serve as advisor to our to-be-established Cloud Hall of Fame, and it will be your task to select which of our prior football players will be enshrined there. We will pay you $100,000 per month until you find another job.”
Coach Pepper replied, “O.K.” They shook on the deal.

You work for a lawyer hired by the University. It is now April 2007. Coach Pepper has announced that he will sue the University for payments due on the four years left on his contract. He also has announced that he expects not only the $2 million base salary per year, but also $1.5 million per year additional that he would have made from the various benefits and perquisites. ($1.5 million per year is the average of the benefits and perquisites that Coach Pepper has received for the last three years.)

Coach Pepper has not been looking for alternate employment and has been taking $100,000/month since February 1, but has done nothing regarding the Cloud Hall of Fame. (You know that the Coach’s obligations regarding the Cloud Hall of Fame have never been reduced to writing or otherwise spelled out beyond the conversation of November 14 between the Coach and Alan Dee). You know that should you argue that Coach Pepper was discharged because of his performance as coach, he will not be able to find another job in college football. Although both the University and Coach Pepper had once assumed that if Pepper left the University it would be to go to the professional NFL, it now appears that Pepper’s options are much more limited. In fact, since November 15, he has been contacted only by high school teams. He has told the University that he might take such a job, but would expect the University to pay the difference between the salary he would receive for coaching high school football and the $3.5 million he would have received for each of the next 4 years had he remained as the University’s head football coach.

Write a memo advising the University.
II. (45 minutes, 25%)

Chef Carlos has owned Café Veneto for the last 5 years. Café Veneto is in a strip mall owned by Les. Carlos has a 10-year rental agreement with Les. This agreement and the addenda attached to it are standard in the industry. One clause of the agreement is that “Tenant agrees to conduct his business in such a way as to not directly compete with or enter the same line of business as any other tenant.” Before Carlos signed the lease, he asked Les about this clause. Les explained, “It means that someone else can’t open an Italian restaurant and that you can’t change what you are doing so that you take business away from one of my other tenants.” The rental agreement lists one tenant as “Sam’s Subs and Sandwiches,” and a line of business that no tenant (other than Sam) can enter as “quick take-out sandwiches.”

Offering inexpensive high-quality Italian Food, Café Veneto initially was quite successful. In recent years, it has become much less so. Carlos wants to change Café Veneto to the “Taco Shack.” He is convinced that his profits would soar should he sell Mexican food.

When Carlos tells Les about his plans, Les responds, “Let me talk to Sam of Sam’s Subs and Sandwiches. He might have an objection, but I’ll be able to persuade him.” Winking, but without any explanation, Les says, “Sam owes me.” Carlos immediately contracts with Irma, of Irma’s Interior Design. Carlos pays her $10,000 to do the design for and to outfit the Taco Shack.
Two weeks later, Les calls up Carlos and tells him that Carlos cannot convert his restaurant into one selling tacos. He explained that the Taco Shack would directly compete with Sam’s Subs and Sandwiches and that Sam would not budge on this issue. The Taco Shack, like Sam’s Subs and Sandwiches, would be principally a lunchtime business. (Café Veneto does equal amounts of business at lunch and at dinner.) They both would sell meals for a few dollars. They both would sell meats and vegetables surrounded by a wrapping. In fact, Carlos got the idea for the Taco Shack when he noticed that many of the customers at Sam’s Sub and Sandwiches were Mexican.

You work for attorney Allen who represents Les. Les insists that a taco is not a sandwich. You advise Allen that taking a survey of strip malls in 5-mile radius from that in which Café Veneto is located would be a good idea. Allen asks you to explain to him why and to be specific about what information you would seek to collect in such a survey. Allen also asks you to draft a memorandum detailing the arguments for and against Carlos’ right to open the Taco Shack.

III. (45 minutes, 25%)

For the last five years, Buyer, Inc. purchased its considerable widget requirements from Seller, Corp. On October 30, Buyer calls up Seller and asks if it has 1000 widgets that it can hold for Buyer for one week. Seller agrees to hold for Buyer 1000 widgets for one week. On November 1, 2006, Buyer mails a purchase order for a batch of 1,000
widgets “to be delivered on December 10.” Buyer’s purchase order reached Seller on
November 3. Seller immediately dispatched an acknowledgement of the order on its
standard form, promising to deliver the goods “on or before December 10.” On the face
of the acknowledgement of order form, the following language appeared in conspicuous
type: “OUR ACCEPTANCE IS EXPRESSLY CONDITIONAL ON THE TERMS ON
THE REVERSE SIDE. IF YOU DO NOT AGREE TO THESE TERMS, YOU MUST
NOTIFY OUR AGENTS IMMEDIATELY!” On the reverse side of the form are various
clauses. One of these clauses is “Buyer must pay for shipment charges for all returned
goods. Buyer is liable for any damage to the returned product until the product reaches
Seller’s place of business.” The Seller’s acknowledgment of order form has not been
changed during the last five years.

Through no fault of Seller, the acknowledgement of order form did not reach the
Buyer until November 30. On November 20, Seller attempted to deliver the 1,000
widgets. Buyer refused to accept them, explaining that the widgets were for the
Christmas season and the Buyer couldn’t accept delivery prior to December 1 at the
earliest. Seller was surprised because Buyer had never rejected a prior shipment for
being too early. Unknown to Seller, during the early part of November, Buyer had
greatly increased the number of products that it sold. Buyer’s warehouse was filled and
there was no room for the thousand widgets.

Although Buyer believed that it had all the widgets that it needed for the
Christmas season, on November 20, it informed Seller that it would take 100 of the
delivered widgets “as an accommodation.” The next day, however, Buyer called up
Seller and said that Seller must come and pick up these 100 widgets. Buyer, said, “You
didn’t tell me that you have changed your widgets.” Seller responded, “They are new and improved.” Buyer responded, “I’ve checked and these new ones are not compatible with Betamex.” Seller responded, “No one uses Betamex anymore.” In fact, Seller is right, even the vast majority of Buyer’s customers don’t use Betamex. Buyer responded, “If you wanted to sell me widgets that were not compatible with Betamex, you should have told me before I bought them. Take them back.” Seller does so, but the truck which is carrying these widgets back to Seller’s place of business is in an accident (caused by the negligence of Seller’s driver) and all the widgets are ruined.

On November 28, the market price for widgets fell sharply. On November 29, Buyer called to cancel the order. What rights if any does the Seller have against the Buyer? What would be the applicable remedies? Seller has no widgets that are compatible with Betamex.

__________________________________________________________

(end of exam)