**Final Examination**

 **Contracts, Fall 2020**

 Prof. Warner

The exam is 3 hours long.

The exam is open book; you may use material on your computers, as well as commercial or personal printed materials.

Steve Sowle is the CEO of the exercise bike company Sowle Cycle, which offers exercise classes and sells the Sowletown, a stationary exercise bike for home use. Sowle Cycle has a website—SowleBikes.com that allows customers to place orders online for SowleTown bikes. SowleBikes.com homepage prominently displays this text:

Why buy from us? Visiting our site entitles you to our lowest price guarantee. Buy without worry! Find the item you buy for a lower price anywhere within three weeks of purchase and we will give you your money back *and* you keep the item! Buy from us and the guarantee is yours.

Sowle told his lawyers not to include or mention the above text in the website’s online Terms of Sale agreement. He said, “Don’t mention the money back guarantee in the Terms of Sale agreement. If I want to delete or change the language on the website, I don’t want to have to rewrite the Terms of Sale agreement too. People will know what the deal is by reading the website. Nobody reads Terms of Sale agreements.” The lawyers do as Sowle insists, and the Term of Sale agreement contains nothing at all that pertains to the money back guarantee. The Terms of Sale agreement contains this clause:

*Entire agreement clause*: This agreement represents the complete and final statement of the parties’ obligations.

 Alice orders a SowleTown Deluxe (cost $1500) over SowleBikes.com. SowleBikes.com is out of the SowleTown Deluxe, so, as a replacement, it sends the SowleTown Pro (cost $2000), for which they charge only $1500. Alice is delighted to get the more expensive bike and keeps it. A week later she discovers a (new, not used) SowleTown Deluxe for sale on Amazon.com for $1450. She requests her $1500 back from SowleBikes.com, which refuses to return her money.

Sowle has written a book, *Pedaling Sowle*, about his business career. It is to be published by Santana Press. Sowle has 1000 pre-public release copies of the book in his warehouse. The New Age book store Mystical Cycle in Santa Monica, California contacts Sowle to purchase all the copies. Sowle sends Mystical Cycle a definite and complete signed written agreement for the purchase of 1000 copies of *Pedaling Sowle* with a note that says “Sign and we have a deal!” Mystical Cycle signs and returns the agreement and includes a note that says “We are delighted to accept your offer. We look forward to receiving the copies of the book. Disputes arising under this contract shall not be subject shall be subject to arbitration.” The agreement Sowle sent did not mention arbitration.

Sowle meets with Carlos, who runs the marketing firm Oye Como Va, which specializes in social media marketing. Sowle tells Carlos, “Send me a proposal.” Carlos sends Sowle asigned copy of the firm’s standard form agreement between Sowle and Oye Como Va. The agreement specifies all relevant details of the deal. Sowle signs and returns the agreement. In reliance on the agreement with Oye Como Va, Sowle spends $2,000 on an expert to develop his own LinkedIn and Facebook sites. Oye Como Va does not require this, but Sowle correctly believes that good looking sites of his own will supplement Oye Como Va’s efforts.

*Pedaling Sowle* is scheduled for publication in March 2021, and Sowle’s contract with Oye Como Va obligates it to begin marketing on social media sites on April 1, 2021. Oye Como Va uses Amazon’s cloud computing services to maintain all of its business operations and its entire Internet presence, and on March 31, completely unexpectedly, all of Amazon’s cloud computing services go down for seven days, and Oye Como Va is unable to begin marketing until April 7. Oye Como Va has a “cyber interruption of business” insurance policy that provides compensation for business losses from such an event.

On April 3, a new autobiography, *Cycle For Your Life*, appears on the market by Sowle’s longtime rival, John Foley, founder and CEO of Peleton. Foley’s book is immediately very popular, promoted in part by an intense marketing campaign on social media. It was common knowledge in the publishing world that Foley would publish the book soon, but it was uncertain what the exact date would be. It is well known in the publishing world is that, when rival books are published close together, the better marketed book sells better.

On April 1, Sowle realized his marketing needed to match Foley’s, so he took over the social media marketing himself when Oye Como Va was unable to perform, and his efforts were as effective as Oye Como Va’s would have been, leading to the same number of sales. Sowle’s time, effort, and expenses come to $20,000, which is approximately what a reasonable social media marketer would have spent at that time under those conditions to promote sales of the book. After April 7, Oye Como Va performs as promised, and Sowle ceases his own marketing efforts.

**Questions**

(1) The SowleBikes.com homepage prominently displays this text:

Why buy from us? Visiting our site entitles you to our lowest price guarantee. Buy without worry! Find the item you buy for a lower price anywhere within three weeks of purchase and we will give you your money back *and* you keep the item! Buy from us and the guarantee is yours.

Is the display of the text an offer?

(2) Whatever your answer to Question 1, assume the display of the text is an offer which Alice accepts. Assume also the requirements of consideration are fulfilled. Further assume, ***for purposes of this question only***, that the Parol Evidence does ***not*** make the guarantee unenforceable. Make the strongest argument you can that Victoria is *not* entitled to her money back.

(3) As in Question 2, assume the display of the text is an offer which Alice accepts, and assume the requirements of consideration are fulfilled. Sowle claims that agreement formed by Alice’s accepting offer is unenforceable under the Parol Evidence rule. Is Sowle correct?

**Assume the Terms of Sale agreement is an enforceable written contract, which specifies the terms that apply to sales over the website, and treat the agreement formed by Alice’s acceptance of the offer as a written agreement formed prior to the Terms of Sale agreement.**

**Use the Parol Evidence rule as formulated in class. Use no other formulations.**

**If you discuss scope, use only the Normal Inclusion test for scope.**

(4) Assume Sowle’s sending the form to Mystical Cycle is an offer. (a) Did Mystical Cycle accept it? (b) No matter what your answer to (a), assume Mystical Cycle did accept the offer. Does the resulting agreement contain an arbitration clause?

**Assume Sowle and Mystical Cycle are merchants. If you find an expression of acceptance, you may assume it is definite and seasonable**.

(5) Assume that the agreement between Sowle and Oye Como Va meets the requirements of offer, acceptance, and consideration. Oye Como Va claims that impracticability doctrine excused its obligation to market during the April 1 – 6 period. Is it correct?

(6) What are Sowle’s expectation/mitigation/foreseeable damages from Oye Como Va’s failure to perform from April 1 to April 6?

**You may assume any damages are provable with reasonable certainty. There is no need to discuss whether the breach is material.**