GRADER'S GUIDE

***** QUESTION NO. 8 *****

SUBJECT: CIVIL PROCEDURE

1. Is Paul correct that the release argument has been waived? Explain. (30 points)

a. Pleading affirmative defenses. In asserting that he has been released from the covenant, Derek is raising the affirmative defenses of release and accord and satisfaction.[1] *See* 1 C.J.S. *Accord and Satisfaction* §§ 2, 7; 71-72; 76 C.J.S. *Release* §§ 2-3, 69-70. Civil Rule 8(c) requires that "any … matter constituting an avoidance or affirmative defense" must be "set forth affirmatively" in a defendant's answer. Indeed, both "release" and "accord and satisfaction" are defenses expressly listed in Rule 8(c) as requiring affirmative pleading. Rule 12(b) likewise requires that defenses be asserted in a defendant's responsive pleading.

b. Waiver. Derek's failure to plead accord and satisfaction as an affirmative defense exposes him to the argument that the defense has been waived, and indeed Paul has argued waiver in his reply. In general, a court may treat defenses omitted from the responsive pleading as waived and no longer part of the case. *E.g., Stanton v. Fuchs,* 660 P.2d 1197, 1198 n.2 (Alaska 1983).

c. Construction of pleadings. Here, a waiver will not be imposed. Derek did not fail to mention the facts giving rise to accord and satisfaction in his answer, erring only in characterizing it as a counterclaim[2]. Rule 8(f) requires that "[a]ll pleadings shall be construed so as to do substantial justice." Since the purpose of pleadings is only to put the adverse party on notice of the issues in the case, and Derek's answer as a whole did put Paul on notice that the release would be an issue, it would be an abuse of discretion for the court to enforce a waiver of the defense in these circumstances. *See Reiter v. Cooper,* 113. S. Ct. 1213, 1217 (1993) (construing parallel federal rule); *Mutual Creamery Ins. Co. v. Iowa Nat. Mut. Ins. Co.,* 427 F.2d 504, 507-8 (8th Cir. 1970) (same).

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[1] Various other affirmative defenses might be drawn from these facts as well, such as waiver and estoppel. *Cf.* Civil Rule 8(c).

[2] It may be that the breach of the release agreement can also be set up as an independent claim, but if Derek wished to use it as a defense to Paul's claim, he should have listed it as such. Hence the failure to plead it as an affirmative defense was an error.

Indeed, although it is more obscure than the general principle in Rule 8(f), there is a specific provision in the rules establishing that Derek's mistake is ordinarily to be viewed as a harmless one. The last sentence of Rule 8(c) states: "When a party has mistakenly designated a defense as a counterclaim . . . the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." Here, there is no prejudice to Paul if the release is considered, since Paul knew of the issue from the time of the answer, whereas if the defense were excluded a key element of the parties' contractual relationship would be stripped from the case. Justice plainly requires that the mistaken designation be treated as a proper one.

d. Potential amendment of answer. Were Rule 8 not dispositive of the issue, Derek could seek to amend his answer under Rule 15(a). Since more than 20 days have passed since he filed his answer, he could not amend as a matter of course, but he could request leave to do so and the rule provides that "leave shall be freely given if justice so requires." In this case, of course, Derek need not, and has not, submitted a motion for leave to amend.

e. Substantive law issues. The question does not ask examinees to evaluate the merits of the release argument, and does not provide enough information to assess it.

2. How should the court resolve Derek's argument that he is entitled to a jury trial? Explain briefly. (30 points)

a. No jury trial on equitable claims. Art. I, § 16 of the Alaska Constitution follows its federal counterpart in preserving a right to jury trial only on claims that would have had such a right at common law, that is, in 1791. *See generally Local No. 391 v. Terry,* 110 S. Ct. 1339, 1344 (1990); *State v. First National Bank of Anchorage,* 660 P.2d 406, 423-4 (Alaska 1982); 9 Wright & Miller, *Federal Practice & Procedure: Civil 2d* § 2302. Here the claim for injunctive relief on the contract is purely equitable, and comes with no jury trial right. Wright & Miller, *supra,* § 2308 at 80 ("no constitutional right to a jury trial on a claim for an injunction"), § 2309 (specific performance is equitable relief; no jury trial right). The fact that the complaint contains one equitable claim (for injunctive relief) and one legal claim (for damages on a tort theory) does not render the injunctive claim triable to a jury. Wright & Miller, *supra,* § 2305 at 70. Note that the fact pattern in the question avoids the slightly more complex problem of a complaint seeking both legal and equitable relief on a single cause of action.

In the fact pattern of the question, moreover, the relief being requested is preliminary relief, pending trial. Even if there were a right to

trial by jury, a decision on the motion for preliminary injunction is not the trial of the case. However, the court does have discretion to advance trial on the merits so as to consolidate it with a hearing on the preliminary injunction, and in that event the court would have to so structure the trial that any claims to which a party had a right to a jury trial would be so tried. Civil Rule 65(a)(2).

b. Right to jury trial waived. To obtain a jury trial on issues triable to a jury (in this case, count 2), Derek needed to file and serve a separate, written demand for jury trial no more than ten days after serving his answer. Civil Rule 38(b). Here, he submitted his demand 30 days later. Failure to submit a demand in accordance with Rule 38(b) "constitutes a waiver by the party of trial by jury." Civil Rule 38(d); *Hollembaek v. Alaska Rural Rehabilitation Corp.*, 447 P.2d 67, 68 (Alaska 1968).

3. *If the court rejects both arguments, describe the analysis it should apply in deciding whether to grant or deny the preliminary injunction. (40 points)*

a. Standard for granting a preliminary injunction. The first step in resolving a motion for preliminary injunction[3] under Alaska law is to determine which test to apply. If the harm to the defendant from the preliminary injunction is relatively slight when balanced against the harm the plaintiff will suffer if the injunction is not granted *or* can be indemnified by a bond, the "serious and substantial question" standard applies. *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-9 (Alaska 1991). That standard is a three-part test:

> 1) the plaintiff must be faced with irreparable harm;
> 2) the opposing party must be adequately protected; and
> 3) the plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be "frivolous or obviously without merit."

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[3] A contract issue that may send a few examinees on a short detour is the notion that contracts (the subdivision covenant being, of course, a contract) are not ordinarily enforced by injunction. This, however, is not true of real property contracts, *see, e.g.,* 81 C.J.S. *Specific Performance* §§ 75ff.; *Carroll v. El Dorado Estates,* 680 P.2d 1158, 1160 (Alaska 1984) ("as a practical matter injunctive relief is the only way to adequately enforce a bylaw of this nature [prohibiting pets from a condominium]), and indeed almost any contract is eligible for the remedy of specific performance if the elements for injunctive relief, such as inadequacy of the remedy at law, are truly present. 81 C.J.S., supra, §§ 6ff.

Borough, 850 P.2d 636, 639 (Alaska 1993) (quoting prior authority). The Alaska Supreme Court also refers to this standard as the "balance of hardships approach," and the application of elements 1 and 2 entails some "weighing the harm that will be suffered by the plaintiff if an injunction is not granted, against the harm that will be imposed upon the defendant by the granting of an injunction." *State v. Kluti Kaah Native Village of Copper Center,* 831 P.2d 1270, 1272-3 (Alaska,1992).

If neither of the triggering circumstances apply—that is, if the harm to the defendant from the injunction is "not inconsiderable" *and* it is a type of harm that "may not be adequately indemnified by a bond"—the "probable success" standard applies. *United Cook Inlet, supra,* 815 P.2d at 379. This standard requires a showing of "a clear showing of probable success on the merits." *A. J. Industries, Inc. v. Alaska Public Service,* 470 P.2d 537, 540 (Alaska 1970). There is no need to show irreparable harm under the second test. *Id.*

In this case, the harm to the defendant from a preliminary injunction is certainly slight (having to turn off decorative lights until the case can be tried). It is probably more slight than the harm to Paul from leaving the lights on, which is loss of sleep and loss of a right that seems to have been important enough to the parties for them to put it in a recorded covenant. Hence, Paul qualifies for the "serious and substantial question test."

Some examinees may be aware that there is a long tradition of courts considering an additional factor, the public interest, in deciding whether to grant or deny a preliminary injunction. *E.g., Amoco Production Co. v. Village of Gambell,* 107 S.Ct. 1396, 1404 (1987); *Hanlon v. Barton,* 740 F. Supp. 1446, 1447 (D.Alaska 1988). This traditional factor for injunctive relief is widely recited in state and federal cases around the country, but is not normally mentioned in Alaska Supreme Court cases. However, since an injunction is an equitable remedy, it is certainly possible that public interest might be argued as an added factor in a motion of this type. Here, the facts provided suggest that there is a city policy in favor of having at least 1000 lights per lot, and enjoining the lights would run counter to that policy. A city policy arguably reflects a collective judgment on the public interest.

b. <u>Application of the standard.</u> The first question in applying that test is whether Paul will suffer irreparable harm. In *Kluti Kaah, supra,* 831 P.2d at 1273 n.5, the Alaska Supreme Court defined "irreparable harm" as

> an injury, whether great or small, which ought not to be

> submitted to, on the one hand, or inflicted, on the other; and which, because it is so large or so small, or is of such constant and frequent occurrence, or because no certain pecuniary standard exists for the measurement of damages, cannot receive reasonable redress in a court of law."

(quoting Black's Law Dictionary, 786 (6th ed. 1990)). Paul's loss of sleep and loss of the benefit of the darkness he bargained for when he bought his lot is not a monetary loss and not one readily compensated through a damages action at law. It probably qualifies as irreparable.[4] In *Carroll v. El Dorado Estates,* 680 P.2d 1158, 1160 (Alaska 1984), the Alaska Supreme Court addressed a no-pets provision in condominium bylaws, analogous in some ways to a subdivision covenant such as this one restricting a relatively minor aspect of property usage; the court noted in dicta that "as a practical matter injunctive relief is the only way to adequately enforce a bylaw of this nature."

The second question is whether the opposing party is "adequately protected." *United Cook Inlet* indicates that a party is adequately protected if the harm suffered is "inconsiderable," and Derek's harm from merely turning off the decorative lights ought to fit in that category. It therefore probably is not necessary to reach the question of whether a monetary bond can be devised that compensates for the injury.

The third question is whether Paul's claim is not "frivolous or obviously without merit." Given that question 3 requires one to assume that the release argument has been rejected, there is no basis to suggest that Paul's effort to enforce the covenant lacks legal merit.

An examinee who argues that Paul failed to meet the threshold for using the "serious and substantial question test" will then have to apply the "probable success standard." Paul seems to meet this standard as well, since he has established by admissions in the answer that there is a covenant and that Derek has strung many lights in his trees, which plainly violates the covenant.

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[4] Paul's argument on this point is weakened, but only marginally, by the fact that he has, in fact, asserted a claim at law to compensate just this injury.