**Scripts for Listening Activities 1-5, 2-2,7-9, and 8-7**

**Exercise 1-5 (International Snowboard Distribution)**

**Phone Call between**

**Cynthia Adler, Partner with Whitney & Holcomb, and Peter Craven, Senior Associate**

**Cynthia:** Hi, Peter. I need for you to help me with a distribution deal for one of our clients, Pegasus Snowboards. You haven’t been with the firm long. Have you worked with this client before?

**Peter:** No, I haven’t.

**Cynthia:** Well, Pegasus is one of our top clients that manufactures and markets snowboards, along with related snowboard equipment, apparel, and accessories.

I just got off the phone with James Sordano, the corporation’s President. Pegasus is working on a deal with a Chilean company for the distribution and marketing of its snowboard merchandise in Chile.

I’d like for you to work on this with me. Have you ever drafted a contract?

**Peter:** No. I took some courses in contract and business law at law school, and I’ve read some contracts. But I’ve never drafted one.

**Cynthia:** Then this will be a good opportunity for you to learn. Fortunately, Pegasus is still working out the details of the deal, and it will be a few weeks before the parties finalize everything. So we’ll have plenty of time to draft the contract. We’ll work through this draft in steps, at a slower pace, so you’ll have time to think about and apply good drafting technique from beginning to end.

**Peter:** Great. I look forward to working on the draft.

**Cynthia:** I need to keep the file, so I’ll tell you what I know right now about the deal. Do you have a pen to take notes?

**Peter:** Yes, go ahead.

**Cynthia:** Our client’s name is Pegasus Snowboards, Inc.

**Peter:** Could you spell Pegasus?

**Cynthia:** P-e-g-a-s-u-s. It’s a Colorado corporation. And it is negotiating

with Deportes Azteca.

**Peter:** And that is spelled?

**Cynthia:** Deportes: D-e-p-o-r-t-e-s. Azteca: A-z-t-e-c-a. L-t-d-a. It’s a Chilean limited liability corporation. It markets, sells, and distributes recreational merchandise in Chile.

**Peter:** Got it. Thanks.

**Cynthia:** So, they, I mean Pegasus, is thinking of granting Azteca the exclusive right to distribute, market, and sell the snowboard products produced by Pegasus. The distribution territory covered by the agreement will be Chile. The agreement will cover at least the next three years. They hope to sign the agreement on November 15, but the agreement won’t go into effect until January 1 next year.

**Peter:** Three years, huh? Will there be any renewals?

**Cynthia**: They’re still negotiating this. For right now, no renewals.

We’ll definitely have a few more meetings with Pegasus to get a clearer understanding of the deal before we meet with Azteca’s attorneys. I have Bill Jones looking into the Chilean laws, though we will insist that Colorado law govern the contract.

**Peter:** Will Azteca have exclusive rights to distribute the snowboard products in Chile?

**Cynthia:** Yes. Azteca doesn’t want Pegasus to use another distributor in Chile. But Pegasus also insists that Azteca not distribute other products that compete with its snowboard merchandise. Also, Pegasus doesn’t want Azteca distributing Pegasus’s products outside of Chile.

**Peter:** Okay. Got it.

**Cynthia:** Also, regarding the exclusive nature of this distributorship, each party wants assurances from the other party: Azteca wants Pegasus to state in the contract that it is not a party to any contract that provides for distribution of its products in Chile. In turn, Pegasus wants Azteca to state that it is not a party to any contract that conflicts with its obligations to distribute Pegasus’s products in Chile. Also, Azteca will state that it is not distributing any products that compete with Pegasus’s products.

**Peter:** Will the contract be written in English or Spanish?

**Cynthia:** English, so we won’t need your Spanish skills to draft this agreement.

Oh, oh, got another call. I’ve got to take this. I’ll call you later with more details. In the meantime, send me an email summarizing what I’ve told you.

**Peter:** Will do.

**Cynthia:** Thanks, Peter.

**Exercise 1-5 (Domestic Wine Distribution)**

**Phone Call between**

**Cynthia Adler, Partner with Whitney & Holcomb, and Peter Craven, Senior Associate**

**Cynthia:** Hi, Peter. I need you to help me with a distribution deal for one of our clients, SWW. I know that you haven’t been with the firm long, but I wondered whether you have had an opportunity to work with this client, yet.

**Peter:** No, I haven’t.

**Cynthia** Well, we anticipate that SWW will be growing exponentially in the next few years. In fact, I anticipate it will be one of our top clients before long. .It’s an LLC doing business as a winery in Benton City, Washington. It operates under the assumed name of Windwalker Vineyard and Winery. Basically, its involved in growing and fermenting grapes, selling wine, and operating a tasting room onsite. I just got off the phone with Lucas Sweetwater, the managing member of the LLC. SWW is working on a deal with a big Washington beverage distributor for the distribution of some of its signature wines throughout the United States.

I’d like for you to work on this deal with me. Have you ever drafted a contract?

**Peter:** No. I took some contracts and business law courses in law school, and I’ve read some contracts. But I’ve never drafted one.

**Cynthia:** Then, this will be a good opportunity for you to learn. SWW is still working out the details of the deal, and it will be a few weeks before the parties finalize everything. So, fortunately, we’ll have plenty of time to draft the contract. We’ll work through a draft in steps, and at a slower pace, so you’ll have time to think about and apply good drafting techniques from beginning to end.

**Peter:** Great. I look forward to working on the draft.

**Cynthia:** I need to keep the file, so I’ll tell you what I know right now about the deal. Do you have a pen to take notes?

**Peter:** Yes, go ahead.

**Cynthia:** Our client’s full name is SWW, LLC. It’s a Washington limited liability company.

**Peter:** What does the “S” stand for?

**Cynthia**: It stands for Sweetwater. That’s Lucas’s last name. He’s in business with his sisters, Paula Whitman and Carol Walters. The “WW” in the company’s name stands for the first letters of the sisters’ married surnames.

**Peter :** You said that they are doing business under the assumed business name of Windwalker Winery and Vineyard. Is “Windwalker” one word or two?

**Cynthia:** That’s one word, spelled as it sounds W-I-N-D-W-A-L-K-E-R.

**Peter:**  Got it. And, who is the distributer?

**Cynthia:** Magna Distribution, Inc. It’s a Washington corporation, but it’s a nationwide distributor for wine and beer from various wineries and breweries around the country.

**Peter:** And that company’s name is spelled M-A-G-N-A, I assume?

**Cynthia:** Correct! So, they, I mean SWW, is thinking of granting Magna the exclusive right to distribute, market, and sell some of its signature wines. It’s three different types of wine that they are proposing for Magna’s distribution. The label names are Windwalker Merlot, Windwalker Malbec, and Windwalker Cabernet Sauvignon. The distribution territory covered by the agreement will be the entire United States. But the territory will exclude the Benton City winery, because—obviously—SWW wants to still be able to sell its wine to customers visiting the winery. The duration of the distribution agreement will be at least two years. They hope to sign the agreement on November 20th, but the agreement won’t go into effect until January 1st next year.

**Peter:** Two years, huh?

**Cynthia:** Subject, of course, to earlier termination under certain conditions. The parties will be working out the specifics of those conditions as they move forward with the negotiation.

**Peter:** Will there be the possibility of any renewals or extensions?

**Cynthia:** We don’t know at this point. For right now, no renewals or extensions, though this might change as the parties continue negotiating.

**Peter:** Will Magna have exclusive rights to distribute these signature wines in the continental U.S.?

**Cynthia:** Yes. Magna doesn’t want SWW to use another distributor in the U.S. Also, in return, SWW doesn’t want Magna distributing its wines outside of the U.S. SWW doesn’t have a distribution deal yet with any international distributor, but it has plans to scale-up its business in the next year or so and is looking to export possibly some of its wine. So, it wants the freedom to look for an international distributor.

**Peter:** Okay. Got it.

**Cynthia:** Also, regarding the exclusive nature of this distributorship, each party wants assurances from the other party: Magna wants SWW to state in the contract that it is not a party to any contract that provides for distribution of its wines in the U.S. In turn, SWW wants Magna to state that it is not a party to any contract that conflicts with its obligations to distribute SWW’s wines. I can think of a few more assurances—you probably can, too—that the parties will want from each other, but we can wait to work on this when we meet with Magna’s attorneys.

**Peter:** Ok. Got it. Looks pretty straightforward right now.

**Cynthia:** Oh, oh, got another call. I’ve got to take this. I’ll call you later with more details. In the meantime, send me an email summarizing what I’ve told you.

**Peter:** Will do.

**Cynthia:** Thanks, Peter.

**Exercise 2-2 (International Snowboard Distribution)**

**Second Phone Call between**

**Cynthia Adler, Partner with Whitney & Holcomb,**

**and Peter Craven, Senior Associate**

**Cynthia:** Peter, it’s Cynthia. Thanks for your email reporting our discussion about the Pegasus/Azteca deal. I just got off the phone with Jim Sordano at Pegasus. The parties have made some progress in their negotiations, but it’s taking a longer than expected. They’ve been negotiating heavily about the minimum purchase schedule.

**Peter:** Minimum purchase schedule? I’m unsure what that means.

**Cynthia:** It’s the minimum amount of merchandise that Azteca is required to purchase each year. Pegasus is giving an exclusive distributorship to Azteca so it wants to ensure that Azteca will sell at least a sufficient amount of the merchandise to make it profitable for Pegasus. But Azteca was concerned about over-committing and being unable to make the quotas. Finally, the parties have agreed on a schedule that is acceptable to both. Are you ready to take this down?

**Peter:** Just a moment…. Okay, go ahead.

**Cynthia:** The first year Azteca will commit to a minimum purchase of 320,000 dollars, not Chilean pesos. The next year increases by 75,000. The third year goes up an additional 95,000. Then, if they renew—

**Peter:** So, the parties have agreed to opt for possible renewal? That was undecided when we last talked.

**Cynthia:** Oh, that’s right. Yes, they’ve agreed to an extension of the contract for additional two years, provided both parties agree in writing at least three months before the initial term expires.

**Peter:** Good, I’ll make a note of this. So, if they extend the contract, the minimum purchase will increase by what amount?

**Cynthia:** 100,000 for each year.

**Peter:** What happens if Azteca doesn’t meet the minimum purchase price in any year?

**Cynthia:** Pegasus can terminate the agreement, if it wants to. But it has to first give 30 days written notice to Azteca no later than 60 days after the end of the calendar year Azteca failed to meet the goal.

On a related matter, I should tell you that Pegasus has agreed to provide Azteca with price lists, promotional flyers, catalogs, specification sheets, and other materials to help with marketing the products. Also, Azteca will receive training.

**Peter:** Have the parties settled on where and when these sessions will take place?

**Cynthia:** The training seminars must be at Azteca’s offices in Santiago. The parties will coordinate the scheduling of these seminars. There is no set number—only as many as necessary to assist Azteca in marketing and supporting the products. Seminars shall be at no cost to Azteca. In addition to the training seminars, Pegasus has also agreed to provide technical and sales assistance as necessary to support Azteca in carrying out its obligations. This, too, shall also be at no charge to Azteca.

**Peter:** If Pegasus fails to do any of this, will Azteca have the right to terminate the contract? Or will Pegasus be given the opportunity to fix the problem?

**Cynthia:** Good point. Include in the contract a termination provision that gives either party the right to terminate the contract in the event the other party breaches a material obligation, which will include the promise to train and provide technical support. The non-breaching party has to give written notice to the other party. Then the breaching party has 30 days after receiving notice to cure the breach. The contract terminates in the event the breaching party fails to cure. But make Azteca’s failure to meet minimum purchase requirements an exception to the right to cure. This failure is subject to the termination requirements that I mentioned to you earlier. We will probably have more termination provisions to add, but we’ll discuss these in more detail in the coming weeks. That’s all for now.

**Peter:** Okay. I’ll send you an email summarizing our conversation.

**Cynthia:** Great. Thanks, Peter.

**Exercise 2-2 (International Wine Distribution)**

**Second Phone Call between**

**Cynthia Adler, Partner with Whitney & Holcomb, and Peter Craven, Senior Associate**

**Cynthia:** Peter, it’s Cynthia. Thanks for your email reporting our discussion about the SWW/Magna deal. I just got off the phone with Lucas Sweetwater at SWW. The parties have made some progress in their negotiations, but it’s taking longer than expected. They’ve been negotiating heavily about sales performance goals and pricing. Are you ready to take this down?

**Peter:** Just a moment…. Okay, go ahead.

**Cynthia:** There are two prices for the wines: the price SWW will charge to Magna, and the price Magna will sell the wines to its retail customers. The parties have set the amounts for these two prices, which will stay in effect for the first six months of the contract’s initial term. After that, the parties will negotiate any price increases no later than 60 days prior to the effective date of the increase.

**Peter:** Wait—you just said “the initial term” of the contract? So, the parties have agreed to opt for a possible renewal? That was undecided when we last talked.

**Cynthia:** Oh, that’s right. Yes, they’ve agreed to extend the contract for an additional two years, provided both parties agree in writing at least sixty days before the initial term expires.

**Peter:** Good, I’ll make a note of this. So, what exactly are the agreed-on prices for the first six months?

**Cynthia:** No need to state these exact prices in the contract. We will be attaching to the

contract the prices for each of the wines. More details on pricing will come later. . . . Oh, by the way, the sales performance goals will be stated in a marketing plan that the parties are still negotiating.

**Peter:** What happens if Magna doesn’t meet the sales goals?

**Cynthia:** Now, you’re thinking like a transactional lawyer! If Magna doesn’t meet at least 90% of the agreed sales performance goals, then SWW will be able to terminate the contract, if it wants to. But to do so, SWW has to give 60 days prior written notice to Magna.

**Peter:** Okay. Got it.

**Cynthia:** As I mentioned, the parties are still working on the marketing plan, which will address all aspects of the wines’ marketing, sale and promotion. The parties intend to finalize the plan within 15 days after the contract’s effective date, though they hope to get this done well before then. In any event, we want to ensure that we state in the contract that Magna is to use its best efforts to promote and sell the wines to the maximum number of responsible customers.

**Peter:** Okay, I’ll make sure it states “best efforts.”

**Cynthia:** Very good, and Magna is also going to pay all costs for marketing the wines and must display intellectual property notices required by SWW on all advertising and marketing materials. To this end, SWW will be granting Magna permission to use its intellectual property in the wines in order to assist Magna in the distributing, marketing, and selling of the wines.

**Peter:** And, anything else?

**Cynthia:** Yes. And to help with the marketing, I should mention that SWW has agreed to provide Magna with price lists, promotional flyers, catalogs, and other marketing-related materials.

**Peter:** Will Magna be creating additional marketing materials?

**Cynthia:** Yes, but anything Magna creates must be submitted to SWW for preapproval. In turn, SWW will promise to notify Magna of its approval or disapproval of the materials on or before the 5th business day after receiving the material from Magna. In any event, if SWW disapproves of the material before the expiration of the time period for review, then Magna must use its best efforts to correct the deficiencies and resubmit the corrected material for approval.

To keep abreast of Magna’s performance: Magna must furnish to SWW with available sales and depletion reports, and details of all promotional and sampling programs with respect to the wines, whenever SWW requests these reports.

**Peter:** If Magna fails to do any of this will SWW have the right to terminate the contract? Or will Magna be given the opportunity to fix the problem?

**Cynthia:** Good point. Include in the contract a termination provision that gives either party the right to terminate the contract in the event the other party breaches a material obligation. The non-breaching party has to give written notice to the other party. Then, the breaching party has 30 days after receiving notice to cure the breach. The contract terminates in the event the breaching party fails to cure. But make Magna’s failure to meet its sales goals is an exception to the right to cure. This failure is subject to termination under the terms that I mentioned to you earlier.

We will probably have more termination provisions to add, but we’ll discuss these in more detail in the coming weeks. That’s all for now.

**Peter:** Okay. I’ll send you an email summarizing our conversation.

**Cynthia:** Great. Thanks, Peter.

**Exercise 7-9 Adding Provisions to a Contract**

You represent Tortech Corp. a company that produces automotive tools in a deal with Villanova S.A. a Spanish distributor. You have drafted the International Distribution Agreement. While on a business trip, Jim Brown a partner in your firm is calling you about adding some provisions.

Take notes and turn his suggestions into contract provisions. Draft the provisions first. Then, look up keywords from your draft and find passages in the sample contracts that deal with the same topic.

**Script**

Hey Liz. I’m just about to take off, so I won’t be able to use my e-mail for a while.

Great job on the deal with Villanova!!! I’ve gone over the contract and found a couple of things that you should put in. I ‘ve got about 2 minutes, so here is what I want you to include.

Number one:

If Villanova wants to be eligible to return defective merchandise, they have to let us know. Make the timeline 7 days from when they received the merchandise.

Number two:

Also, if Villanova is not able to return the merchandise in 60 days, we should not have to accept it and definitely won’t give them credit.

I also didn’t see anything about modifications in the contract, so number three is to

make sure to include that modifications to our agreement are only valid if we and Villanova agree to these changes in writing.

I got to go. I got about two more things. I’ll contact you as soon as I can.

Bye, Liz.

**Exercise 8-7 Turning Notes into Provisions**

Jackie Howard, a partner in your law firm calls you with instructions as to what she wants to be included in some contract provisions. You represent the manufacturer in the deal. Take notes and compose the provisions accordingly. Also, consider anything else you have learned so far about drafting a provision and apply these principles to your draft.

**Transcript of the Conversation**

***Jackie****:* Hi, Veronica. Thanks for drafting these additional provisions for the distribution contract on such short notice. If you are ready, I’m going to summarize the provisions that we need to include before Friday.

***Veronica****:* No problem. I am ready to take notes.

***Jackie****:* Okay. You know most of the deal anyway, but let me know if you have any questions.

***Veronica:***Sure, go ahead.

***Jackie****:* Well. Number one. Acceptance of orders.

An order for products will be considered accepted by the manufacturer unless it expressly rejects the order. We are talking about a written rejection here, and the order has to be rejected within 5 business days after they receive the order.

***Veronica:***Order accepted unless rejected in writing. Has to happen 5 days after receipt. And, what is meant by “business days”?

***Jackie****:* The days that the manufacturer is open for business.

***Veronica:*** Days they are open for business.

***Jackie****:* You got it. Number two. Change in ownership or control of the distributor. So if there is any anticipated change in ownership or control, then we should notify manufacturer at least 45 calendar days—not business days—in advance of that event. But if a law or contract prevents us from letting them know about this event because it would violate our obligation of confidentiality, then they still want to require us to let them know of the change in ownership or control within five calendar days after the change*.*

***Veronica:*** That’s a long one. We need to be notified about change in ownership as early as possible. Forty-five days before if the law and contract allows it. If not, at least five days after the change.

***Jackie:***You almost got it. They need notification WITHIN the first five days after that change happens.

***Veronica:***I see. I’m sorry.

***Jackie:***No problem. Here’s the last one, termination. The manufacturer can terminate if we have breached our payment obligations under the contract. Provided, however, they have to give us written notice AND we must have failed to cure the breach within 30 days after receiving the written notice.

***Veronica:*** Is that 30 calendar days or business days?

***Jackie****:* Calendar days. Okay. That’s it. Anything else you need to know?

*Veronica:* No. I’m fine. I’ll get the provisions to you by 5.

*Jackie:* Very good. Thanks.