CONTRACTS I

Professor Stilson

December 18, 1992

INSTRUCTIONS:

- 1. This is a THREE HOUR examination and is LIMITED CLOSED BOOK. You may use only your CODE BOOK. You may not use other written materials of any kind.
- 2. There are TWO QUESTIONS of EQUAL WEIGHT. Please allot your time accordingly.
- 3. Please do not assume facts not given unless, in your opinion, it is necessary to do so in the discussion of an issue that is in the problem.
- 4. DO NOT PANIC! OUTLINE the issues presented and then ADDRESS THE FACTS CHRONOLOGICALLY.
- 5. Blank pages have been provided after each question for your answers. USE ONLY THESE PAGES TO RESPOND TO EACH QUESTION AND USE ONE SIDE OF EACH PAGE ONLY. At the end of the examination, please turn in the exam and the answer sheets provided.

GOOD LUCK AND HAPPY HOLIDAYS!

Drug Testing Company ("DTC"), a Delaware corporation, is in the business of developing, testing and marketing new drugs for use in the United States. DTC has developed, over the past five years, a drug that will stimulate the growth of hair for persons who suffer from baldness. Although the drug is experimental, having only been tested on bald male mice, DTC is confident that the drug will produce the same astounding effect of stimulating hair growth when used by humans. In order to market the drug, however, DTC needs a \$5 million commitment in sales by U.S. consumers in order to receive a federal subsidy for marketing the drug nationwide (the theory being that a \$5 million commitment will evidence a need for the drug and thus federal supervision for manufacturing and marketing the drug). To that end, DTC has placed an advertisement in several newspapers of national circulation stating:

"Miracle drug discovered! \$250 reward will be paid by the Drug Testing Company ("DTC") to any person who does not develop a beautiful, luxurious head of hair within four weeks of using Bald No More, an exciting new cure for baldness which has been manufactured and developed by DTC. Five thousand dollars is deposited with New York Guaranty, a federally-insured bank, as evidence of our seriousness in this matter. Bald No More is available for purchase at participating pharmacies without prescription. Bald No More will assure each user of Hollywood-like tresses if used according to enclosed directions. Why wait any longer? Act now while supplies last and have a gorgeous head of hair by Christmas!"

Susan Donner, one of those unfortunate women who suffers from premature baldness, saw the DTC ad and immediately called her local pharmacy for information on the new drug. Although Susan's pharmacist was not aware of Bald No More, the pharmacist offered to locate a sample for Susan who had been a loyal customer of the pharmacy for many years. Indeed, the pharmacist knew that Susan had tried every "cure" for baldness known to man and that Susan suffered from virtual schizophrenic insecurity due to her extremely thin head of hair. After many phone calls to surrounding pharmacies, a sample of Bald No More was finally located and sold to Susan (who was forced to negotiate a second mortgage on her home to pay the \$1,000 necessary to purchase the first week's dosage). The directions on the package stated: "Apply Bald No More liberally on areas of baldness. medication to dry before exposing head to outside environment. Persons suffering from pre-existing medical conditions are advised against using this product without first consulting their physician." No side-effects were disclosed in the directions.

Susan immediately took the drug home and religiously applied

Bald No More to all areas of her head each evening before bed. Within two weeks, Susan's hair began to grow at an astounding pace. To her delight, her rapid hair growth was accompanied by many calls for dates. Indeed, during this period Susan met Kevin, the man of her dreams. Kevin and Susan were inseparable for the following week, during which Susan's hair grew even more luxurious. Susan's life was so wonderful that within those first three weeks of using Bald No More, Susan had gone from being a professional wallflower to an engaged, wildly ecstatic young woman (Kevin having been so taken by Susan's beauty and numerous male admirers that after an evening of champagne and wine he said to Susan "I promise to marry you and be a part of your life forever if I continue to be as happy with you as I am at this moment" to which Susan responded "I promise to marry you also").

As can only happen on law school exams, tragedy struck soon thereafter! On the evening of their wedding announcement to an assembled group of 100 family members and friends, Susan's hair began to fall out and her head began to turn a deep shade of purple. Kevin, not knowing about Susan's prior history of baldness, was so shocked at Susan's appearance as well as her lack of disclosure to him of, as he stated, her "true self", immediately called off all wedding plans and demanded the return of the diamond engagement ring which he had recently given to Susan as evidence of his eternal commitment to her. Kevin has now refused even to talk to Susan who, as a result of these events, is in psychotherapy.

Susan has retained you as counsel. She seeks the following:

(1) That Kevin marry her according to his promise;
(2) Damages against DTC and/or Kevin, including, but
not limited to, (a) compensation for her embarrassment at the
announcement party; (b) the cost of her wedding dress (which she
ordered on credit the same day as the announcement party and
which dress is non-returnable); (c) the value of her lost love
(in the event you are unsuccessful in securing the remedy sought
in (1) above); (d) the damage to her head (which, as it turns
out, is not reversible and which will result not only in her
permanent baldness but a permanent purple shading on her scalp);
(e) the loss of a "beautiful, luxurious, Hollywood-like" head of
hair; (f) the cost of her psychotherapy; and (g) the monies
expended to purchase the new drug.

Please advise Susan on the likelihood of succeeding on each of these claims.

2. On December 9, 1992 Joseph Tully spoke to a realtor as well as several neighbors regarding his plans to sell his 100-acre farm, including his 250-year old colonial home and barn located Tully's reason for selling the family homestead, instead of passing the property to his four daughters or the local museum as originally contemplated by him before his daughters were born, was due in significant degree to his immediate and dire need of money to finance impending heart surgery. On December 10 his neighbor, Jack Roberts (who owns a farm immediately to the south of Tully's property) asked Tully if his plans for selling the "Tully place" "continued to be in effect," to which Tully responded that he expected to be able to put a price on the property shortly. Roberts then stated that he had whatever money was necessary to purchase the Tully property and that Tully "did not have to worry about a buyer" because Roberts was "ready, willing, and able" to settle the purchase at any time. Three days later, on December 13, Tully sent a letter to the realtor and four contiguous neighbors, including Roberts, enclosing "the information discussed with you," as follows:

Selling farm and all structures located thereon (as described in deed) at the assessed market value of \$3.5 million. Terms available - 30% down - balance over 10 years at 8% interest. Negotiate sale date for December 31, 1992 or January 15, 1993. This offer to remain open until 5:00 p.m. December 15, 1992.

As these events were taking place, Tully's daughters heard of their father's plans. In an effort to stay this desperate sale by their father (and, of course, to preserve the property for themselves and their children), the daughters secured a bank loan at noon on December 14 in the amount of \$3.5 million and immediately sought to present same to their father in return for a conveyance to them of the family farm.

While the daughters were in transit to their father's home, Roberts heard from a friend of his who worked at the lending bank of the plan of Tully's daughters and that Tully was "predisposed to sell the land to his kin". In order to thwart that plan, Roberts mailed an acceptance at 1:00 p.m. on December 14 to Tully stating, "Accept your offer to sell Tully place for \$3.5 million. Am faxing 15% down this afternoon, to be followed by balance of down payment by no later than January 20, 1993." Unfortunately, Roberts did not proofread this letter before its transmittal and thus did not discover that his secretary inadvertently typed January 20 as the settlement date instead of the January 15 date which Roberts intended. Roberts immediately attempted to notify Tully of his mistake and, to that end, left a message on Tully's answering machine at 8:00 p.m. on December 14 explaining his mistake, reiterating his acceptance of Tully's offer and apologizing for any inconvenience or confusion that the mistake may have caused. Due to a malfunction in Tully's answering

machine, Roberts' message was not received by Tully until December 16.

While the Roberts letter was in route, two other neighbors mailed acceptances on December 14 which conformed in all respects to Tully's letter to them. These acceptances, like Roberts', were initiated after the senders heard from town gossip that Tully "was probably going to sell the farm to his children" but before the December 15 deadline.

On the evening of December 14, notwithstanding his knowledge that at least three neighbors had sent acceptances to him, Tully promised to will the family farm to his daughters in return for the \$3.5 million tendered by them (Tully took the money and placed it between the mattresses in his bed before joining his daughters for a celebration dinner). That evening Tully suffered a stroke which resulted in his death at 3 a.m. on December 15. Although Tully's daughters were at his side throughout his final hours, Tully never regained consciousness and was thus unable to redraft his will in accordance with his agreement with his daughters of the previous evening. At noon on December 15 the mailman delivered the acceptances of the two neighbors as well as a contract for purchase executed by the realtor on behalf of the realtor's client.

Tully's daughters have retained you as counsel. They seek the conveyance to them of the subject property. Roberts, the other two neighbors who responded to the offer, the realtor on behalf of his client, and the local museum (who is to take the property under Tully's present will) intervene, each seeking a right to the property.

- (a) Please advise the daughters of their likelihood of succeeding in their action as against these defendants.
- (b) Would your answer to (a) change if the subject matter of the exchange were GOODS and the person seeking enforcement were a MERCHANT? PLEASE ONLY IDENTIFY THE ISSUE/S PRESENTED AND PROVIDE A BRIEF RESOLUTION OF SAME.