

MONTEREY COLLEGE OF LAW

**REMEDIES**

Final Examination

Spring 2017

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INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

Question 1

Alice took her diamond ring worth \$14,000 to Bob, a jeweler, to have the stone reset. After Bob had agreed to reset the stone and Alice had left the shop, Bob carelessly placed the ring on a counter for a few minutes while he helped another customer. Carl, also a customer, took Alice's ring and left the shop.

Carl later sold the ring for \$15,000 to Dan, who knew nothing about Carl's theft. Carl deposited \$2,000 of the proceeds in a savings account that already contained \$5,000 of his own funds and bought Blackacre with the remaining \$13,000.

When Alice returned for her ring, Bob told her that it had been stolen, that he thought he knew the identity of the thief, that he had hired a private investigator, and that he hoped to recover the ring. The investigator's activities prompted Carl to admit his theft and reveal that he sold the ring to Dan.

Blackacre is now worth \$26,000. The balance in Carl's savings account, which had dropped to a low of \$600 after he had deposited the \$2,000, is now \$3,000.

What are Alice's rights and to what relief, if any, is she entitled? Discuss.

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Question 2

Bosco Car Company produces high-quality American automobile for the world market, selling their high-performance vehicle equipped with special-quality tires. In October 2016, Bosco entered into a valid, written contract with Salvo Tire Company to provide 100,000 special-quality tires for Bosco's 2017 production year, at a cost of \$1,000,000.

In November 2016, Israel and Iran begin a major conflict. The Middle East erupted into several zones of conflict and the global price of oil tripled. As a result, the price of tires went up drastically.

In December 2016, the Salvo Tire Company informed Bosco Car Company that it refused to perform per the October contract for 100,000 tires, due to increased production costs. Salvo offered to meet with Bosco to adjust the terms of the October contract but Bosco lied and said that the 2017 production run had begun and there was no time for such a meeting. In fact, Bosco had not begun its 2017 production run.

In January 2017, Bosco Car Company was desperate for tires and was offered a contract by Segundo Tire Company for 100,000 special quality tires, at a cost of \$1,500,000. The increase in the price of oil had driven the market up so that, as of January 2017, 100,000 special-quality tires had a fair market value of \$2,000,000.

Bosco Car Company is considering suing Salvo Tire Company. Advise Bosco Car Company on their options regarding:

1. Legal Remedies available, including possible defenses, if any.
2. Equitable Remedies available, including possible defenses, if any.

Do not be concerned with contract formation or contract defenses.

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### Question 3

Dacme built a power plant in a rural area. As part of its operations, Dacme operates a smoke stack. Dacme monitors the levels of smoke discharged daily.

About a year after Dacme began operations, Penny, a spa owner, purchased a new building for her spa about half a mile away from the smoke stack. Within several months, some of Penny's clients stopped coming. Penny initially attributed the loss of clients to the distance of the new location. After another year of continuing loss of clients, Penny was informed by several former clients that the smoke stack made the spa experience unbearable. Penny's total loss was about \$100,000, and she projects that her losses will increase every successive year unless Dacme stops operating the smoke stack during business hours.

Dacme is the largest employer in the county, employing 2,000 employees. As a result of Penny's complaints, Dacme hired a consultant to investigate the emissions of the smoke stack and learned that installation of a new filtration system could substantially reduce, if not eliminate, the emissions. The filtration system would cost almost \$500,000, which could only be paid if financed over a 5 year term. Relocation of Dacme would cost millions of dollars and would cause Dacme to cease operations. Operating the smoke stack during non-business hours would cost Dacme \$75,000 more per year. Relocation of Penny's Spa would cost approximately \$300,000.

Penny sued Dacme requesting an injunction either to enjoin all operations of Dacme or to require that Dacme cease or remedy the discharge from the smoke stacks. Penny also claimed that she should be awarded substantial damages to compensate her for her past and prospective losses. Dacme opposed the prayer for an injunction on the ground that its operations in the area preceded Penny's activities, and asserted that either an injunction requiring any of the remedies sought by Penny or an award of damages of the magnitude sought by Penny would put Dacme out of business.

1. What arguments might be made for and against an injunction incorporating each of the forms of injunctive relief sought by Penny, and what would be the likely result on each? Discuss.
2. How should the court rule on Penny's claims for past and prospective damages? Discuss.

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1. ALICE vs. BOB

A. Rights

(1) Negligence

- a. Duty: Alice, as a customer, was a foreseeable plaintiff.
- b. Standard of Care: Bob was the equivalent of a bailee and owed a duty to act with reasonable care when handling a customer's property.
- c. Breach: Bob left the ring unattended "for a few minutes"
- d. Causation: Bob's carelessness was the actual & proximate cause. The intervention of a criminal act regarding an expensive ring was foreseeable.
- e. Damages: Alice's property loss
- f. Defenses: None apply as Alice's behavior was without fault.

B. Remedies

(1) Compensatory Damages

- a. Measure: Bob is liable for the actual value (\$14,000 or \$15,000).
  1. The choice of either \$14K or \$15K does not make the value uncertain
  2. The damages are, as mentioned above, foreseeable & causal.

2. ALICE vs. CARL

A. Rights

(1) Trespass to Chattels

- a. An intentional interference with a chattel affecting a marketable interest.

(2) Conversion

- a. An intentional act that interferes with plaintiff's right of possession, so serious that it warrants full payment (forced sale) for the chattel.

B. Remedies

(1) Compensatory Damages

- a. Measure: Value of chattel at the time of taking.

(2) Punitive Damages

- a. Measure: Damages that will punish & deter for willful, wanton, or malicious conduct. Related to the actual damages.

(3) Replevin

- a. Legal restitution permitting recovery of specific chattel (ring), however, Carl no longer has the item.

(4) Constructive Trust

- a. Equitable restitution imposing a fictitious trust on Carl, so that property he possesses will not be unjust enrichment.
- b. Tracing of Blackacre: Tracing possible because Blackacre purchased "with the remaining \$13,000".
- c. Alice entitled to the increased value of \$26,000.

(5) Equitable Lien

- a. Equitable charge on property to prevent unjust enrichment.

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- b. Tracing of Co-mingled funds: The lien can only be to the extent of the lowest intermediate balance (\$600).

3. ALICE vs. DAN

A. Rights

(1) Trespass to Chattels / Conversion

- a. A bona fide purchaser is (strictly) liable for Trespass to Chattels and Conversion if the chattel was stolen from the true owner.
- b. Doctrine: A thief cannot deliver title to a stolen item.

B. Remedies

(1) Compensatory Damages

- a. Measure: The actual value of the ring (\$14K or \$15K).
- b. Punitive damages not likely as no wanton behavior -- Dan "knew nothing about Carl's theft".

(2) Replevin

- a. Recovery of the specific chattel is possible as Carl seems to have possession.

(3) Election of Remedies

- a. Alice may not recover the value of the ring from all three defendants, but may only recover one remedy. When plaintiff recovers from one, there is a satisfaction and she may not recover further against any other joint tortfeasor.
- b. Alice's best remedy is the Constructive Trust for Blackacre because she is entitled to the appreciated value.

BOSCO Car Company vs. SALVO Tire Company

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1. SALVO's message that it refused to perform per the October contract was an act of Anticipatory Repudiation which placed the SALVO company in present, material breach. The BOSCO Car Company may sue at that time, not needing to wait until the term of the contract begins or ends, and seek both legal and equitable remedies.

2. Legal Remedies

- A. Damages -- allowing Buyer, prior to acceptance, to cancel the contract, OR, ask for restitution of any amounts paid (2-711) plus "cover" -- the cost of replacement goods, less costs under contract (2-712), OR, ask for expectancy damages (2-713).

(1) Cover

- a. The facts do not recite any amounts paid to SALVO by BOSCO.
- b. Would the purchase of 100,000 tires from SEGUNDO be a "reasonable substitute"?
  1. The number of tires is the same and the quality ("special-quality") is the same or very similar. The price seems competitive because it is less than the fair market value during the same months. The Middle East conflict is a genuine, serious, global event so the "drastic" increase in price is foreseeable.
- c. The measure of damages would be the cost of cover (\$1,500,000.), less the contract price (\$1,000,000.), for damages of \$500,000.

(2) Expectancy (Benefit of Bargain)

- a. The measure of damages would be market price (\$2,000,000.), less the contract price (\$1,000,000.), for damages of \$1,000,000.
  1. Should "market price" be the time of breach, or the time the breach was learned? Those qualifiers would still be in December, after the market rose "drastically".
  2. No incidental or consequential damages are mentioned in the facts.
- b. Would the extra measure of damages not be allowed as a "windfall"?

3. Equitable Remedies

- A. Specific Performance -- a court order requiring SALVO to perform under to contract and deliver 100,000 tires for the contract price.
  - (1) There exists a definite, valid, written contract and no conditions are unsatisfied
  - (2) BOSCO needs to show that the legal remedy is inadequate, and that will be difficult because the damages discussed seem sufficient. Not "unique".
  - (3) The decree would be feasible to enforce as it is not a personal service contract and no jurisdictional problems are given in the facts.
  - (4) The defense of unclean hands may apply because BOSCO lied after SALVO's offer to "adjust the terms", showing possible bad faith and a reason why it should not receive a "windfall" measure of damages. Defenses based on time and writing do not apply because there is not an unreasonable delay and the contract was in writing.

### Spring 2017 Examination Remedies Answer to Question 3

#### 1. ARGUMENTS FOR AND AGAINST AN INJUNCTION

Issue: What arguments can be made for or against an injunction? [1]

Rules: An injunction orders the defendant to refrain from engaging in certain conduct or activities (i.e., a negative injunctions), or to perform a particular act (i.e., a mandatory injunction). [1]

To obtain an injunction: (i) the legal remedy must be inadequate; (ii) it must be feasible to enforce; (iii) the court must balance the hardships; and (iv) there must not be any defenses. [4]

##### a. Inadequacy of Legal Remedy

Rule: The remedy at law is inadequate when the injury suffered by the plaintiff is a continuing wrong. [1]

Analysis: Dacme constantly discharges smoke from its smoke stack, making this a continuing wrong. [1]

Conclusion: The legal remedy is inadequate. [1]

##### b. Feasibility of Enforcement

Rules: (i) Whether it is feasible to enforce an injunction depends largely on whether it is negative or mandatory in nature; (ii) negative injunctions pose no feasibility problems because the court can simply hold the defendant in contempt if it fails to refrain from engaging in certain activities; (iii) mandatory injunctions pose feasibility problems because the court must supervise the order to make sure the affirmative act is done properly. [3]

Analysis: (i) Penny has requested that Dacme stop operating and/or stop operating during business hours, which is a negative injunction; (ii) if the court grants this injunction, there will be no enforcement problems because Penny can simply inform the court that Dacme is still operating and the court can hold Dacme in contempt. [2]

(i) Penny has also requested that Dacme cease or remedy the discharge, which are mandatory injunctions; (ii) since these injunctions require complex and potentially long-term tasks, the court would be less likely to grant one of them than a negative injunction. [2]

Conclusion: A negative injunction is easily enforced so the court is more likely to grant a negative injunction. [1]



**c. Balancing of Hardships**

Rules: (i) The court may perform a balancing test to make sure the hardship to the defendant or the public does not outweigh the benefit the plaintiff may receive from the relief sought; (ii) under the majority view, if the harm to the defendant or public outweighs the harm to the plaintiff, the plaintiff may seek only money damages. [2]

Analysis: If Dacme were required to cease operations: (i) Dacme would have to shut down completely because relocation is too expensive; (ii) Dacme's employees would likely have to travel far to find new employment because they are from a rural community. [2]

If Dacme is permitted to continue its operations without changing any of its current practices, Penny's burden will be heavy because she has already lost \$100,000 and her losses are expected to increase each year. [1]

Given the effect this injunction would have on Dacme and the community, the hardships weigh in Dacme's favor. [1]

(i) If Dacme were required to cease or remedy the discharge, Dacme would have to install a filtration system at a cost of \$500,000 over 5 years (i.e. \$100,000 per year); (ii) if Dacme were required to operate during non-business hours, it will cost Dacme \$75,000 per year; (iii) if Dacme was not required to cease or remedy the discharge, Penny would continue to have \$100,000 yearly in business losses. [3]

(i) For both parties, the financial burden is severe, but as a large plant, Dacme can likely better afford the pay \$75,000-\$100,000 per year than Penny can; (ii) as such, the hardships seem to weigh in Penny's favor here. [2]

(i) Given the burdens associated with each injunction, the court would likely order Dacme to install the filtration system or operate during non-business hours, despite the fact that it requires some enforcement; [2] (ii) If other spas and business were to move into the area, the air would still be polluted, and Dacme would have to spend more time, energy, and money to remedy the nuisance. [2]

**d. Dacme's Defenses-Coming to the Nuisance and Laches**

**Coming to the Nuisance** Rule: The fact that a nuisance exists when the plaintiff moves to it is not a defense to a plaintiff's suit for injunctive relief. [1]

Analysis: Dacme cannot defend against an injunction on the basis that Penny came to the nuisance when she purchased her land one year after Dacme started its operations.

[1]

Conclusion: Dacme cannot successfully used the defense of coming to the nuisance. [1]

**Laches Rule:** (i) To prevail on the defense of laches, the defendant must show that the plaintiff has unreasonably delayed in asserting an equitable claim, and the delay has resulted in prejudice to the defendant; (ii) laches begins to run from the time the plaintiff had knowledge that a right has been infringed. [2]

Analysis: (i) Dacme cannot successfully argue that Penny is ineligible for injunctive relief because she failed to file a claim against it for more than a year after she purchased her land; (ii) Penny didn't learn that the smoke stack emissions were causing the business loss until more than a year after she moved into the area, at which time she promptly brought her complaints to Dacme's attention and then filed suit. [2]

Conclusion: Therefore, Penny did not unreasonable delay and the court should grant an injunction requiring Dacme to cease or remedy the discharge by installing a filtration system or operating at night only. [1]

## 2. PENNY'S CLAIMS FOR DAMAGES

Issue: How should the court rule on Penny's claim for damages?

### **Continuing Nuisance**

Rules: (i) Traditionally, the measure of damages for continuing nuisance is the value of the loss of use and enjoyment of the property (i.e., loss of profits), plus costs incurred in trying to abate the nuisance and an award for any discomfort or annoyance to the occupant; (ii) damages must be caused by the defendant's breach of a duty and be foreseeable, certain, and unavoidable. [2]

(i) Damages are computed from the time the nuisance began up to the commencement of the action; (ii) recovery for future losses or damages is not available because the defendant may discontinue the nuisance at any time. [2]

### **Permanent Nuisance Doctrine**

(i) To avoid multiplicity of suits, some jurisdictions have developed the "permanent nuisance" doctrine, which allows a plaintiff to recover damages measured by the permanent diminution in value of her property; (ii) mere proof of a physical

permanence demonstrating that the nuisance cannot practically be abated will suffice.

**[2]**

### **Compensation for Past Losses**

Analysis: Under the standard measure of damages, Penny is entitled to \$100,000 for her past business loss. **[1]**

These damages (i) were caused by the defendant's emissions of smoke; (ii) were foreseeable because smoke is irritating; (iii) are certain because it is easy to verify the cost of the loss of business; and (iv) were unavoidable because Penny could not avoid the smoke from entering her spa. **[3]**

Alternatively, if the jurisdiction awards damages under the permanent nuisance doctrine, the Penny will be entitled to damages for the permanent diminution in the value of her property. **[1]**

**Conclusions:** (i) Penny should not be awarded damages to compensate her for prospective losses since Dacme would theoretically stop emissions from the smoke stack at any time; (ii) furthermore, prospective losses are avoidable because Penny could move her business to another property; (iii) to prevent further losses, Penny should instead seek an injunctions, as discussed above. **[3]**

### **Scale**

Raw Score		Approximate Scaled Score
0-11	Significantly below passing	40
12-15	Below passing	45-50
16-20	Slightly below passing	55-60
21-27	Passing	65-70
28-35	Above Passing	75, 80, 85
36-55	Significantly above passing	90, 95, 100

1)

### Alice's Rights to Relief

First, we must find a cause of action to base our remedies off of. Here, Alice's ring was stolen by Carl at the jewelry store. Alice can sue Carl for trespass to chattel and conversion of her ring.

Now that we have decided a cause of action, we must decide on which remedies to pursue for Alice.

1. Legal Compensatory Damages are awarded to a harmed plaintiff to make her whole again before she was wronged. In order to bring an action and pursue legal damages, we must satisfy the requirements for legal damages. The damages must be foreseeable, certain, unavoidable, and there must be causation.

Certain - The damages must be reasonably certain and not speculative. Here, the facts state that the ring was worth \$14k at the time of the theft. This would not be speculative but an exact amount, which satisfies the certain element.

Causation - "But for Test." The plaintiff must establish that but for the defendant's conduct, she would not have been harmed. Here, this element is satisfied because Carl stole Alice's ring. The facts are clear. But for Carl taking Alice's ring, she would not have suffered damages.

Foreseeable - The damages must have been foreseeable at the time of the injury. Here, Alice would argue that legal damages are foreseeable from a theft. It is foreseeable that someone

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would suffer economic/emotional harm if something was stolen from them, especially a diamond ring.

The court would likely rule that the damages are foreseeable.

Unavoidable - The damages must be unavoidable, meaning that the plaintiff must mitigate their damages. Here, Alice would claim that she had no idea who stole the ring, so it would be very hard for her to mitigate damages from a stolen diamond ring.

The court would rule that the damages are unavoidable because Alice mitigated her damages to the fullest extent.

General Damages are damages that are foreseeable at the time of the injury and are non economic in nature. An example would be pain and suffering. Here, Alice would claim that this diamond ring has very sentimental value to her and means a lot to her, evidenced by the fact that she is having the diamond stone reset. Alice would claim pain and suffering from <sup>?</sup> the fact that she lost this diamond ring. really

Special Damages are damages that are unforeseeable at the time of the injury and are economic in nature. The facts are silent as to what Alice did after her ring was stolen other than listen to Bob's hiring of a private investigator. Alice would not claim special damages in this fact pattern.

Nominal Damages are damages that are awarded to establish and vindicate a plaintiff's rights. There is no actual injury. Here, Alice suffered injury so she would not be able to claim nominal damages, nor should she.

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Punitive Damages are damages that are used to punish a defendant's conduct. They must be used when compensatory, restitution, or nominal damages are pled. The damages award must not be grossly excessive otherwise it is Due Process violation. They must also be reasonably proportional and a rule of thumb is that the award is 10X the damages award. Here, Alice would want to bring an action for punitive damages to punish Carl. I would advise Alice to sue Carl for punitive damages because he intended to steal her ring and profit from the sale. Carl would argue that his conduct did not reach the level of wanton or willful, but stealing a diamond ring in a jewelry store and selling it to make thousands of dollars, to which was used to buy real property, the court might award punitive damages.

The Court would likely rule in favor of Alice and award her legal compensatory damages to make her whole again. They would also consider tacking on the punitive damages award to the compensatory award to deter Carl from repeating the same conduct.

Legal Restitutionary Damages are damages that are calculated by the value of the benefit that was received by the defendant. The goal is to prevent unjust enrichment by the defendant. While a plaintiff has an option to choose between legal damages and legal restitutionary damages, you cannot claim both. The plaintiff must choose the cause of action that will garner the biggest reward.

Here, Alice can claim that Carl was unjustly enriched by his theft and subsequent sale of the diamond ring. She will argue that Carl benefitted \$15,000 from selling the ring to Dan, and then bought Blackacre and deposited some money in a commingled bank account. She will assert that Carl is grossly unjustly enriched. Carl would argue that the award must be on the value that the plaintiff lost, only to make her whole. However, the court will base the award amount in a restitution case off the benefit that the defendant received. In this case, Carl received the cash from the sale of the ring, and also received Blackacre, which is now worth \$26,000. Alice can claim that Carl benefitted more than \$28,000, thus she would sue under

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legal restitutionary damages for this amount. Alice could also claim punitive damages and couple them with the restitutionary award.

The court would likely rule that Carl was unjustly enriched from the theft and sale of the ring, thus he owes the value of the benefit he received.

Replevin is a restitutionary remedy when a plaintiff is seeking prompt return of her specific personal property. In order to achieve Replevin, the plaintiff must prove that (1) she has a right to possession to the property and (2) the defendant wrongfully withheld the property. If the defendant possesses the property, the plaintiff can seek return of the property before trial by filing a bond. This is sometimes called "claim and delivery." However, the defendant can defeat this claim by posting a re-delivery bond. The drawbacks to filing a re-delivery bond are that the defendant will possess the property for longer, so if the plaintiff couples her replevin action with compensatory or restitutionary damages, the defendant could conceivably pay more because the plaintiff lost the value of the use of the property. If the personal property is sold to a bona-fide purchaser (the BFP did NOT know of the theft), then the BFP prevails over the plaintiff.

✓ Here, Alice will likely not be able to successfully bring an action for replevin because the ring was sold to Dan, a BFP. However, Alice would still be able to claim legal restitutionary or compensatory damages.

The facts state that Carl sold the ring to Dan for \$15k and then deposited \$2k in his bank account with funds already in place, and bought Blackacre for \$13k. Alice will have to think of a way to reach the Blackacre and the bank account.

Equitable Restitution

Constructive Trust is an equitable remedy imposed by the courts when the defendant is unjustly enriched by wrongfully obtaining title to plaintiff's property. The effect is that the plaintiff will be awarded title to the property, because the defendant is now the trustee of the constructive trust. In order to bring an action, the plaintiff must establish no adequate legal remedy is available. In order to prove inadequate legal remedy, the plaintiff can claim the defendant is insolvent or the property is unique. A constructive trust cannot be used when there is commingling. The plaintiff must also trace the defendant's property to their own property. Again, plaintiffs will lose to BFP's. If a constructive trust is put in place, the plaintiff will have rights over unsecured creditors, essentially making the plaintiff a secured creditor.

Here, Alice will try to get a constructive trust imposed on Blackacre. She will argue that Carl sold her diamond ring for money, and then used that money to buy Blackacre. She will argue that Carl is unjustly enriched by the purchase of Blackacre at her detriment. Alice will argue that legal damages is inadequate because Blackacre is unique. Perhaps, Alice would like title to Blackacre now that she knows it is what Carl bought with the money. If Alice could trace the funds from the ring to the purchase of the Blackacre, then she would most likely receive a constructive trust on Blackacre.

The court would likely rule that a constructive trust imposed on Blackacre is an appropriate equitable restitutionary remedy for Alice because Carl is unjustly enriched. Alice would receive title to Blackacre.

However, Alice could not impose a constructive trust on the bank account because it is commingled with Carl's funds. Alice must pursue another equitable restitutionary remedy.

Equitable Lien is an equitable restitutionary remedy available when the defendant wrongfully attains title to the plaintiff's property. The court will force a sale of the property

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so that the plaintiff can be compensated for her loss. Again, there must be an inadequate legal remedy, meaning the defendant must be insolvent. If the defendant is solvent, then the plaintiff could pursue money damages. Plaintiffs will lose to BFP's. However, when funds are deposited into a commingled bank account, and a withdrawal is made that lowers the balance beneath what the value was first deposited, then the most the plaintiff could recover is the "lowest intermediate balance."

Here, Alice would pursue an equitable lien on Carl's commingled bank account. This is the only equitable restitutionary remedy available to her because the bank account is commingled. Alice will claim that she should receive \$2,000 from the bank account because that is what was originally deposited, but the lowest intermediate balance test would require that Alice could only receive \$600 because the balance went lower than what was originally deposited.

The court would likely grant an equitable lien on Carl's bank account because he unjustly enriched himself from stealing and selling Alice's diamond ring.

It is up to Alice and her attorney to decide the best cause(s) of action to garner the best recovery.

**END OF EXAM**

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1. Legal remedies

Here, Bosco Car Company ("B") may bring a cause of action against Salvo Tire Company ("S") for breach of contract. B will claim that they had a valid, written contract for S to provide 100,000 special quality tires for B's 2017 production year at a cost of \$1,000,000.

Damages

Once B proves that S is liable for the breach, B may seek legal remedies. B may seek compensatory damages.

B can show that S's action caused damages to B. B had to go out and get substitute goods in order to keep their production running. Generally, in a sale of goods where seller breaches, buyer may claim recovery for the difference of his cover price and the contract price. Or the buyer may claim recover for the difference of market price and the contract price.

Compensatory damages is meant to provide for the plaintiff's loss that resulted from the defendant's conduct. It's main purpose to bring the plaintiff in a position as if the contract had been performed.

In order to recover damages, plaintiff has to meet the following elements:

1. Causation. Defendant's conduct must be the cause of the damages. "But for the defendant's conduct, the damages would not have occurred."
  2. Foreseeable. Damages must be the type of injury that results from the harm.
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3. Uncertainty. Damages must be with sufficient certainty so that the court may award damages. Plaintiff's loss at the time of the harm occurred.

4. Unavoidable. Court will require that plaintiff mitigate it's loss. ✓

### **Causation**

Here, B would argue that S breaching the contract caused the damages that B had incurred.

But for S not delivering the products as promised. B would not have to go out and purchase substitute products in order to keep his production. ✓

### **Foreseeable**

B would argue that its damages (cover price less contract price) or (market price less contract price) is a natural loss that is expected to occur as a result of a potential breach at the time the contract was contemplated. ✓

### **Certainty**

In addition, loss must be with sufficient certainty. Here, the parties know the contract price (\$1M), market price (\$2M) and the cover price (\$1.5M). Thus, buyer's loss in a seller's breach may be calculated.

### **Unavoidability**

Here, B was able to mitigate damages by purchasing substitute goods from Segundo Tire Company for \$1.5M. The court will look to whether this price is reasonable. Since this is lower than the fair market value price of \$2M, the court will likely rule that B was able to mitigate its damages. ✓

### **Possible Defenses:**

There are various defenses that Salvo Tire Company ("S") that may bring up:

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### 1. Unconscionability

Here, the facts show that there is a conflict between Israel and Iran that had a major impact that caused S' production costs to go up. S offered to meet with B to adjust the terms of the October contract but Bosco refused. In addition, Bosco lied and said that the 2017 production run had begun and there was no time for meeting.

It will be unconscionable for a court to let S to pay for the loss since S did not anticipate the conflict and the market effect on the prices.

The court will likely consider the factors above. Court will likely argue that since S has been in the tire business and probably should have considered all the factors before they entered the contract with that much value. They should have done their research in order to anticipate market impact.

Court will likely rule that B prevails and should be given award damages. ✓

### 2. Unclean hands

S would argue that B can not have a cause of action when B has unclean hands. B lied and said that their 2017 production had begun and S could have renegotiated the contract.

Under clean hands theory, a party can not seek recovery if it has unclean hands.

*equitable*

### 2. Equitable Remedies

#### **Quasi-Contract**

Quasi-contract is implied by law. When there is no valid contract, the court may allow the parties to continue as if there was a valid contract. It disregards parties intent and even with

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their express dissent. It is a form of an equitable remedy. It may provide for the value of goods (quantum meruit) or the value of services (quantum valebant).

Since the fact states that the contract is a valid, written contract, the court will likely enforce the contract.

### **Specific Performance**

Under the restitution, a party may be compelled to provide specific performance. It may be enforced if the following requirements are met:

1. Terms are Certain and Definite
2. Feasible
3. Mutuality
4. Inadequate legal remedy
5. Lack of defenses

### **Terms certain and definite**

In order to enforce a specific performance, the terms of the contract has to be certain and definite. This way the court can enforce the contract with definite terms. Here, the contract is written with terms that shows S to provide 100,000 special quality tires for \$1M.

The terms are certain and definite. There's no contested issues with regards to the terms of the contract.

### **Feasible**

The other factor that the court look is whether it is feasible. Will the court have to supervise for a long term? Is it feasible for the parties to carry on the contract with very little supervision from the court. Based on the facts, depending whether S can provide the

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tires as promised, court might have to supervise depending upon S can readily provide tires that they can supply to B. S will probably have to purchase the tires in order to comply with a specific performance order.

### **Mutuality**

Under this factor, the court look at whether plaintiff is ready and willing to pursue the contract. Here, the facts states that B was desperate for tires. It is ready and willing to do its part of the bargain.

### **Inadequate legal remedy**

One other factor is whether is inadequate legal remedy. Some things that will be considered is whether the property is unique. Facts show that the goods are special quality tires.

There's no other facts to show that it's unique in a sense that it would be hard for B to find substitute tires. In fact, it was able to find substitute products. Based on that evidence, the uniqueness of the goods will probably not suffice as providing reason for inadequate legal remedy.

### **Lack of defenses**

Here, B would argue that S has no defenses since the contract is valid. However, S would argue that it has valid defenses. One of them is unconscionability. Allowing the contract to continue would make the contract one-sided. S did not cause the conflict in Israel and Iran and it had no way of anticipating for an event like this when they contemplated on the contract.

✓ **Conclusion:** Based on the analysis above, Court will likely not compel S to provide specific performance because there is adequate legal remedy available and S has defenses.

### **Defenses:**

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1. Unconscionability

Here, the facts show that there is a conflict between Israel and Iran that had a major impact that caused S' production costs to go up. S offered to meet with B to adjust the terms of the October contract but Bosco refused. In addition, Bosco lied and said that the 2017 production run had begun and there was no time for meeting.

It will be unconscionable for a court to let S to pay for the loss since S did not anticipate the conflict and the market effect on the prices.

The court will likely consider the factors above. Court will likely argue that since S has been in the tire business and probably should have considered all the factors before they entered the contract with that much value. They should have done their research in order to anticipate market impact.

Court will likely rule that B prevails and should be given award damages.

2. Unclean hands

S would argue that B can not have a cause of action when B has unclean hands. B lied and said that their 2017 production had begun and S could have renegotiated the contract.

Under clean hands theory, a party can not seek recovery if it has unclean hands.

3.

**END OF EXAM**

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3)

3/4 Penny is suing Dacme for injunctive relief. She seeks permanent injunctions 1) to enjoin all operations of Dacme and/or 2) to require Dacme to cease or remedy the discharge from the smokestack. In order to win her injunctions, Penny will have to show 1) an inadequate remedy of law, 2) feasibility 3) irreparable harm and 4) balancing of the interests in her favor. + no defenses

2 Prior to a trial regarding a permanent injunction, Penny may wish to receive a preliminary injunction requiring Dacme to cease or remedy the discharge from the smokestack. In order to receive a preliminary injunction, Dacme will need to be given notice of the pre-trial hearing, and at that preliminary hearing Penny would have to show 1) inadequate legal remedy, 2) her harm outweighs the harm to the defendant if the injunction were granted, 3) granting the injunction would be in the public interest, and 4) a likelihood of prevailing on the merits.

#### Inadequate Remedy of Law

3/3 Penny would argue in favor of the injunctions by asserting that she has an inadequate legal remedy because money would not adequately compensate her for the damage to her clientele that she has already suffered, and since the smoke from the smokestack is a continuing nuisance she would have to bring a multiplicity of suits to continue to recover for her continuing damages.

#### Feasibility

2/3 Penny would argue that based on her investigations, it would be feasible for Dacme to install a filtration system at a cost of \$500,000 per year for 5 years, which would be cheaper for Dacme than paying continuing legal costs to present and future plaintiffs. However, the

court may not view Penny's permanent injunctions as feasible. Mandatory injunctions, in which the court orders the defendants to affirmatively do something, are very difficult for the court to supervise. A negative injunction, in which the court orders the defendant NOT to do something, is much more feasible for the court since it requires no supervision, and it is up to the plaintiff to bring the case back to court if the defendant violates a negative injunction.

#### Irreparable Harm

Penny will argue that Dacme's operation of the smokestack is causing her irreparable harm, due to the ongoing loss of her clientele and profits, and if the injunctive relief is not granted her spa may go out of business.

#### Balancing of Interests

2/2 Penny will argue that her interest in the injunctive relief is great, because Dacme's power plant is significantly affecting her livelihood and may one day cause her to go out of business. However, the court must balance the interests of the plaintiff with the harm to the defendant if the injunctive relief were granted as well as the public interest. In this case, Dacme employs 2,000 people, and presumably powers a city or county.

2/2 If the court were to grant Penny's injunction to enjoin all operations of Dacme, that would cause 2,000 people to lose their jobs. Since Dacme is a power plant, it would also likely cause the entire town to be without electricity. Clearly the public interest in keeping Dacme in operation outweighs Penny's interest in her loss of clients and profits. The court is not likely at all to enjoin all operations of Dacme.

3/3 Penny's injunction to require Dacme to cease or remedy the discharge from the smokestack would cost Dacme \$500,000 over 5 years to install a filtration system. Operating the smokestack during non-business hours would cost Dacme \$75,000 per year, annually. Both

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remedies would be costly and burdensome for Dacme. In contrast, Penny's spa would only cost \$300,00 to relocate. However, there is a public interest in reducing the emissions of power plants. Therefore, depending on the finances of Dacme, it is possible that the court may grant Penny's injunction to require Dacme to remedy the discharge from the smokestack, in the public interest.

9/14  
- 8/8 Defenses: Laches & Contributory Nuisance  
9/14  
Penny's claims for past and prospective damages

Penny's injunctions are requesting the court to remedy a nuisance. In this case, since Dacme built its power plant in a rural area, and Penny seems to be the only person near the smokestack, she is bringing a private nuisance claim.

2 | 2 Damages must be Foreseeable, Certain, Unavoidable, and there must be Causation.

Foreseeable

Damages must be foreseeable.

Certain

Damages must be certain, and not speculative. Prospective damages are speculative.

Therefore, Penny will not be awarded any prospective damages. She may be awarded special damages for loss profits if she is able to show specifically how much money she has lost in revenue.

Unavoidable

Damages must be unavoidable. One has a duty to mitigate damages. Penny has located her spa near a smokestack, which was avoidable. She could choose to relocate her spa and avoid the damage to her business. Since the nuisance of the smokestack was there before she located her business there, she came to the nuisance. Therefore, she could have researched

her spa's location before she opened the spa and located the spa somewhere else. It is not likely that Penny will be awarded damages because she could have avoided the damages to her business altogether.

a/s Causation

Penny may have difficulty proving causation

Permanent Missance - 2

**END OF EXAM**