

This three-hour exam is due at 1:00 PM. Your Exam4 may be set to Open + Network, and you may look at any written material during the exam. However, you may not talk, or otherwise communicate, with anyone except me. This exam consists of three stories on the following pages. Each story is preceded by the suggested time to be allocated to it. The number of points a story is worth is in proportion to its suggested time, and the suggested time for reading these instructions is 10 minutes. After reading each story:

- Discuss the options available to the parties as they are at the end of the story. To the extent these options involve drafting and forming contracts, discuss the pros and cons of realistically possible contract terms and approaches to contract formation.
- To the extent the options available to the parties involve lawsuits or other legal proceedings, start at the beginning: who would assert what claim(s) against whom? In other words, who would sue whom and what would be the claims (e.g., breach of contract, or rescission)?
- How would the claimant (typically the plaintiff) satisfy the elements of each claim? How would the defending party reply? Make the parties' arguments, using relevant statutes, case law, and other authority. No need to research anything beyond materials required for this course.
- Issues arise in the context of arguments by disputing parties; do not state an issue without first describing the claim and arguments generating that issue. For example, do not start your answer by saying something like "The first issue here is . . ." Issues do not arise out of thin air like that. They arise from competing arguments. You should state the claim and arguments that produce the issue, rather than just declaring that the issue exists.
- As you discuss arguments and counterarguments, assess their strengths. Predict how issues are likely to be resolved by a court and why. Do not wait until the end of your answer to assess the strengths of arguments. For example, a bad way to organize an answer is to make all of the plaintiffs' arguments, then make all of the defendant's arguments, and then predict how the court will resolve the case. Much better is to make all parties' arguments on one issue and then predict how that issue is likely to be resolved by a court (and why) before showing how that resolution connects with the other issues you discuss. For instance, "If the court agrees with P that P and D formed a K, then the court will turn to P's argument that . . ."
- If you identify an issue on which more than one party has a strong argument, then write the rest of your analysis in the alternative. For example, if you conclude that both parties have strong arguments about whether a contract is voidable then you should discuss what follows if the court concludes the contract is voidable and what follows if the court concludes the contract is not voidable. Similarly, if you identify an issue for which you need more facts, then write the rest of your analysis in the alternative. "If, then" statements help show organized analysis.

Organization counts. Therefore, you should think before you write, and you should start a new paragraph when you start discussing a new topic. Paragraph breaks (hard returns) between issues helpfully show your organization with white space. Good luck!

1. Suggested Time 35 minutes

For over 15 years, BuildHouses, Inc. (B) has regularly bought large quantities of lumber, which it uses to build houses and other structures.

On April 30, 2020, B formed a written contract with Sonia Torres (T), pursuant to which B promised to build a house on T's land. The contract price was \$400,000:

1. one-fourth due upon contract signing;
2. the second fourth due after B dug the house's basement and built its foundation;
3. the third fourth due when the house was framed and "under roof"; and
4. the final fourth due upon completion of the construction.

B is used to ordering lumber shortly after contracting to build a home, and then having that lumber arrive to the construction site when needed. However, in the first few days of May 2020, lumber prices rose sharply, and lumber shipping times increased greatly. So, on Monday, May 4, when B called its lumber suppliers, the earliest available delivery of lumber to T's land was not until July 6, 2020.

In early May 2020, B's bulldozer flattened and gently graded T's land, then B's other heavy equipment dug a hole for the basement of T's house. In mid-May, B built the house's foundation with poured concrete and steel rebar. The next steps in construction required lumber to build the house's frame and get the structure "under roof." But B lacked sufficient lumber for these steps. After a couple rainy weeks in late May—during which T repeatedly saw her house's foundation partially fill with water—on June 1, T told B "I can't take any more delay in getting this construction under roof. I'm going to hire another builder to finish the job." Which she quickly did. T paid that other builder \$250,000 to complete construction. T had already paid B \$200,000.

2020 was busy for home builders, with lots of demand for newly built houses, and thus for lumber.

2. Suggested Time 65 minutes

Shan's Fitness, Inc., (S) owned and operated four fitness centers—each with extensive weight training equipment and other exercise facilities. With each of its customers, S had a written membership agreement entitling the customer to use any of the four locations' equipment whenever the customer wanted between 6:00 AM and 9:00 PM. These agreements required customers choosing the monthly agreement to prepay \$100 a month, and customers choosing the annual membership to prepay \$1000 a year.

On Jan. 6, 2020, S sold all four of its fitness centers to Gym Corp. (G), which then began operating them under the name Gym's Health Club. G's written contract with S requires G to pay S \$1 million on Jan. 6, 2020, which G did, and then to pay S another \$20,000 on the first day of each of the following 10 months (Feb. through Nov.). The contract between G and S also "assigns to G all S's contracts with its customers" and states that G "assumes all S's duties" to such customers. G continued offering customers the same monthly (\$100) and annual (\$1000) prices and terms S had offered customers.

Due to the Covid-19 pandemic, the state health department ordered the closure of all gyms and fitness centers, including G's, for the two months of April and May 2020. During this time period, G received no revenue. Since G's facilities re-opened in June, G's monthly revenue has been half its Feb. 2020 revenue. G can barely pay its essential expenses and fears it may soon need to cease operations. G has made no payments to S since the beginning of March 2020.

Many of G's customers who chose annual contracts (with S or G) before the health department order have demanded that G pay those customers money as compensation for the two months (April and May) they could not use G's facilities, and a few such customers have also demanded compensation for not being able to use G's facilities after May due to their ages or medical conditions requiring them to be especially careful about Covid-19. G has not provided any customer with refunds or other compensation.

3. Suggested Time 70 minutes

Nardo, Inc. (N) is a large and widely respected information technology company. On March 9, 2018, N and Michael Huseby signed the document on the following pages. From then until summer 2018, Huseby worked as N's Chief Financial Officer (CFO) in N's New York City offices.

In July of 2018, N relocated Huseby's job to N's Palo Alto, CA, offices, where Huseby worked until Dec. 3, 2020.

N immediately ended Huseby's employment on Aug. 14, 2020, when N learned that Huseby had earned \$10,000 a few months earlier by providing confidential consulting to Rampalle Corp., which is in the beverage business.

Huseby makes the following two assertions and has credible witnesses willing to testify that they are true:

- a) many CFOs provide occasional consulting to businesses outside their employers' industries; and
- b) on March 9, 2018, N's Vice President for Human Resources, Michelle Smith, told Huseby that his "employment contract permits small occasional consulting because it is minor in the scheme of things."

N disputes both of these assertions, and has credible witnesses willing to testify that they are false.

Huseby started searching for a new CFO job on Aug. 15, 2020 and found one a few days ago. This morning, he began working as CFO of a once strong, but now declining, software company. His salary is \$600,000 per year.

March 9, 2018

Mr. Michael P. Huseby
c/o 122 Fifth Avenue
New York, NY 10011

Dear Mr. Huseby:

This letter agreement (the "Agreement") is intended to set forth our mutual understanding regarding your employment as Chief Financial Officer of Nardo, Inc. (the "Company").

Accordingly, we are pleased to agree as follows:

1. Duties. You agree to be Chief Financial Officer for the term of this Agreement. In this capacity, you shall perform such duties and have such responsibilities as are typically associated with such position. While you are the Company's employee, you agree to devote your full business time and attention to the performance of your duties and responsibilities hereunder. You shall report to the Company's Chief Executive Officer. Your principal work location shall be at the offices of the Company located in New York City, provided that the Company may, in its discretion, relocate your principal work location to Palo Alto, CA.

2. Term. (a) The initial term of this Agreement shall be for a period beginning on March 13, 2018 (the "Effective Date") and ending on the third anniversary of the Effective Date or, if earlier, the termination of your employment in accordance with the provisions set forth below (the "Initial Term"). At the expiration (but not earlier termination) of the Initial Term, the term of this Agreement shall automatically renew for additional periods of one year (each, a "Renewal Term"), unless your employment has earlier terminated or either party hereto has given the other party written notice of non-renewal.

(b) Your employment hereunder may be terminated by the Company immediately for Cause (as defined below) or following two weeks written notice to you for any other reason. Your employment hereunder may also be terminated by you following written notice to the Company of your intention to resign.

(c) For purposes of this Agreement: "Cause" means (A) your engaging in intentional misconduct or gross negligence that, in either case, is injurious to Company; (B) your indictment, entry of a plea of nolo contendere or conviction by a court of competent jurisdiction with respect to any crime or violation of law involving fraud or dishonesty or any felony; (C) any gross negligence, intentional acts or intentional omissions by you that constitute fraud, dishonesty, embezzlement or misappropriation in connection with the performance of your employment duties and responsibilities; (D) your engaging in any act of intentional misconduct or moral turpitude reasonably likely to adversely affect the Company or its business; (E) your abuse of or dependency on alcohol or drugs (illicit or otherwise) that adversely affects your job performance; (F) your willful failure or refusal to properly perform the duties, responsibilities or obligations of your employment; or (G) your material breach of this Agreement or of any other contractual duty to, written policy of, or written agreement with the Company (with the exception of a material breach based in good faith on the advice of professional consultants, such as attorneys and accountants).

3. Compensation. During the Initial Term and any Renewal Term, the Company shall pay you, for all services you perform hereunder, an annual salary of U.S. \$900,000.

4. Entire Agreement. This Agreement constitutes the entire agreement between you and the Company with respect to the terms and conditions of your employment by the Company and supersedes all prior agreements, understandings and arrangements, oral or written, between you and the Company with respect to the subject matter hereof.

If the foregoing accurately reflects our agreement, kindly sign and return to us the enclosed duplicate copy of this letter.

Very truly yours,

NARDO, INC.

By: /s/ Michelle Smith

Name: Michelle Smith

Title: Vice President, Human
Resources

Accepted and Agreed to:

Michael P. Huseby

By: /s/ Michael P. Huseby

Name: Michael P. Huseby

Date: March 9, 2018