1. On March 1, 2004, Jonathan borrowed $50,000 from Vlad and signed a promissory note stating that Jonathan would pay Vlad $10,000 per month, due on the first day of each month, beginning April 1, 2004 and ending September 1, 2004. Because Jonathan was a questionable credit risk, owing to extreme anemia, Vlad insisted that a financially responsible third party guarantee the loan. Jonathan’s fiancée, Mina, who was present when Jonathan signed the note, agreed to guarantee its repayment. Vlad, being a true gentleman, took Mina at her word, knowing that she had considerable personal and family wealth. If Jonathan defaults on his promise to repay Vlad as agreed, may Vlad enforce Mina’s promise to guarantee repayment? Please explain.

(20 Points) Vlad may be able to use R2 § 139 to enforce Mina’s promise. Vlad may not enforce Mina’s promise as a contract because Mina’s promise is one “to answer for the duty of another,” R2 §§ 110(1)(b) & 112, and Vlad can produce no writing signed by Mina. The exceptions set forth in R2 §§ 112 & 116 do not relieve Vlad of the need for a writing signed by Mina. Absent such a writing, the statute of frauds bars Vlad’s breach-of-contract claim. However, he may find refuge in R2 § 139, which would require Vlad to prove that (1) Mina should reasonably have expected Vlad to act or forbear based on Mina’s promise to personally guarantee Jonathan’s promissory note; (2) Vlad did, in fact, act or forbear based on Mina’s promise; (3) Vlad suffered a detriment because of his reliance on Mina’s promise; and (4) injustice can be prevented only by enforcing Mina’s promise, notwithstanding the statute of frauds, because (a) Vlad has no other legal remedy (assuming Jonathan has insufficient money to pay a judgment against him in the amount of the note plus interest); (b) Vlad’s action or forbearance – loaning Jonathan $50,000 – was “definite and substantial”; (c) Vlad’s action or forbearance was a reasonable response to Mina’s promise; or (d) Vlad’s action or forbearance was a reasonably foreseeable response to Mina’s promise.

2. Reread the Nevada Supreme Court’s opinion in Sandy Valley Associates v. Sky Ranch Estate Owners Ass’n, 35 P.3d 964 (Nev. 2001), as well as the Nevada Supreme Court’s attached opinions in Kaldi v. Farmers Insurance Exchange, 21 P.3d 16 (Nev. 2001), and All Star Bonding v. State, 62 P.3d 1124 (Nev. 2003), and answer the following questions, referring in your answer to one or more of the opinions that support or call into question each of your answers.

A. Are the degree of integration and the existence of ambiguity questions of fact or of law?
(10 Points) Based on the statement in All Star Bonding that “[c]ontract interpretation is a question of law” to be reviewed de novo, coupled with Kaldi’s affirming the trial court’s pre-trial dismissal of Kaldi’s claim, strongly suggest that the degree of integration and the existence of ambiguity are questions of law – notwithstanding the language in Sandy Valley referring to the “substantial evidence” supporting the trial court’s decision to consider extrinsic evidence in construing the parties’ agreement.

B. Must a Nevada court find that a written contract is less than fully integrated in order to consider extrinsic evidence in order to construe and interpret the parties’ agreement?

(10 Points) Apparently not. At least with respect to the easterly 150 feet of Lot 39, the Sandy Valley court condones the trial court’s resort to extrinsic evidence “to determine the true intent of the parties when a contract is ambiguous.” It says nothing about whether and to what extent the ambiguous contract is integrated. The Kaldi court seems to place some weight on provision “J” of the subject contract, which “specifically prohibits separate oral contracts and requires that all changes, alteration or modifications to the Agreement be in writing and signed by all parties.” However, the court does not suggest that, absent such a provision, the existence of ambiguity alone would be insufficient to warrant a trial court considering extrinsic evidence.

C. Must a Nevada court find that a written contract is not unambiguous in order to consider extrinsic evidence in order to construe and interpret the parties’ agreement?

(10 Points) Apparently not. At least with respect to the five triangular lots, Sandy Valley condones the trial court’s resort to the recorded tentative plat map – a document clearly outside the “four corners” of the contract at issue – to determin[e] the intent of the parties.” It says nothing about whether the contract was ambiguous with respect to those five triangular lots. Likewise, in Kaldi, the court recognizes that Nevada law permits the admission of extrinsic evidence to prove “[t]he existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms.” All Star Bonding seems far more concerned with ambiguity than integration.

D. What evidence may a Nevada court consider in deciding whether a written agreement is less than fully integrated or not unambiguous?

(10 Points) Sandy Valley appears to permit, at a minimum, evidence of “the circumstances surrounding the execution of a contract and the subsequent acts or declarations of the parties.” Kaldi, again, recognizes that Nevada law permits the admission of extrinsic evidence to prove “[t]he existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms.” Otherwise, Kaldi and All Star Bonding seem to focus on the “four corners” for the threshold determinations of integration and ambiguity.
3. Reread the excerpt from Lisa Bernstein’s article Merchant Law in a Merchant
Court: Rethinking the Code's Search for Immanent Business Norms, 144 U. PA. L.
REV. 1765, which is reprinted in Barnett, Perspectives on Contract Law, pp. 142-155,
and answer the five questions on p. 142 preceding the excerpt.

A. How do the practices described by Professor Bernstein differ from what
would occur under the U.C.C.?

(8 Points) Article 2 treats course of performance, course of dealing, and trade usages (in
that order) as unwritten terms supplementing every agreement governed by Article 2, unless the
parties explicitly negate those unwritten terms. The NGFA approach, by contrast, treats trade
usages, course of dealing, and course of performance (in that order) as “gap fillers” to be resorted
to only if the express terms of the agreement, written trade rules (i.e., Grain Rules, Feed Rules,
Barge Rules, and Barge Freight Trading Rules), and common trade practices do not resolve an
issue. Most markedly, the NGFA approach affords no particular weight to the parties’
performance of the contract at issue (if it calls for multiple occasions for performance) –
something Article 2 considers the next best evidence of the parties’ intent to their express terms
(and, at times, a better indicator of the parties’ intent than their express terms) – nor does it
recognize any duty of good faith beyond that implied in the formal trade rules.

B. Why does Professor Bernstein doubt the desirability of looking to business
norms when interpreting or construing a contract?

(8 Points) Because the parties to a particular contract may agree to deviate from those
norms, but may not be able to agree on the exact nature of the deviation or may be
unable/unwilling to bear the costs of explicitly contracting around the undesired “norm.”

C. Why don’t contracting parties want to make all the duties they intend to
perform legally enforceable?

NOTE: The last three subparts are primarily “thought problems,” where I am
looking for good ideas and good reasoning supporting them much more than I am
looking for particular answers or reasons. The said, here are some ideas and
examples:

(8 Points) Contracting parties may not want to make all the duties they intend to perform
legally enforceable if doing so would discourage parties from entering into agreements they
intend to perform as promised but don’t want to be liable if they can’t perform as promised or if
doing so would make the transaction so costly to arrange and/or perform that it is no longer
economically beneficial to one or both parties. Suppose I agreed to teach a special bar review
course, open only to Boyd students, each year for a three-year period, in exchange for which the
SBA agreed to pay me $500 per year. Either I or the SBA may fail/decline to sign a writing
memorializing the agreement because we want the right to withdraw from the agreement if it
turns out to be unprofitable or because we cannot agree on the precise language of the writing
and are unwilling to spend the additional time and effort to bargain out the terms of a contract
involving so little money.
D. Why would it be in the interest of one party to accept an unenforceable commitment from the other?

(8 Points) One party may accept an unenforceable commitment from the other if doing so might pave the way for ongoing contractual relations between the parties that will greatly benefit the party willing to accept one or more unenforceable commitment(s). For example, Bruce Roberts, the owner of a resort hotel in the Berkshires, might enter into a contract to pay celtic-techno-goth sensation Wallace Williams $75,000 to perform at Bruce’s hotel for one week, despite knowing that Wallace is underage and will have the right to avoid the contract, because Bruce hopes that Wallace will enjoy the experience of performing there so much that he will be willing to come back on more favorable terms than he would agree to with someone with whom he did not have a prior relationship; or, even if Wallace backs out of the present gig, Bruce may hope that Wallace will remember that Bruce dealt with him fairly and will come perform at some later date after Wallace is “too big” to play such a modest venue.

Likewise, one party may accept an unenforceable commitment from the other if the parties are transacting in a market or industry where custom provides a “law” that is more relevant than general contract law and where private “enforcement” – in the form of collective shunning or embracing – is more relevant than general contract remedies. If other concert venues would “punish” Wallace for breaking his deal with Bruce, that may be enough to make Bruce willing to enter into the voidable contract.

A party may also accept an unenforceable commitment from the other if legal enforcement would be economically inefficient, but the party has good reason to believe that the other party will perform – for business or personal reasons – despite the first party’s inability to enforce the contract through judicial action. Suppose that a state enacted a law, in an effort to reduce the civil caseloads of its courts and arbitrators, providing that there must be at least $10,000 in controversy for a breach of contract claim to be docketed. Would parties completely avoid entering into contracts for less than $10,000? Of course not. They would simply rely on the facts that most parties perform their contractual obligations regardless of the legal sanction for not doing so and that those who don’t suffer in the “court of public opinion” or in the form of buyer/seller shunning.

E. Do you think that examining arbitration practices provides useful information about how courts should decide contract disputes?

(8 Points) Perhaps. Assuming we’re talking about arbitration practices in a particular trade or locality that are widely known to market participants in that trade or locality, the arbitration practices – or at least the outcomes of those arbitrations – are part of the circumstances surrounding the formation of a contract, which is relevant to understanding the parties’ intent when they entered into the contract. On the other hand, a court need not feel constrained by the procedural or evidentiary norms of arbitration practices – particularly where the parties have ended up in court because of their inability to reach a mutually satisfactory result through arbitration or because they were unwilling to agree to have their dispute arbitrated in the first instance.