**Final Examination**

**Contracts, Fall 2018**

Prof. Warner

December 17, 2018

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. You may not access the Internet.

Steve Sowle owns and operates Sowle Foods, a grocery store and cooking equipment chain. Sowle Foods maintains a website, TheSowleNet.com. The website allows customers to place orders online. Online orders are filled at the nearest local Sowle Foods and delivered to the customer. TheSowleNet.com homepage prominently displays this text:

Why shop at Sowle Foods? Visiting our site entitles you to our lowest price guarantee. Lowest price or your money back! You never have to worry if you buy from us! 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.

Sowle told his lawyers not to include the above agreement in the website’s online Terms of Use agreement. He said, “**The idea is that people *read* the promise about the money back guarantee and are motivated to buy over our site because they know they get their money back. Nobody reads Terms of Use agreements. So don’t even bother to put in in there.”** The lawyers do as Sowle insists, and the Term of Use agreement contains nothing at all that pertains to the money back guarantee. The Terms of Use agreement contains this clause:

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

Victoria Geist orders a Lodge Cast Iron Skillet (cost $65) over TheSowleNet.com. TheSowleNet.com is out of the Lodge Cast Iron Skillet, so, as a replacement, it sends a Le Creuset Signature Iron Handle Skillet (cost $200), for which they charge only $65. Victoria is delighted to get the more expensive skillet and keeps it. A week later she discovers a Lodge Cast Iron Skillet for sale on Amazon.com for $50. She requests her $65 back from TheSowleNet.com, which refuses to return her money.

Peter Seele contacts Sowle to negotiate the purchase of two professional stoves for his chain of restaurants (known as *Quintessence*, with the motto “Warm your mind in our soul kitchen”). The type of stove Seele wants is one Sowle invented, the SowleStove, a 48-inch dual fuel steam range. Sowle sends Seele Sowle’s standard purchase order form filled out for two SowleStoves and specifying all other relevant details of the sale, including a delivery date of June 13, 2018. The form includes these two clauses:

Disputes arising under this contract shall not be subject shall be subject to arbitration.

*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.

When he receives the form, Seele calls Sowle. He says, “Just so we are clear, only the 48-inch stove is acceptable. I know you have a 44-inch model, but that is not big enough for my needs. One more thing, I am opening a new restaurant and using the stoves there. They are essential for the restaurant to be a success. A delay in delivery would cost me $100,000.” Sowle says, “Understood. No problem.” Seele also says, “I am also concerned about your ability to supply the stoves. I just read an article in the trade magazine, *Eternal Fire*, about a sudden surge in demand for 48-inch dual fuel steam ranges. Are you sure your manufacturer can get the 48-inch Sowle Stoves to you in time to fulfill my order?” Sowle replies, “That is no problem. I was just talking with the manufacturer, Brimstone, and it said it had two 48-inch SowleStoves scheduled for completion in plenty of time for me to fill your order.” Seele replies, “Our souls can rest easy then.” In fact, Sowle misremembered his conversation with Brimstone. Brimstone said it has four *44*-inch SowleStoves scheduled for completion. It does not have any 48-inch stoves that will be ready in time to send to Sowle for his order from Seele. They had to temporarily shut down production of those stoves because problems in their factory. Those problems are now fixed, and they can in the future supply Sowle with any number of SowleStoves he needs—just not by June 13.

Seele signs the purchase order and inserts an additional clause that says,

Agreement to arbitration: The parties agree that all disputes arising under this contract shall be resolved through binding arbitration.

Seele returns the contract with the additional page and a note that says, “I have accepted your offer. Glad our deal is done.” Sowle and Seele have no further conversations about the purchase agreement.

On June 5, Sowle learns that Brimstone is unable to supply him with any 48-inch SowleStoves. On June 9, he delivers two 44-inch SowleStoves to Seele, who rejects the delivery. Sowle then seasonably announces his intention to cure. Sowle has no idea about how he is going to get two 48-inch SowleStoves. Sowle broadcasts his plight on Twitter, and much to his surprise, his long lost cousin, Lou Cipher, contacts him to explain that he is an admirer and collector of 48-inch SowleStoves and that he has arranged for delivery of two 48-inch stoves from his collection to Sowle in time for Sowle to deliver them to Seele on June 13. Lou Cipher give the stoves to Sowle for free (with no delivery charges) out of admiration for Sowle’s great accomplishments. Sowle delivers the stoves to Seele on June 13, but Seele rejects the delivery and does not pay for the stoves. Seele was convinced that Sowle would be unable to deliver the stoves, so on June 12 he bought two 48-inch Sowle Stoves from Lou Cipher.

Questions

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

Why shop at Sowle Foods? Visiting our site entitles you to our lowest price guarantee. Lowest price or your money back! You never have to worry if you buy from us! Find the item you buy for a lower price anywhere within three months of purchase and we will give you your money back and you keep the item.

Is the display of the text an offer?

The display is an offer if (1) it is a manifestation of a willingness to enter a bargain (2) so made as to justify Victoria in thinking her assent will conclude the bargain. As to (1), the display of the website text and Sowle’s explanation to his lawyers--

“The idea is that people *read* the promise about the money back guarantee and are motivated to buy over our site because they know they get their money back”—show that Sowle is manifesting a willingness to enter a bargain. The bargain is definite and complete as to the money back guarantee. As to (2), the “guarantee” language of the text plus--“The idea is that people *read* the promise about the money back guarantee and are motivated to buy over our site because they know they get their money back”—shows that the display is designed to make people think their assent will conclude the bargain.

(2) Whatever your answer to Question 1, assume the display of the text is an offer which Victoria Geist accepts. Assume also the requirements of consideration are fulfilled. Further assume, ***for purposes of this question only***, that the Parol Evidence rule does ***not*** make the guarantee unenforceable. **Make the strongest argument you can that Victoria is *not* entitled to her money back.** Assume there is no trade usage concerning “the item you buy.”

*The best argument that Victoria is not entitled to her money back is based on interpretation doctrine. If the* ***“item you buy”*** *means that “item delivered and accepted” then Victoria did not find the “item she bought” at a lower price and so is not entitled to her money back. Does the “item you buy” mean “item delivered and accepted”?* **We start with Objective Intent test.** The test is that if a reasonable person would interpret the words and actions as a **promise** to do X, then they are a promise to do X. How would a reasonable person interpret **the phrase “the item you buy”**? Would it be the item ordered or the item delivered and accepted? **Suppose we hold that the “item you buy” is the item ordered?** Then Victoria *gets a more expensive skillet which she finds acceptable* and which SowleNet sends her a greatly reduced price. She would also get her money back for an item that she found to be better than the one ordered. *Is that a reasonable interpretation of “the item you buy”? No, no reasonable business would put itself in such a position.*

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

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

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

**Use only the Normal Inclusion test for scope.**

The rule is that the display text is unenforceable under the parol evidence rule if the text contradictions the ToU, or the **ToU is a complete integration** and the side agreement is in its scope.

Complete integration = parties intend complete and final statement of obligations. Did they have such an intent. Evidence for: the entire agreement clause is evidence that the parties intended the ToU to be the complete and exclusive statement of the parties’ obligations. But this evidence is not decisive and may be overridden by other evidence to the contrary. Is there evidence to the contrary? Yes . . . So not a complete integration.

(4) Assume that Sowle’s sending the purchase agreement to Seele is an offer. Did Seele accept the offer? And, assuming he did, does the resulting agreement contain an arbitration clause?

(5) Would Mistake Doctrine excuse Sowle from performing under his contract to Seele?

(6) What damages, if any, does Seele owe Sowle?

Assume that SowleStoves are quite popular and that Sowle sells several stoves a year.

**Some possibly relevant UCC Sections (you may need more than these sections for some questions)**

§ 2-207. Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

§2-508. Cure by Seller of Improper Tender or Delivery; Replacement

(1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

§ 2-710. Seller's Incidental Damages.

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.