**Final Examination**

**Contracts, Fall 2021**

Prof. Warner

The exam is 2 hours long.

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

Steve Sowle owns and operates a business devoted to research on solar energy, Sowle Research—called “SowleR” for short. He is negotiating with Joanna Donne, the CEO of Programming Donne to create software which will link solar energy installations in private homes to a grid that will facilitate more efficient energy use. As they are negotiating, Sowle says, “One thing. I will sell the software for two years, but after that, I will make the software publicly available for free. You agree with that?” Donne says, “I agree.” Sowle adds, “It is important that you deliver the software to me on June 13. The business constructing the grid has agreed in a written contract to buy my software for $500,000. I have to get the software to them by June 15. If I am late, they will buy from a competitor instead. That June 15 date is set in stone. Even if I get the software to them on June 16, they will not accept it and buy from a competitor.” Donne says, “Understood. I will be on time.”

Donne sends Sowle an unsigned written agreement—the software agreement—that describes all pertinent details of the software deal. The details include the June 13 delivery date and the detailed specifications the software must meet. Donne includes a note that says, "Look this over. Make changes if you want. Sign it, and return it. I will make sure it is OK with me, and, if it is, I will sign it and send it back to you." The written agreement contains this clause:

*Entire agreement clause*: This agreement represents the complete and final statement of the parties’ obligations. Neither party is relying on any oral or written representations not contained in this agreement.

The agreement also contains a clause requiring binding arbitration of disputes.

When Sowle receives the agreement, he calls Donne and says, “Got your agreement. I will look it over, see if I want any changes, and send it back to you.”

The agreement does not say anything about selling the software for two years and then making it publicly available for free. When Sowle notices that, he calls Donne to discuss it before he signs the agreement. He says, “We don’t have anything in the written agreement about selling the software for two years and then making it publicly available.” Donne replies, “Do we need to put that in there? Our word is good enough, isn’t it?” Sowle responds, “Good enough for me! Should we ask the lawyers whether we need to put it in?” Donne says, “What would be the point? I don’t understand most of what they say anyway.” Sowle replies, “Same for me. Let’s leave it out. But except for that, everything we have agreed to is in the written agreement, right? Donne says, “Right! Everything else is in there. If it is not in there, we did not agree to it.”

Sowle signs the agreement and sends it to Donne with a cover letter that reads, “Here you go, for your consideration. Sign and we have deal.” When Donne receives the agreement, she signs it and also includes this clause in her response:

The parties agree to resolve all disputes arising out of this agreement in courts of competent jurisdiction in Illinois, applying Illinois law. The parties do **not** agree to resolve disputes by binding arbitration.

Donne sends the document back to Sowle with a note that says, “Here is my acceptance. Glad our deal is done.” Sowle and Donne have no further communication about the documents.

Donne uses the cloud computing services of The Mekong, a provider of such services to businesses. She uses it to maintain all of her business operations and for software development. On June 1, Mekong’s entire cloud computing services go down for six days. As a result, it is impossible for Donne to deliver the software to Sowle on June 13. Neither Sowle nor Donne had any reason to think that The Mekong’s services would go down. When Donne signed up with The Mekong, it offered her its “cyber disruption insurance” policy at a very reasonable rate. The Mekong’s website explains in detail why such insurance is a very reasonable option for businesses that depend on cloud services. Donne read through the material and decided it would be reasonable to purchase insurance after her research showed that it is increasingly the custom and practice of people in her situation to buy such insurance. However, she never got around to buying the insurance.

Donne delivers software on June 2, but it does not comply with the specifications in the contract. Donne seasonably announces her intention to cure. On June 16, Donne delivers that software meets the specifications in the contract, but Sowle refuses to accept it.

**Questions (1) – (5)**

(1) Does the written software agreement between Sowle and Donne contain a clause requiring binding arbitration? Begin your analysis with the unsigned written agreement that Donne sends to Sowle.

**TREAT SOFTWARE AS A GOOD.** Assume that Sowle and Donne are merchants. You may assume that **if** there is an expression of acceptance, it is definite and seasonable.

(2) The written software agreement refers to "software" without specifying the language in which it is written. Before entering the agreement, Sowle said to Donne, “You’re the software expert, so I leave the choice of the language to you.”

Sowle nonetheless assumed the language would be Python, which is the most widely used language. He thought that was a good idea for software made publicly available. Donne assumed the language should be C, which runs much more quickly than Python. She thought the speed was essential to software that would perform adequately in connecting homes to a grid.

Donne argues that the written contract is unenforceable under mutual mistake doctrine. She claims that she and Sowle entered the written contract under the mutually mistaken belief that they meant the same programming language by the word “software.” Is Donne correct?

Discuss only whether Donne is right. **DO NOT** discuss any allocation of risk issues under mistake doctrine.

There is no trade usage for “software.”

(3) Consider the oral agreement to sell the software for two years and after that make it publicly available. Is it enforceable under the Parol Evidence Rule?

Even if you decide the written agreement is not a complete integration, assume it is and give the best argument you can that the oral agreement is still enforceable.

**NOTE: USE THE PAROL EVIDENCE RULE *AS STATED IN CLASS*, AND USE ONLY THE NORMAL INCLUSION TEST FOR SCOPE.** You may assume the oral agreement satisfies the requirements of offer, acceptance, and consideration, and assume that the written software agreement between Sowle and Donne is a legally enforceable agreement.

(4) Did Donne breach the software agreement on June 2? Did she have a right to cure? Did Sowle breach when he refused to accept the software on June 16?

(5) Does Donne owe Sowle $500,000 in consequential damages? Assume the market price of the software at the time Sowle learned of the breach is the same as the contract price. Assume Sowle does not attempt to cover. Assume there are no incidental damages.