INSTRUCTIONS:

1. This is an OPEN BOOK exam. All materials other than library or stolen materials may be brought into the examination room.

2. This exam has three questions. In grading, each question will be weighted according to the time I recommend you spend on each.

3. Where appropriate, you should cite sections of the Uniform Commercial Code by number. Case precedent may but need not be cited. It is sufficient if you indicate clearly that you know and understand a principle of case law, even if you cannot cite authority for it.

4. If at any time in this examination you believe you need additional facts, state why you think that you need additional facts. Then hypothesize reasonable facts not inconsistent with the facts given and proceed.

5. Your graded exam and a typed copy of good student answer will be available from me during the first week of the second semester. I will also schedule a special time for going over the exam, and make available appointments for individual conferences on your exams. Look for an email on class listserv announcing these activities.

Question 1 (90 minutes)
Student attended the State University of Utopia Law School and received very high grades. Between his second and third year, when he was 23 years old, he served as a summer intern for Braun, Fielder and Weeks (B, F & W), a large law firm that was located in Chaos, the largest city in Utopia. Several partners told him that the firm had a terrific future. They did not mention that three major corporate clients, who were dissatisfied with the way the firm had handled important litigation, were contemplating transferring their legal business to another firm. There is no way that Student could have discovered this.

Shortly after Student returned to his third year classes, Paul Partner telephoned Student. Partner offered Student a position as an associate at B, F & W, to begin one month after Student's graduation from Utopia Law School. Partner said that the beginning salary would be $150,000 per year. Partner explained that it was the firm's policy to evaluate all associates after their third year. Those whose work was satisfactory would be invited to continue to work for the firm as associates until they had been at the firm for six years. At the beginning of the seventh year, the firm considered each associate for a partnership. Those who became partners, of course, would continue with the firm with a substantial increase in responsibility and compensation. Those who were not granted partnerships would have to leave the firm. B, F & W had an excellent record in helping those who did not make partner to get jobs elsewhere with clients or in smaller law firms. Partner stressed the fine training which his firm gave young associates. He said that many smaller law firms were eager to get people who had B, F & W training.

Student immediately agreed to join the firm a month after he graduated, and thanked Partner for giving him the wonderful opportunity. Shortly after this conversation, Partner sent Student a signed letter accurately reporting their telephone conversation in detail. The letter detailed the firm's promotion policy as stated above. The letter asked Student to counter-sign an enclosed copy of the letter and return it to the firm, signifying his agreement to the offer, which Student did.

Student then revised his third year schedule at Utopia Law School. He took only courses which were related to the kinds of legal practice handled by B, F & W. Student did not interview other law firms, seeking offers for beginning positions. Student found an appropriate apartment in Chaos and signed a two year written lease, starting the next summer.

During Student's third year at Utopia Law School, B, F & W's fortunes declined. The firm lost the three clients mentioned above, and economic conditions in Utopia were not good. B, F & W, who had made similar arrangements as with Student with nine other law students, decided that they needed to do something to cut costs. But the firm did not want just to dismiss the students who had received a written letter of employment, for fear that it would compromise their ability to recruit new employees in the future. Paul Partner designed a plan to save money while minimizing damage to the firm's reputation. Student, and the nine others who were to join the firm in the fall, were offered $30,000 if they would agree, in writing, to defer joining B, F & W for one year. The ten associates-to-be could do anything they wanted except work for a competing law firm, and they could keep whatever money they made during the year in addition to their $30,000 compensation from B, F & W.
Paul Partner telephoned all of the associates-to-be and told them of the firm's problem and its plan. When he received Partner's call, Student objected. He pointed out that his financial circumstances were strained, and he needed to begin repaying his large student loans which he had taken to finance both college and law school. Partner defended the firm's plan but the conversation ended with no agreement.

Two days later Paul Partner invited Student to his office to discuss the matter further. Partner made clear that B, F & W would honor its employment letter if Student insisted. However, Partner also made clear that many of his colleagues would be upset by Student’s non-cooperative behavior. All the other associates-to-be had agreed to the deferral, he pointed out. He stated that Student’s refusal to agree to the deferral offer could be held against him when it was time for Student’s third year review. He also informed Student that a current Associate was in the process of being dismissed, with one month severance pay, for inadequate performance even though he had been with the firm for only one year. Partner also expressed his concern that, if Student did not defer, other partners at B, F & W would not assign Student important legal work, which would make it harder for Student to find another well paying job if he should leave B, F & W because he would not have had much meaningful experience. Partner stressed that he had Student’s best interests at heart, and he truly believed that Student should agree to the deferral plan.

Student was still reluctant to postpone starting work as a lawyer, partly because he would have to defer payments on his student loans (which would cost him some interest). However, in the past two days Student had looked for other law jobs which dealt with corporate work, and he had quickly learned that, because of the economy, there were no open positions at firms paying anything close to the starting salary for B, F & W. And he realized that refusing to accept the deferral would probably be harmful to his long-term career. So Student reluctantly agreed to sign a deferral agreement that Paul Partner had prepared. The agreement stated explicitly that in return for $30,000, Student waived all claims against B, F & W arising from the deferral of his employment. And it stated that the effective date of the previously signed employment letter was postponed for one year.

Student's uncle offered a job for the year in the uncle's real estate business, selling real estate on commission. This job was also in Chaos, so Student could use his apartment. Student was not very successful in selling real estate, given the economy, but he managed to live on the $30,000 provided by B, F & W. During the year Student stumbled on information about Mark Roth, owner of several commercial office buildings in Chaos, who was cheating on his federal income taxes by overstating expenses. He learned about this practice when a fellow employee at his Uncle’s real estate firm told Student about preparing false invoices for commissions ostensibly paid by Roth, when in fact the tenants in the office buildings had just renewed their leases and Roth had paid no commission to anybody. Student turned this information over to the United States Attorney, and Roth is about to be indicted for income tax evasion.

As Student’s deferral year came to close, he received another call from Paul Partner, who told him that, regretfully, the firm would hire only nine of the students who had been deferred for the past year, and that Student did not have a job at B, F & W. Managing Partner told Student
that the law firm’s economic fortunes had declined further, and that, in addition, one of the firm’s long term clients, Mark Roth, had specifically asked that Student not be hired. B, F & W could not afford to lose another important client.

Student immediately looked for positions with other law firms. He took the best one that he could find. He was hired by a Racine, Wisconsin law firm. It paid only $50,000 per year. Also, this Racine firm operates under a system where at the end of a probationary period, successful associates are given the title of senior associate. The firm will promote no one to partner until one of the existing four partners dies or retires. A senior associate continues on salary but is not entitled to a share of the firm's profits and has no voice in running the firm. A senior associate's salary, while substantial, is far less than even the most junior partner's share of the firm's profits.

Student thinks his career has been prejudiced substantially by B, F & W’s actions. You work for a firm that specializes in employment law. Student has come to the firm seeking advice. The partner for whom you work, asks you to prepare a memorandum considering Student's possible causes of action against B, F & W and the potential remedies associated with each. The memorandum should also discuss B, F & W’s likely response to each of Student's theories of liability and remedy. Write the memorandum.

You may assume that the law of Utopia applies to all aspects of this question. Utopia is located in the United States. It has enacted the UCC. The Utopian Supreme Court follows the general common law of contract on all issues for which a substantial majority of other American jurisdictions are in agreement. Where there is substantial disagreement between other jurisdictions on a question of law, the Utopian Supreme Court has established a tradition of paying close attention to policy arguments. In its policy preferences, however, the Court is thoroughly centrist, avoiding positions that would be considered extreme or “out of the mainstream” by most informed opinion.
Jeff Brown is a Wisconsin ceramicist, making among other things individually designed, hand made bowls, plates, and serving platters. Each is “one of a kind”. Brown does not make sets of matching dishes. Brown sells his work in regional galleries and gift stores patronized by wealthier clientele, as well as at art fairs. In recent years his income has grown significantly, as he has become better known and has been able to raise his prices.

Cindy Chai moved to Milwaukee from San Francisco in January, 2009, because her partner, a famous heart surgeon, took a position with a well known Milwaukee hospital. Chai had been a real estate developer in San Francisco who managed to liquidate her holdings just before real estate market crashed in 2008, leaving Chai with a good deal of money to invest. Upon arriving in Milwaukee and surveying the opportunities, Chai decided to start a chain of five teahouses in wealthier Milwaukee neighborhoods. After signing five year leases for appropriate locations, she contacted Brown about making plates for her teahouses. Chai thought that having Jeff Brown plates would help attract patronage from the many residents of Milwaukee who were interested in arts and crafts.

Brown welcomed Chai’s business. Chai offered to buy 40 plates for each teahouse, or a total of 200 plates. For Brown this was a big order so he offered Chai a 20% reduction in his usual per-plate price. The contract price would be $100 per plate, or a total cost of $20,000 for the order. The plates were to be individually designed by Brown, but Chai specified the size (7 inches in diameter), and that the designs should be “compatible” so that they looked like part of a set. Brown had not previously made dishes that looked like a set, but Brown agreed to his condition nonetheless. Chai also mentioned that the plates should be “stackable” (i.e., capable of being stacked on top of each other), an important concern for a food serving establishment that did not have the space to store each plate separately. Chai and Brown agreed on a delivery date of September 5, 2009. It would take Brown several months to make this many plates.

Brown’s partner, Susan Green, is a lawyer for a Milwaukee firm, where she does contracting work. She offered to write up a formal written contract for this large order. Because Brown did not usually prepare contracts for his sales, he did not have a standard form contract. Green wrote a contract that described the goods to be sold as “200 stackable 7 inch plates of compatible design”. The contract required that 50% of the contract price was to be paid when the contract was signed. One clause in the contract stated that: “If the seller makes timely delivery, the unpaid contract price shall be paid on September 15, 2009 whether or not the buyer takes delivery of the plates. The seller shall be under no obligation to mitigate damages by reselling plates. If the buyer refuses delivery, seller shall hold the plates for disposition in accordance with the buyer’s instructions.” The contract also contained a clause stating: “SELLER MAKES NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY.” When Brown presented the written contract to Chai, she read it quickly, offered no objections, and signed it. Chai also wrote a check for the required $10,000 deposit.
While Brown was producing the plates, Chai proceeded to prepare her teahouses for their scheduled opening on September 10, 2009. She hired a woodworker to design, make and install special wall racks, at a cost to her of $4,000. The racks were intended to display 10 Brown plates on the wall of each teahouse, and to serve as a substitute for the usual paintings or photographs that are placed on the walls of similar teahouses or coffee shops. In late August Chai placed advertisements in Milwaukee’s newspapers announcing her grand opening, at a cost to her of $1,000.

Brown delivered the plates on September 5, 2009, as promised. They were in five different boxes, each containing 40 plates. Cindy opened the boxes but did not inspect the contents closely. She was on that day quite distracted for two reasons. First, her partner had just told her that he was in love with another woman and was leaving the relationship. Second, Chai’s father, a widower, had a stroke on Sept. 2nd in San Francisco, where he lived. Though Chai’s father survived the stroke and did not lose his speech or other mental capacity, he was partially paralyzed and would need a great deal of personal care for the foreseeable future.

A few days later Chai decided to move back to San Francisco to live with and help her father. Her teahouses were never opened for business. She dismissed the employees she had hired, as all were employees at will. She negotiated settlements with the lessors, releasing her from her leases. She offered the five wall racks for sale on eBay, eventually selling them for $400 (for all five). And on September 10, 2009, she delivered the five boxes of plates back to Brown’s studio. Brown was not there so she left the plates on the doorstep. She also left a letter, which read as follows:

Dear Jeff:

I am regretfully returning the plates. Unfortunately they are not stackable, as required by the contract. Because each one is individually made, though each is 7 inches in diameter, they do not have precisely the same thickness or curvature. In my opinion it is not wise to place more than 5 plates in a pile, for fear that the pile would become unstable and some breakage might result. I have checked my opinion with a friend who manages a coffee shop and he shares my opinion. But it is not practical to limit stacks to only five plates in a busy teahouse. It requires too much storage space for the plates.

Please refund the $10,000 deposit that I have paid. As you may have heard, I am moving immediately to San Francisco to care for my father who has become an invalid. Send the check to the following address: 2345 Market Street, San Francisco, CA 94114.

Sincerely,

Cindy Chai

Green has decided to represent Brown in a lawsuit against Chai for the balance of the purchase price. Brown is unwilling to sell the returned plates at his usual outlets – galleries, gift shops, and art fairs – fearing that if he offered them for sale, they would make it more difficult for him to sell his other work at his usual prices. So Brown kept the plates in his storage facility for eventual delivery according to Chai’s instructions. Green has been able to obtain service of
process on Chai, when she returned to Milwaukee to collect her personal possessions. A Wisconsin trial court has determined that it has personal jurisdiction to hear the case against Chai and that Wisconsin law will be applied to the case.

You work for a law firm that has been retained by Chai to defend against Brown’s lawsuit. You have been asked to write a memorandum advising the senior partner of the law firm (1) whether Brown’s lawsuit is likely to succeed, and (2) whether a potential counterclaim by Chai for return of the deposit and for consequential damages would likely be successful. Discuss all reasonable arguments that are likely to be raised by Brown’s attorney as well as reasonable arguments that could be made on behalf of Chai, and identify what kinds of evidence might be important to the outcome of the litigation. The senior partner tells you that you may ignore all possible tort issues, as he is an expert in tort law, and he instructs you to assume that the Magnuson-Moss Warranty Act has no application to this contract. The senior partner further suggests that in your memorandum you first address liability issues (e.g., who, if anybody, has breached the contract) and then discuss any remedy issues. Write the memorandum.

Question 3 (60 Minutes)

Terry Terrific, a recent graduate of Wisconsin Law School, is an assemblyperson in the Wisconsin legislature. Contracts was her favorite course in Law School. Since being elected, Terry has proposed much legislation based on ideas that first occurred to her in that course. Terry is a proponent of freedom of contract. A constituent has told her about a personal experience in which a court refused to enforce a contract for employment because it was not in writing. This has prompted Terry to prepare the following legislation:

“No contract for services shall be unenforceable simply because it was made orally. All existing legislation inconsistent with this provision is repealed.”

Terry is also in favor of simplifying the law. She remembers from Law School that the law respecting illegal contracts is particularly confusing. She has heard about legislation from New Zealand that authorizes a court to grant “relief to any party to an illegal contract ... as the Court in its discretion thinks just”. Terry has proposed a Bill to enact similar legislation in Wisconsin.

Terry’s Bills have been referred to the same state legislative committee. You are a legal advisor to the Chair of that committee, who has a good general understanding of contract law but needs to be reminded of details with respect to these two Bills. She asks you to write a memorandum discussing the following questions: (1) What practical changes, if any, would Terry’s Bills make in contract law? Is either Bill, if enacted, likely to change the outcome of very many cases? (2) What are the most persuasive arguments that are likely to be made in favor of and in opposition to each Bill?

Write the memorandum.