New Business Counseling Practicum

William Kell
UC Berkeley Law School

NEW BUSINESS COUNSELING PRACTICUM

Report of Activities for the 2007/2008 Academic Year

William Kell
Supervising Attorney and Lecturer in Residence
wkell@law.berkeley.edu

Fall 2008
UC Berkeley Law School
The New Business Counseling Practicum
Report of Activities
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   *Note: Shared with Client Consent
I. Introduction

The New Business Counseling Practicum (the “Practicum”) provides rich learning opportunities for students in business law, as they provide legal assistance to local start-up businesses under skilled supervision. The following memo is designed to update Boalt faculty, alumni, and other key stakeholders re: the course, the students’ experiences, clients, and future plans.

II. What is the Practicum?

Over the past ten years, the New Business Counseling Practicum (Law 256.12, 3 Credits) has developed into an innovative experiential learning course at Boalt, particularly for students interested in transactional lawyering. Traditionally, over half of Boalt graduates will not be working in a courtroom – most will be advising businesses about how to form a legal entity, negotiate contracts, comply with regulatory requirements, and generally chart a safe path through a challenging legal landscape. The Practicum offers students a chance, before graduation, to develop their budding skills as transactional lawyers, all under close mentorship from experienced lawyers. In addition, the Practicum serves as Boalt Hall’s only in-house experiential learning program with a local impact, supporting Boalt’s efforts to “give back” to its Bay Area community.

Over the 14 week semester, Practicum students acquire a working knowledge of law and business development, which enables them to assist entrepreneurs with common legal issues related to start-up. Students are certified to practice under attorney supervision by section 9.42 of the CA Rules of Court. Supervision and overall quality control is provided by the full-time Supervising Attorney, assisted by a core group of four veteran transactional attorneys (2 with MBAs). Student work is also supported by a team of lawyers and Boalt faculty who have agreed to advise the Practicum re: their particular spheres of expertise, e.g., capitalization, contracts, and other areas of business law. Finally, students develop their knowledge base through a variety of learning methods, including lecture, simulation, case conferences, team meetings, panels/workshops, and field trips; students also receive substantial amounts of individualized feedback from the Supervisory team and their student colleagues throughout the course.
III. Curriculum

The basic structure of the course was formed at Cornell University Law School, as part of a transactional clinical program created in 1998 by Supervising Attorney William Kell. When Kell arrived at Boalt in 2001, he first established the Practicum as a simulation course, drawing heavily on Alumni who participated in the class as “mock” business clients for the students. The Alumni mock clients, most of whom continue to this day as mentors to the course, helped create complex fact scenarios for the students to work with from the Mentors’ own experiences consulting with or running businesses. As part of the simulation format, Practicum students became “associates” working under the Supervising Attorney, meeting with their “clients,” convening case conferences of the “firm”, doing research and providing recommendations in a series of simulated client meetings. Together with the Supervising Attorney, the Alumni mock clients provided ongoing feedback to the students, as well as workshops and panels designed to provide a solid grounding in transactional law. The curriculum is imparted through a diverse set of teaching methods: including lecture, simulation, periodic “case conferences”, workshops/panels with experienced attorneys/entrepreneurs, and field trips to local businesses (see attached).

From this simulated experience grew a rich curricular base, supported by experienced Alumni, ready to anchor a live client program at Boalt Hall like the original at Cornell. The diverse teaching methods and business law curricula has not significantly changed – in essence, the major change has been the transformation of the “mock” clients into real business clients. The Practicum began offering consultation to real start-up businesses in Fall 2007.

The attached syllabus describes the format for today’s Practicum course. A typical semester begins with a front-loading of transactional law applicable to start-up businesses, plus training in practice skills (interviewing, counseling, case planning) and certain basic business management knowledge. By the end of the fifth week, students participate in a final preparatory simulated interview with “mock” entrepreneur clients – the same Alumni mock clients and scenarios used in the earlier Practicum when it was solely a simulation course. After receiving written and oral feedback about this simulated “first client encounter – feedback from the Instructor, the Alumni “mock” client, and fellow classmates -- students then arrange to have their first meeting with their actual, assigned start-up business clients.

For the remaining eight weeks of the term, plus the exam period, Practicum students work in teams of two to interview and meet periodically with their clients to provide assistance as the business’s “legal team”. Such assistance includes doing research, drafting legal documents, and providing recommendations as to different options, all under supervision of the Supervising Attorney, assisted by the four volunteer attorneys in the “Mentors” group, plus the two JD/MBA Teaching Assistants. Students submit their research summary and recommendations for the client to the Supervising Attorney and two attorneys of the Mentors group by week 12, allowing time for a thorough review and written feedback. Final meetings with the client occur during exam period; students share their research summaries and recommendations orally at that meeting, followed by submission of their written work a couple of weeks later. The Supervising
Attorney then gives all student submitted work a third and final review before distribution to the client.

As to curriculum content, the Practicum curriculum has been developed since 1998 to include the essential "start-up in a box" knowledge that transactional attorneys rely upon to work with start-up businesses. Before students meet with a client (mock or actual), the student is given a grounding in Interviewing and Counseling skills, as well as key principles of Case Planning and Business Planning. Substantive knowledge areas covered during the semester include:

* Business Entity Formation
* Key Business Relationships: founders, employees, independent contractors, investors, creditors, suppliers, landlords
* Tax – aspects in formation/entity choice, basic IRS expectations (2 classes)
* Understanding Financials
* Capitalization
* Intellectual Property
* Employment Law and Human Resources
* For-Profit/Non-Profit Business Activities

As part of supervision, if a client need involves an issue other than the above, the Supervising Attorney arranges additional curriculum and mentorship, e.g., by linking the student with a pro bono attorney or one of the additional subject matter advisors.

Finally, but critically important, is the substantial emphasis on ethics education which has been integrated into all aspects of the curriculum. The duties of loyalty, confidentiality, competence and avoidance of conflicts are covered in the first classes and re-emphasized in all supervisory meetings. The students encounter challenging but common ethical dilemmas during client simulations, which allow them to receive additional mentorship in a safe setting. When ethics issues come up in the real client cases, the Instructor and TAs revisit them in case conferences so that the ethics training is shared among the whole class.

It should be noted that, in light of its unique history and development, the Practicum curriculum was featured in a workshop led by the Supervising Attorney at the annual conference of Transactional Law Clinical Teachers in Detroit, Michigan this April 2008: "Getting the Best of Both Worlds: The Use of Simulation and Live Client Work to Teach Transactional Law".

**IV. Clients**

This year the Practicum served a total of 12 clients, with an average of 10 clients each semester: an equal mix of for-profit and non-profit start-up businesses. The for-profit clients come to the Practicum primarily through a relationship with the UC Haas Business School student business incubator, operated in conjunction with the Lester Center for Entrepreneurship. The non-profit
clients come primarily from the Instructor’s close affiliation with the East Bay Community Law Center, a veteran community-based law office supported by Boalt Hall. All clients must meet the following criteria: (1) the client must be a start-up business, or a veteran business starting a new program/product, (2) the client must be unable to afford counsel, and (3) the client must be willing to meet with, communicate, and work actively with the assigned student team throughout the term.

In order to limit student work/client service to those areas within the Practicum’s arena of competence, the Instructor negotiates a Letter of Agreement with the client at the beginning of each term. The LOE is designed to set reasonable goals and to delineate appropriate expectations between the client and Practicum as to what will and will not be covered (see sample LOE attached).

At intake and in the LOE, clients are informed that certain client needs are NOT served by the Practicum:

- Patent Law or Complex Intellectual Property Matters
- Litigation
- Bankruptcy
- Complex Tax Matters
- Purchase or Sale of Businesses, Assets, or Realty.

Clients who need assistance with the above matters are referred to alternative counsel – pro bono attorneys arranged by the Supervising Attorney, or to another pro bono lawyer program in San Francisco: Legal Services for Entrepreneurs (LSE), which is a project of the Lawyer’s Committee for Civil Rights. The Supervising Attorney has forged an ongoing relationship with LSE to help take on cases the Practicum is unable to serve.

V. Supervision

In every respect, the Practicum operates as a formal law office, following standard procedures consistent with professional ethics and effective practice. All work is supervised by a full-time licensed, experienced transactional attorney. Law students are certified for practice, under attorney supervision, pursuant to section 9.42 of the California Rules of Court. Students learn, starting in the first class, about the importance of protecting client confidentiality – this and other key ethical guidelines are re-emphasized in several of the simulations, which integrate difficult ethical dilemmas into many of the mock client fact scenarios. Non-disclosure agreements are used to bind Haas students to the Law Office confidentiality policies. In addition, the limitations re: attorney-client privilege protection as to business matters are specifically explained to each client at intake. Finally, all work conducted for clients is specifically negotiated and delineated at the beginning of client representation in a retainer ("Letter of Engagement" (LOE) – see Appendix for sample).

Once the research objectives are identified for each client in the LOE, the Supervising Attorney and the Mentors group steer each student to the relevant research sources, sometimes with
assistance of other pro bono attorney mentors in specific subjects. For example, during a Spring 2008 intake, a question was raised by the Mentor’s group as to whether one client’s business model may involve money service transfer regulation. As part of the assigned student team’s research, a special workshop was arranged with Partner Tom Brown of O’Melveny and Myers, who teaches a course at Boalt on the subject. Chris Brown also reviewed the students’ final research summaries and recommendations before they were shared with the client. Similarly, one client’s development of a record label prompted the arrangement of a consultation with another Partner at the DLA Piper law firm who was an experienced music industry attorney. He also reviewed the student work prior to distribution.

As mentioned above, the Practicum has benefited from the knowledge and professionalism generosity of Alumni and other experienced attorneys, who have agreed to provide specific mentorship in the following subject areas, when needed:

- Entity Formation
- Due Diligence
- Capitalization
- Tax
- Payment Mechanisms
- Intellectual Property
- Cyberlaw
- Finance
- Immigration Law
- Insurance
- Employment Law
- Risk Management
- Contracts
- Youth Law
- Entertainment Law
- Non-Profit/For-Profit Collaborations
- International Business Law

As previously described, draft recommendations for the client are submitted by the students in week 12, allowing for review and written feedback by the Supervising Attorney and two attorneys from the Mentors group. Final meetings with the client occur during exam period and are followed by submission of the final versions of the student research memos, which are given a final review by the Supervising Attorney before distribution to the client.

VI. Evaluation

Since 2001, the Practicum has enjoyed consistently positive student evaluations (see attached summary). Most semesters end up with students still on the waiting list hoping to get a slot in the class; unfortunately, given the amount of supervision and individual feedback, class size must be limited to an amount somewhat smaller than traditional student demand.

As to overall Practicum evaluation and improvement, after each term, the Supervising Attorney has reviewed the previous semester’s work with the Mentors group. This has produced important adjustments in the curriculum and practice guidelines and will be an important source of strength and mentorship for the Practicum’s development in the years to come.

As to client evaluation of the program, after each term, the Supervising Attorney also talks with each client to gain helpful feedback about the student/Practicum work provided. Overall reaction has ranged from “very satisfied” to “extremely grateful”. During Summer 2008, the Supervising
Attorney will formalize the process more by distributing written satisfaction surveys to each client, to supplement the feedback already informally received.

VII. Future Development

The Practicum has provided a model for transactional legal education, supported by the wealth of knowledge and generosity of mentorship contributed by experienced Alumni. During Summer 2008 the Supervising Attorney will continue to broaden the Alumni base – with a particular goal of finding more attorneys willing and able to mentor students in specific subject areas (see Appendix). An advantage of the Practicum is that there are a variety of ways that interested Alumni can participate: as part of the Mentors group (larger time commitment), serving as “mock” clients, and/or sharing their experience and perspectives on specific subject areas or in Practicum workshops and panels.

The Supervising Attorney will also work during Summer 08 and ongoingly to expand the budding pro bono network for the Practicum. This will be greatly assisted by several recent Practicum graduates who have agreed to act as liaisons between their law firms’ pro bono coordinators and the Practicum course. Having substantial pro bono resources at its disposal helps the Practicum maintain its focus and guidelines re: what legal assistance can or cannot be offered to clients. Ultimately, these resources enable the Practicum to continue to focus on start-up related issues while leaving more complex subject areas to other more experienced counsel.

As to the development of scholarship, the Supervising Attorney will also be using the Summer and Winter intercessions to write about the Practicum’s unique experiential learning model. This will build upon the presentation of the Practicum curriculum and teaching at the Transactional Law Clinical Teacher’s annual conference in Detroit, Michigan in April 2008.

With approval from BCLBE, the Supervising Attorney hopes to build upon its listing in the BCLBE sphere of classes and create a more formal affiliation with the Center. Ideally, this would allow the Supervising Attorney to write grant proposals to foundations interested in supporting legal education, entrepreneurship education, ethics education, and community economic development efforts. This relationship would also potentially assist in the scheduling of a future annual meeting of the transactional law clinical teachers at Boalt Hall, possibly in 2010, which would foster important discussions about innovations in teaching transactional law.

In addition, with approval from BCLBE, the Supervising Attorney would like to explore ways to collaborate with other BCLBE faculty who want to include simulation/experiential learning components in substantive lecture classes. This would build upon the success of a pilot collaboration with Steve Choi’s Corporations class in 2005, which helped teach entity formation utilizing a simulated interview with a “mock” business client. According to Professor Choi, the simulation helped generate substantial class discussion and bring alive important considerations of the differences between corporations, LLCs and other legal entities.

Finally, it should be noted that, while it appears that the past term’s student and client numbers can be accommodated, a more ideal target capacity to maintain would be 15 students total per
term, plus a maximum of 10 clients. This would allow more time for the Supervising Attorney to work on additional program enhancements, scholarship, fundraising, and the strengthening of relationships between the Practicum, Alumni, the Haas Business School, and Bay Area law firms.

VIII. Conclusion

Much was learned, and much was accomplished in the Practicum’s first year of live client service. Overall, teaching evaluations and informal student communications describe the Practicum as having given students important tools, guidance, and confidence that will likely improve their future practice. The rich curricular base and supervisory structure developed since 1998 has enabled Practicum students to experience what it would be like to work in an effective, well-run transactional law office. This can only improve students’ prospects to be knowledgeable and successful in their own transactional practice after law school.
IX. Appendices

- Course Description
- Course Syllabus
- Additional Advisors
- Summary: Practicum Student Evaluations
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- Sample Mock Client Scenario
- Client Case Summaries (Redacted)
- Samples:
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Course Materials

- Course Description
- Course Syllabus
UNIVERSITY OF CALIFORNIA AT BERKELEY
BOALT HALL SCHOOL OF LAW

Course # 256.12: New Business Counseling Practicum

Instructor: William Kell, Lecturer in Residence          Units: 3
Meeting time: T Th 1:55 to 3:10

Pre-requisites: Law students must be either 2L or 3L, AND also have taken Civil Procedure and Evidence (or be concurrently enrolled). Note: This is an interdisciplinary class, so there are 12 slots available to Boalt students, and 4 slots available to students from the Haas Business School. There are no pre-requisites for Haas students.

Description: In the Practicum, students will learn and apply a broad range of knowledge in law and business related to the development of new businesses, through classroom learning, field trips, participating in simulations, and through providing hands-on assistance with real business start-ups. Class time will be primarily devoted to preparing students for consulting with real entrepreneur clients during the term, specifically entrepreneurs who are beginning new business ventures (for-profit or non-profit). Students will work in interdisciplinary teams and under Instructor supervision, to research and formulate options that will address their entrepreneur clients’ needs.

The course will ready students for transactional lawyering and consulting with business clients, but in the larger sense, will demonstrate in depth what is needed to start a successful business. The course will also examine ethical issues and other critical practice matters for transactional lawyers and other professionals. Critical questions include:

* What do entrepreneurs need to know re: law & management in order to survive and thrive?

* How can consultants assist entrepreneurs effectively, both in dealing with acute legal problems, and in planning preventively for the future?

* How can lawyers and other professionals (e.g., MBAs) work effectively together to assist new businesses, given the often interconnected nature of legal and business problems?

Traditional topic areas be examined and applied particularly in the context of assisting new businesses. Areas of law will include: business regulation, risk management, contracts, intellectual property, and taxation. Areas of business management will include financing, marketing, business planning, and evaluating financials. Finally, mixed areas of law and business management will be examined, including entity formation, capital formation, and tax planning.

Exam: None. Grade is based on performance in meetings with clients (1 simulation, and 3 actual client meetings), plus a research memo prepared for the client (approx 8 pages in total).

Contact Professor William Kell for more information:(o) 642-4050, (e) wkell@law.berkeley.edu.
<table>
<thead>
<tr>
<th>Aug</th>
<th>Class</th>
<th>Reading Assignment</th>
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<tbody>
<tr>
<td>T</td>
<td>18 INTRODUCTION- Class Format &amp; Requirements; Model; Overview of</td>
<td>READ: Supp. pp. 3-19, SKIM: 20 - 50</td>
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<td></td>
<td>Diagnostic Model for Assisting New Businesses</td>
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<td>Th</td>
<td>20 FIELD TRIP TO CREPEVINE; Meet at Corner of Cedar &amp; Shattuck in</td>
<td>SKIM: Supp. pp. 53 -64 (Diagnostic)</td>
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<tr>
<td></td>
<td>Berkeley to talk with Entrepreneur Joseph Bayyat</td>
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<td><strong>Info Request -- Please return to BK by Friday 8/28</strong></td>
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<td>Th</td>
<td>27 TAXATION &amp; CAPITALIZATION; At end of class, students will hear</td>
<td>SKIM: Links to IRS Forms for Tax Reporting on Supp. p 209 and p. 211; READ: Handout: “Tax Consequences and Choice of Entity”</td>
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<td></td>
<td>details about the client cases available for assignment this term</td>
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<td>F</td>
<td>28 CLIENT SKILLS BOOT CAMP - (2.5 hours, with Food) - Training in</td>
<td>READ: Reader pp. 3-45, SKIM: Reader pp. 47 - 49, READ: Reader pp. 53 - 80 and 89-110.</td>
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<td></td>
<td>Counseling, Negotiation (With Drafting Class Students)</td>
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<tr>
<td>Day</td>
<td>Time</td>
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<td>Su</td>
<td>9:00</td>
<td>New Business Counseling Practicum – Fall '09 Syllabus (Updated 8/18/09)</td>
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<tr>
<td>Tu</td>
<td>7:00</td>
<td>Team Meetings (No Tuesday Class)</td>
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<td></td>
<td>7:30</td>
<td>Fall Break (No class meetings)</td>
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<td>8:15</td>
<td>Fall Break (No class meetings)</td>
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<td>9:00</td>
<td>Before Fall Break</td>
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<td></td>
<td>9:15</td>
<td>Begin Real Client Meetings/Finish First Team Meetings This Week</td>
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<td></td>
<td>9:30</td>
<td>1st Draft of 2-page Client Intake Memo due</td>
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<td></td>
<td>9:45</td>
<td>Week 1: Writing Assignment 1st Draft of 2-page Client Intake Memo</td>
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<td></td>
<td>10:00</td>
<td>Finish Real Client Meetings/Finish First Team Meetings This Week</td>
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<td></td>
<td>10:15</td>
<td>Fall Break (No class meetings)</td>
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<td></td>
<td>11:00</td>
<td>Begin Real Client Simulations/Finish First Team Meetings This Week</td>
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<td>11:15</td>
<td>Client Intake in order to help team prepare for real client meetings</td>
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<td></td>
<td>11:30</td>
<td>Review Interview Skills Readings in Reader pp. 265-268, 314</td>
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<td></td>
<td>11:45</td>
<td>Business Plan for Financing and Supply Chain Management: Readings pp. 167 and 173</td>
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<td></td>
<td>12:00</td>
<td>Interview Planning Time</td>
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<td>12:15</td>
<td>Business Planning: Last part of class (reserved for mock and real client interviews)</td>
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<td></td>
<td>12:30</td>
<td>Review Interview Skills Readings in Reader pp. 167 and 173</td>
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<td>12:45</td>
<td>Attend Business Plan seminar (6) real client case, and (6) complete mock</td>
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<td>1:00</td>
<td>Schedule interview between 9:00 and 9:30, but only AFTER the team meets</td>
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<td>1:15</td>
<td>Real clients this week set the first meeting. First meetings can be reviewed this week, and class assignments due.</td>
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<td></td>
<td>1:30</td>
<td>Immediately contact the teachers, and class assignments due. Students can immediately contact the teachers, and class assignments due.</td>
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<td></td>
<td>1:45</td>
<td>Business Relationships &amp; Regulatory Compliance: Class Reading: Assignment 2, Chapter 15</td>
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Reading Assignment: Class Reading: Assignment 2, Chapter 15
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<th>Oct</th>
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<tr>
<td>Th</td>
<td>1 FIRST CASE CONFERENCE; Brief Intro to Cases /Issue Spotting</td>
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<td>T</td>
<td>6 SECOND CASE CONFERENCE; Brief Intro to Cases /Issue Spotting (Contd.)</td>
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<td>Th</td>
<td>8 START-UP &amp; CAPITALIZATION ISSUES WORKSHOP - Attorney/Mentor Allian Kaplan and other guest panelists</td>
<td>READ: (TBA)</td>
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<td>T</td>
<td>13 TEAM MEETINGS (No Tuesday Class)</td>
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<td>Th</td>
<td>15 TAX ISSUES FOR NEW BUSINESSES WORKSHOP - Attorney Al DeLeo</td>
<td>SKIM: Tax Consequences in Choice of Entity (handout from earlier in the term)</td>
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<td>20 THIRD CASE CONFERENCE: Focus on For-Profit Cases</td>
<td>READ: (TBA)</td>
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<td>Th</td>
<td>22 UNDERSTANDING FINANCIALS - WORKSHOP - Attorney Al DeLeo</td>
<td>SKIM: Reader p. 121 (Starbucks Financials) ; READ: Handout - Summary of Sarbanes Oxley Law</td>
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<td>27 TEAM MEETINGS (No Tuesday Class)</td>
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<td>Th</td>
<td>29 NON-PROFIT/FOR-PROFIT BUSINESS ISSUES WORKSHOP - Attorney/Mentor Gabrielle Lessard</td>
<td>READ: Handouts on Advantages/Disadvantages, and Myths about Non-Profits</td>
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<td>Reading Assignment</td>
<td>Class</td>
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<tr>
<td>Requirements for 50103</td>
<td>Nov</td>
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<td>Approval Letter and link to IRS brochure re: ongoing</td>
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<tr>
<td>READ: Handout: Sample 50103 Application IRS</td>
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<td>3 Fourth Case Conference: Focus on Non-Profit Cases</td>
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<td>5 Risk Management Panel – Attorney: Mentor Richard Macbride and other</td>
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<td>10 Check-in Meetings with Clients This Week -- By phone or in-person</td>
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<td>12 Intellectual Property Issues Panel</td>
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<td>as scheduled at close of first client meeting; (No Thursday class)</td>
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<td>17 Intellectual Panel – Attorney: Michael</td>
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<td>as scheduled at close of first client meeting</td>
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<td>26 Thanksgiving (No Class Meeting)</td>
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<td>READ: Handsouts from Chamber of Commerce HR</td>
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<td>24 Employment Law and Human Resources Panel – Attorney Michael</td>
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<td>Load and other guest panels to</td>
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<td>6 Sixth Case Conference: Focus on other 1/2 cases as assigned</td>
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<td>Conference – Second Drafts due Thursday, December 5</td>
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<td>Receive By Student on Draft Memos and Letters Before Case</td>
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<td>17 Fifth Case Conference: Focus on 1/2 cases as assigned</td>
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<tr>
<td>Read: Reader pp. 175-177</td>
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<td>Assessing the IP Inventory of a Business</td>
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<tr>
<td>READ: Reader p. 125-147 and additional handout on</td>
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<td></td>
</tr>
<tr>
<td>Dec</td>
<td>Class</td>
<td>Reading Assignment</td>
</tr>
<tr>
<td>-----</td>
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</tr>
<tr>
<td>Th 5</td>
<td>WRAP-UP CLASS: Revisit the Diagnostic Approach with Assisting Businesses; Ethical Issues - <strong>Second drafts of Memos and Cover Letters due today</strong></td>
<td>READ: Supp. pp. 215 - 264 (Skim Enron Report)</td>
</tr>
<tr>
<td>12/5 to 12/18</td>
<td>FINAL CLIENT MEETINGS -- <strong>Students can schedule these meetings anytime during this period -- allow for brief (last) Team Meeting beforehand for final prep; Teams receive final BK comments on research memo/cover letter drafts prior to last Client meeting</strong></td>
<td></td>
</tr>
<tr>
<td>TBA</td>
<td>END OF TERM CLASS BARBECUE!! - At BK &amp; Family's House (Details TBA)</td>
<td></td>
</tr>
<tr>
<td>F 12/18</td>
<td><strong>Final drafts of Research Memos and Cover Letters due today - Send by Email to BK, BK sends to Client after final review</strong></td>
<td></td>
</tr>
</tbody>
</table>
Additional Advisors
New Business Counseling Practicum

Additional Advisors

The Practicum benefits greatly from the contributed experience and expertise of a number of Alumni and other attorneys. There are different levels of involvement depending on what the particular advisor has agreed to: (1) Assistants to the Supervising Attorney, (2) Mentors Group, (3) Advisors to Students on Specific Subjects, and (4) “Mock” Client Assistants to the course. For (1) – (3), the Practicum clients specifically agree in the Letter of Engagement that the advisor only assists the Practicum and is NOT in an attorney-client relationship with the client. The Letter of Engagement also provides for disclosure of confidential information to the Mentors Group; client information is not shared with the Advisors on Specific Subjects unless agreed to in writing by the client.

1. Assistants to the Supervising Attorney

The Supervising Attorney has an ongoing agreement with two experienced attorneys who assist him with reviewing each student’s draft research memo and recommendations at the end of the term, prior to distribution to the client. These two attorneys have assisted the Practicum for 4-7 years, and also serve as members of the Mentors Group.

Richard MacBride (Boalt ‘98), MBA, former Partner at Squires, Sanders, and Dempsey, San Francisco – (For-profit/MBA Specialist)

Gabrielle Lessard, Legal Director, Insight Center for Community Economic Development (Non-profit Specialist)

2. Mentors Group

At the beginning of each term, the Supervising Attorney reviews the previous term’s work with the Mentors Group, plus the client case needs for the coming term. New potential cases are also screened and discussed. These attorneys have substantial experience with a wide variety of businesses, and have all participated in the Practicum curriculum as teachers and/or mock clients. This enables the Mentors Group to also advise on curricular improvements, ethical issues, and general supervisory issues.

Allan Kaplan (Boalt ‘82), President and CEO, IPRO

David Roberts (Boalt ‘74), MBA, Senior Advisor, Focus Investment Bank, LLC

Richard MacBride (see above)

Gabrielle Lessard (see above)
3. **Advisors to Practicum Students on Specific Subjects**

The following Alumni, Faculty, and other experienced consultants have agreed to share their expertise with Practicum Students on certain subjects, whenever the need arises:

- Al DeLeo, Boalt Lecturer, Partner at Cox, Castle, and Nicholson: Tax, Financials, Capitalization, Entity Formation

- Bert Lazerow, Boalt Lecturer, Professor, University Of San Diego Law School: Tax

- Jack McNulty, Professor Emeritus, Boalt Hall: Tax

- Richard Buxbaum, Professor, Boalt Hall: International Business Transactions

- Joan Hollinger, Lecturer, Boalt Hall: Youth Law

- Thomas Brown, Partner, O’Melveny and Myers: Payment Mechanisms

- Richard Lyons (Boalt ’82), Partner at Wendel, Rosen, Black and Dean: Start-up Issues

- Bruce Lymburn (Boalt ’82), Partner at Wendel, Rosen, Black and Dean: Start-up Issues

- Sean O’Connor, Clinical Teacher, University of Washington Law School: Intellectual Property

- Robert Barr, Executive Director, Berkeley Center for Law and Technology: Intellectual Property

- Lothar Determann, Partner, Baker & McKenzie: Web Law


- Michael Bolgatz, JD: Risk Management, Legal Ethics

- John Danner (Boalt ’75), MBA, Lecturer, UC Haas School of Business – Start-up and Capitalization

- David Charron – MBA, Lecturer, UC Haas School of Business – Start-up and Capitalization

- Christopher Kirkham, Partner, O’Melveny and Myers: International Banking, Microfinance, Contracts

- C. Brophy Christensen, Partner, O’Melveny and Myers: International Banking, Microfinance, Contracts
Susan Turner (Boalt ’74), President and CEO: Protocol: Employment Law

Michael Loeb, Senior Arbiter, Office of the Judicial Administrator, former Partner, Bingham McCutchen: Employment Law, Independent Contractors

4. **Pro Bono Attorneys Who Assist Clients Directly Where the Practicum Cannot**

A fourth category is being developed, which includes those attorneys who have agreed to set up a separate attorney-client relationship with a Practicum client, when the Practicum is unable to assist the client in a particular area of expertise. During Fall 2007/Spring 2008, the following two firms contributed pro bono attorneys to assist Practicum clients, setting up a separate retainer and attorney-client relationship:

* DLA Piper
* O’Melveny and Myers

The Supervising Attorney will be working during Summer and Fall 2008 to expand this list of pro bono resources, assisted by former Practicum Students/Alumni who have agreed to serve as liaisons with their own law firms’ pro bono coordinators.

5. **Alumni and Other Entrepreneurs Who Assist the Class as “Mock Clients”**

Finally, the Practicum students and curriculum are greatly enhanced each term by those who volunteer their time to participate in fact-rich, realistic simulations with the students. These simulations are scheduled each term before the students meet their “real” clients, and thus provide key opportunities for students to develop their practice skills and encounter ethical issues common to transactional practice, all in a safe setting. As previously described, these volunteers work with Supervising Attorney Kell to “tee up” challenging fact situations based on their own experiences in business. The students encounter them “in role” for one hour, then receive extensive feedback from the mock client, student observers, and the Supervising Attorney. A number of the following mock clients have volunteered with the Practicum since its beginning in 2001:

- Allan Kaplan (Boalt ’82)
- David Roberts (Boalt ’74), MBA
- Richard MacBride (Boalt ’98), MBA
- Lydia Esteve (Prof., Universidad de Alicante)
- Mary Ann Tidwell Broussard, Entrepreneur
- Lisa Feldstein (Boalt ’92)
- Deborah Moss-West (Santa Clara ‘94)
- Joe Alioto (Boalt ‘00)
- Susan Turner (Boalt ’74)
- John Yuasa (Hastings ’75)
- Jeremy Evnine, Entrepreneur
- Richard David (Boalt ’09)
- Shakti Narayan (Boalt ’08)
- Vien Truong (Hastings’06)
- Beatriz Rodriguez (Penn ‘00)
Summary: Practicum Student Evaluations
### Practicum Evaluations

<table>
<thead>
<tr>
<th>Semester</th>
<th>Course No.</th>
<th>Course Title</th>
<th>Units</th>
<th>Avg. of Teaching Evaluations</th>
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<tr>
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<td>01</td>
<td>256.12 Small Business Counseling Practicum</td>
<td>3.0</td>
<td>5.33</td>
</tr>
<tr>
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Client Satisfaction Survey Form
New Business Counseling Practicum
Evaluation Form for Clients

Dear Client, we have completed our first year of service and want to hear from you how it went. Specifically, we would appreciate your candid assessment of our work with you, as to the aspirations we have set for the Practicum. Please mark the number that best reflects your response to each statement, and return it to Supervising Attorney Bill Kell at wkell@law.berkeley.edu as soon as possible. THANK YOU!

Aspirations for Practicum Work:

<table>
<thead>
<tr>
<th>Statement</th>
<th>Strongly Agree</th>
<th>Agree</th>
<th>Unsure/ Not Enough Info. to Say</th>
<th>Disagree</th>
<th>Strongly Disagree</th>
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</thead>
<tbody>
<tr>
<td>1. The students were courteous and respectful.</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>2. The students were thorough.</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>3. The assistance was provided in a timely fashion.</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>4. I got a prompt response whenever I called/mailed.</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>5. The students’ written work was easy to read and understand.</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>5. The recommendations and research were helpful.</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>6. The students received the right amount of supervision.</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>7. If needed, I would use the Practicum again to assist my business.</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>2</td>
<td>1</td>
</tr>
</tbody>
</table>

** Please feel free to add more comments below (attach additional sheets if needed):
Sample Mock Client Scenario
Mock Client Fact Scenario: David Roberts (Boalt '74)

* Intake Information Provided to Students Before the Simulated Interview:

David Roberts, of Caliber Collision Centers, Inc., is a shareholder and director of a large auto collision repair consolidator. He has been discussing the possibility of forming another company with a friend (Rick, another entrepreneur). The new company would specialize in truck collision repair and painting. David and Rick want to purchase certain assets for this venture currently offered for sale by a public company, and also possibly lease a building. They will likely need to get a loan for working capital, though David is ready to put up about $50,000. David would like Rick to run the business.

* Students take this information and prepare a plan for a diagnostic interview with Mr. Roberts (60 minutes in role, followed afterward by a 30 minute critique from the Supervising Attorney, Mr. Roberts, and 2-3 students observing)

* Note: the remaining information is for the Students to discover at the Interview:

Client Demeanor at Interview: Experienced entrepreneur; genial but a little brusk; “not interested in the details”; in a hurry to make the deal happen; wary about lawyers as “wet blankets” impeding business deals.

Issues Presented at the Interview:

- **Entity Formation:** Partnership vs. LLC vs. Corporation?
- **Business Relationships:** Employee vs. Independent Contractor vs. Partner position for Rick?
- **Contracts:** Asset Purchase, Leasing of Equipment, Leasing Realty
- **Capitalization**

Underlying Issues – To be Discovered at the Interview:

- **Board Fiduciary Duty for Dave:** Dave is a Caliber Board Member; He heard of this business opportunity through the CEO. Does Dave have a fiduciary duty of loyalty to Caliber? A duty not to compete? Will Caliber Board need to be informed and approve?
- **Non-Compete Duty for Rick:** Rick is currently an independent contractor for a truck collision and repair company (likely competitor) in a nearby region; he may have acquired intellectual property and expertise from current company, and may have non-compete clause in contract.
• **Due Diligence:** Dave only knows Rick from meeting him at two previous business conferences and some email correspondence. How well has he checked out his background/ability to run the business?

• **Business Planning:** Dave has no business plan for the venture (primarily “in his head”), and is reluctant to take time to put it down in writing or fill out the details further.

• **Regulatory Law:** Truck painting and repair business will likely require licenses, toxic waste disposal permits, and other State/Local approvals – might take time or be hard to obtain (preventing/delaying start-up).

**Ethical Issues to Highlight (in the Interview, or Afterward):**

• **Duty of Loyalty:** Who is the client: Dave? Dave and Rick? Dave asserts that he can “speak for Rick”, but does not want to share decisionmaking power or more than minimal profits at the beginning until Rick “proves himself.” If Rick is also a client, or not, what is the attorney’s duty to inform him about his possible duties to his current company?

• **Duty of Candor:** Client may be about to violate Board fiduciary duty/non-compete duty, but does not want to inform or get board approval for new venture. Client disagrees strongly with attorney advice here — feels strongly that the Board would not care, and that informing Board would likely “gum things up.” Client wants attorney to give him a different reading on this or to just “leave it alone” (implicating attorney’s duty of independent judgment).
Client Case Summaries (Redacted)
PRACTICUM CASE SUMMARIES - REDACTED

Note: the following is designed to convey a general sense of the cases and issues worked on in the Practicum during Fall 2007/Spring 2008 -- actual descriptions and names have been altered to protect confidentiality

The Domestic Violence Project, Inc.

Non-profit 501c3 Corporation providing a variety of services for battered women and their families.

Issues:  
- Employee Retention – understanding the different benefit options for setting up retirement accounts and flexible spending pre-tax accounts for dependent care, medical care, and commuter expenses  
- Policy Development re: Non-Discrimination in Service Provision  
- Need for Sample Board Resolutions

Car Match

For-profit business developing new web-based service to facilitate and negotiate the purchase of used cars for consumers.

Issues:  
- Terms of Use  
- Entity Formation

Oakland Collective Enterprises

Non-profit business designed to incubate worker cooperatives in trade and service industries, in order to create more economic opportunity for workers in poor urban areas.

Issues:  
- Entity Formation  
- IRS Rules re: Non-Profit/For-Profit Collaboration  
- Creating Cooperative Forms of Governance (in Bylaws/LLC Agreements)  
- Business Planning  
- Immigration Issues with Non-Citizen Cooperative Members
Independent Artists Network

For-profit, web-based, business designed to assist independent visual artists with social networking and finding financing.

Issues:  
-Money Service Transfer Regulation  
-Charitable Fundraising Regulation  
-IRS Rules re: Non-Profit/For-Profit Collaboration  
-Non-Profit Formation

Carbon Busters

Non-Profit web-based business designed to promote and streamline donations to fight climate change.

Issues:  
-Entity Formation  
-IRS Rules re: Non-Profit/For-Profit Collaboration  
-Troubleshoot Client’s Trademark Application

Change the World

A for-profit business designed to promote philanthropic giving by customers when they make purchases at different retail establishments.

Issues:  
-Entity Formation  
-Charitable Fundraising Regulation  
-Escrow Regulation

Visaphone

A for-profit business seeking to create a prototype electronic device that would dramatically increase video/visual quality for small electronic devices (e.g., cameras, cell phones).

Issues:  
-Entity Formation  
-Developing a Founders’ Agreement  
-Business Relationships – founder, investor, employee, independent contractor
Green for Green

A for-profit business designed to increase financing opportunities for building owners who want to add energy efficiency and conservation equipment.

Issues:  
- Finance  
- Landlord/Tenant Law  
- Utility Contracts  
- Business Planning

Young Websters

A for-profit business designed to increase safety/prevent exploitation for minors using the internet.

Issues:  
- Money Service Regulation  
- Terms of Use  
- Entity Formation  
- Contracting with Minors  
- Web Regulation re: Minors

Oakland Youth Alliance

A non-profit business promoting voter registration and youth empowerment, assisted by HipHop artists and other local celebrities.

Issues:  
- Federal Tax Exemption Application  
- Business Planning  
- Contracting  
- Intellectual Property – Rights of Artists  
- Board Training/Development
**United Prosperity** (Note: = Actual name, provided with client consent, so sample student work could be shared in this report)

A non-profit web-based organization that uses donor funds to create loan guarantees to support low-income microenterprise projects in developing countries.

**Issues:**
- IRS Rules re: deductibility of donations/loans
- SEC Rules re: what constitutes a “security”
- Terms of Use
- Contracting
- Microfinance
- Entity Formation

**Richmond Youth Works – Record Label Project**

A non-profit 501c3 corporation for youth trying to market music produced by teens.

**Issues:**
- IRS Rules re: Non-Profit and For-Profit Collaborations
- Contracting
- Intellectual Property – Rights of Artists, Rights of Minors
- Business Planning

**Richmond Youth Works – Urban Park Project**

A non-profit 501c3 corporation for youth trying to create a skate park/urban playground.

**Issues:**
- Risk Management
- State and Local Regulation
- 501c3 Activities and Sponsorship
- Business Planning
Samples: Practicum Student Work
For Client United Prosperity
(*Note: Shared with Client Consent)

- Letter of Engagement
- Non-Disclosure Agreement Form
- Client Intake Memo
- Student Research Memos & Cover Letters
Intake Memo

To: Bhalchander Vishwanath, United Prosperity
From: Justin M. Winegar, Steve C. Chiu
CC: William Kell, Supervising Attorney and Instructor
Date: Thursday, March 13, 2008

Thank you for meeting with us on February 21st, 2008. It was a pleasure hearing about your business venture and we look forward to assisting you this term.

Fact Summary

As we begin this work, we wanted to recap the relevant facts we gathered through our meeting with you. From what we understand, United Prosperity (UP) will harness the internet’s social networking power to pool contributions made by social investors into a microfinance intermediary fund. This fund will ultimately be leveraged to guarantee portions of repayments of loans to microfinance institutions (MFIs). These guarantees will provide the incentive for banks to make low-interest loans to small and new MFIs to which they otherwise would not lend. Consequently, more MFIs will be able to extend more micro-loans to increasing numbers of entrepreneurs that would otherwise have no ability to receive the loans they need to start their own enterprises.

At this point, your key concerns appear to revolve around the successful incorporation of your organization as a 501(c)(3) nonprofit, the formation of contractual relationships with all the parties involved (MFIs, lenders, social investors, fiscal sponsors, cross-guarantors), and the navigation of the various systems of regulation involved in transnational finance.

If anything is missing from this fact summary, or if it appears to be inaccurate in any way, please email us to let us know. It is important that we have an accurate understanding of your operation as we will base our work for the rest of this term on such understanding.

Our Work with you This Term

After consulting with our supervisor, we believe we can offer the following assistance:

1. **Entity Formation.** Hanson Bridgett LLP will research the issues involved, prepare the legal documents, and assist in the incorporation of United Prosperity as a 501(c)(3) non-profit organization.\(^1\) Supervising Attorney Kell will be available to assist as needed.

\(^1\) Here it is useful to note, per our discussion in our initial interview, that providing social guarantors/investors some form of return on their investment (e.g. through a percentage yield) would not be
2. Fiscal Sponsor. Hanson Bridgett LLP will assist in arranging for a fiscal sponsor so that you may accept tax-deductible donations while undergoing the 501(c)(3) incorporation process.²

3. Regulatory Issues. We will research and provide legal analysis of international law issues regarding cross-border monetary transactions between United Prosperity and its networks of MFIs and lenders.

4. Website. We will research and draft appropriate terms of use for United Prosperity’s website.

5. SEC Issues. We will research SEC regulations to verify that there are no regulatory hurdles to social investors offering 0% loan guarantees through United Prosperity.

6. Contracts. We will research and assist in drafting contracts for United Prosperity for its agreements with MFI networks, MFIs, lenders, its cross-guarantors, and social investors.

7. Business Plan. We will continue to review and provide input on your business plan with respect to legal issues that might be implicated by your business.

8. India Subsidiary. We will research any regulatory or other legal issues (e.g. non-profit status, employment) involved with setting up a subsidiary in India.

Due to the comprehensive nature of the work involved, some of the research tasks and legal documents (particularly those that arise in the later stages of business development) may need to be completed by future New Business Counseling Practicum students, as we focus our work on issues that are currently a high priority.

What We Need from You

After taking a preliminary look at your business plan, we would appreciate it if you could submit the following updates:

1. Mitigation plans for each of the key risks that you numbered 4, 8, and 9 in your table of Key Risks and Mitigation Plans.

2. A general plan for dealing with loss in value of social investors’ contributions, either due to deductions made by PayPal / Google Checkout, to fluctuations in currency exchange rates, or to other factors.

In addition, we need the following information to help us in our research. Your business plan and documents have been very helpful in giving us a good foundation, but we would still benefit from answers to some threshold and clarification questions before we begin our work. These questions are below:

² This is a relatively straightforward process—one for which we already possess the template agreement. However, we will assume Hanson will handle this drafting if needed.
CONFIDENTIAL LEGAL DOCUMENT – NOT FOR DISTRIBUTION

1. On page 4 of your business plan, you state that social investors may provide loan guarantees to an entrepreneur or a group of entrepreneurs. How many entrepreneurs usually exist in each group? Are MFIIs typically group-based, individual-based, or some combination of both?

2. In our intake interview, you mentioned that you have many different relationships with many of the different players in mind. These players include the cross-guarantors and fiscal sponsors needed while starting up as well as the MFI networks and lenders with which United Prosperity will establish long-term relationships. While you mentioned that you have not established agreements with any of these players, we would like to know whether you have set up tentative agreements with any of the players. If not, have you begun preliminary discussions with any of the players? If not, do you have specific players in mind? Do you have a specific organization in mind to serve as your fiscal sponsor?

3. In our intake interview and on page 6 of your business plan, you state that you would like to make the United Prosperity platform available to others (e.g., microfinance networks). Do you envision the uploading of entrepreneur profiles directly to the United Prosperity website by MFI networks? If you have other types of access to the United Prosperity platform in mind, what types are you thinking of and what would you like in return? A response to this set of questions will help us to anticipate any intellectual property issues that may arise in the course of your business.

4. In the section of your business plan on microfinance guarantee competitor analysis (p. 11), you distinguish United Prosperity from Microcredit Enterprises (MCE) in the following ways:
   a. United Prosperity guarantees facilitate lending to the MFI in local currency while MCE loans are issued and repaid in U.S.D. (or guarantee by MCE / Citibank to allow MFIs to access local currency). (Question: Is there a way to draw a starker contrast between United Prosperity and MCE on this point?)
   b. United Prosperity makes guarantees to MFIs based on the performance of MFIs as tracked by UP. (Question: What does MCE do in comparison?)

5. During our intake interview, you mentioned that you had planned for United Prosperity to repay social investors incrementally as their sponsored entrepreneurs incrementally fulfill their loan obligations. In contrast, Kiva.org repays social investors with a lump sum once the sponsored entrepreneur has repaid the entire loan—in this way, Kiva generates more interest income by holding investor money in an interest-bearing account and spends less time and fewer resources on administration as well. Aside from the potential incentive to a would-be social investor of a faster repayment, what are the advantages of your proposed system?

6. When an entrepreneur defaults and United Prosperity becomes obligated to repay some of the resulting debt, will money from the UP fund be transferred directly to
the relevant bank or will the money be transferred first to the relevant MFI intermediary?

7. Seeing as how Kiva has already grappled with some of the issues with which we are currently faced, a natural inclination is to seek advice from them. However, Kiva is currently positioned as a competitor in UP’s business plan. Is the relationship between Kiva and UP of such a nature that it would be inappropriate to tap them as a mentor of sorts in answering some of the questions we might encounter?

8. Aside from the mortgage insurance policies that you gave us during the intake interview, do you have or know of any organizations who might give us some sample contracts that would cover the lending or guarantee relationships you hope to establish between and among each of the players in the microfinance investment and guarantee process?

What We’ll be Working On Until our Next Meeting

Between now and our next meeting, we will review your business plan and other documents and conduct research on threshold issues involving the comparative regulations associated with international monetary transfers. We will also conduct research regarding the appropriate level of protections to give social investors via the terms of use listed on UP’s website—this research will include an analysis of the most appropriate balance between an effective delivery of the terms of use and web-users’ aversion to terms of use agreements. We will give you updates on our research regarding these issues at our next meeting.

Proposed Next Meeting

Now that we and Hanson Bridgett LLP have defined our respective roles on this project, we will focus our initial research on the threshold issues mentioned above. After conducting this initial research, we would like to meet with you again. We will contact you during the week of 3/31/08 to set up our second meeting.
Date: March 24, 2008

To: Bhalchander Vishwanath, *United Prosperity*

RE: Letter of Engagement – Work with Practicum Students this Term

Dear Bala:

We are pleased that you have asked the New Business Practicum to assist your business. The Practicum is an ongoing class at University of California’s Berkeley Law School which seeks to prepare students for transactional lawyering with businesses such as yours. Our students work under the supervision of a licensed attorney, and we charge no fees for this assistance.

The purpose of this Engagement Letter is to set forth the terms and conditions of our work with your business this semester. Please review these terms, sign, and return the document to show your agreement with this arrangement. If you have any questions about the agreement’s terms before signing, please contact Supervising Attorney William Kell at (510) 681-6517 or wkell@law.berkeley.edu.

**TERMS**

1. **IDENTITY OF CLIENT:** In this case, the Practicum represents the following (check one):

   ___ The INDIVIDUAL: ________________ (if represented as an individual, skip to Section 2).

   XXX The ENTITY: *United Prosperity* ________________ which includes the following individuals:

   Bhalchander Vishwanath

If representing an ENTITY, it is agreed that the Practicum does not separately represent the owners, officers, directors, founders, managers, members, general partners, limited partners, employees, or other affiliates of the entity in their individual capacities, or with respect to their individual affairs. The Practicum will rely upon the above named individuals within the entity to inform other stakeholders of this fact where appropriate.
Unless we agree otherwise in writing, we do not by virtue of our representation of you also represent any entity (or individual) that controls the Entity, is controlled by the Entity or is under common control with the Entity. For our instructions on the Entity’s behalf, we will take direction from the entire group as a whole (speaking through its valid decisionmaking process). We can instead take direction from a duly appointed agent for the Entity where we receive notice of such appointment in writing.

2. COMPREHENSIVENESS OF LEGAL ASSISTANCE TO BE PROVIDED: The legal assistance provided by the Practicum under this arrangement will be commensurate with what you can expect of a California attorney. However, it is no substitute for the level of representation that you might purchase from a comprehensive transactional firm headed by many partners with decades of experience in law and business. What the Practicum offers are basic legal services -- including research, recommendations, and document drafting -- that is intended to (1) help your business get started, and (2) acquaint you with the most common legal pitfalls for new businesses. Overall, this assistance is designed to help new businesses, specifically those with limited resources, to steer a more successful course from the beginning.

3. SPECIFIC LEGAL ASSISTANCE TO BE PROVIDED: In our interview and other communications with you, you have requested the Practicum’s assistance with a number of matters (see intake memo accompanying this Letter). For this semester (January 15 through May 16, 2008), commensurate with the capacity of the Student Team and the Practicum Supervising Attorney, we agree to provide the following assistance:

A. Regulatory Issues. We will research and provide legal analysis of international law issues regarding cross-border monetary transactions between United Prosperity and its networks of MFIs and lenders.

B. Website. We will research and draft appropriate terms of use for United Prosperity’s website.

C. SEC Issues. We will research SEC regulations to verify that there are no regulatory hurdles to social investors offering 0% loan guarantees through United Prosperity.

D. Contracts. We will research and assist in drafting contracts for United Prosperity for its agreements with MFI networks, MFIs, lenders, its cross-guarantors, and social investors.

E. Business Plan. We will continue to review and provide input on your business plan with respect to legal issues that might be implicated by your business.

Due to the comprehensive nature of the work involved, some of the research tasks and legal documents (particularly those that arise in the later stages of business development) may
need to be completed by future New Business Counseling Practicum students, as we focus our work on issues that are currently a high priority.

This assistance will likely include legal research and recommendations, all of which will be reviewed and approved by the Practicum Supervising Attorney. If any legal documents are to be drafted in providing the above assistance, the Practicum Supervising Attorney will review and approve all these documents. Unless otherwise mutually agreed in writing, our work for your business this term will not include any assistance not specifically described above.

If you wish that we provide any other assistance not covered by this agreement, a separate written agreement between you and the Practicum will be needed to modify this Letter of Engagement.

4. LEGAL ASSISTANCE NOT PROVIDED:

A. Entity Formation. Hanson Bridgett LLP will research the issues involved, prepare the legal documents, and assist in the incorporation of United Prosperity as a 501(c)(3) non-profit organization.¹

B. Fiscal Sponsor. Hanson Bridgett LLP will assist in arranging for a fiscal sponsor so that you may accept tax-deductible donations while undergoing the 501(c)(3) incorporation process.²

C. India Subsidiary. Given time constraints and its relationship to the formation work being done by Hanson, we will likely not be able to research the regulatory or other legal issues (e.g. non-profit status, employment) involved with setting up a subsidiary in India (if time unexpectedly becomes available, we will need to add this as a separate addendum to this Letter of Engagement).

D. Finally, due to the complexity involved, the Practicum will not provide assistance involving the following:

* Patent Law or Complex Intellectual Property Matters
* Litigation
* Bankruptcy
* Complex Tax Matters
* Purchase or Sale of Businesses, Assets, or Realty

If your business needs assistance with these matters, please request a referral, and the Practicum will attempt to refer you to experienced counsel.

¹ Supervising Attorney Kell may be available to assist with the more complex 501c3 issues – please contact him if needed.
² This is a relatively straightforward process—one for which we already possess the template agreement. However, we will assume Hanson will handle this drafting if needed.
5. **NATURE OF LEGAL ASSISTANCE PROVIDED:** We will provide strictly legal assistance to you in connection with this engagement. You are not relying on us for, and we are not providing, any investment, business or accounting advice or decisions or any investigation of the character or credit of persons with whom you may be dealing. Although the Practicum may offer a recommendation or opinion about possible results regarding the subject matter of this agreement, like any attorney, the Practicum cannot guarantee any particular result. In signing this agreement, you acknowledge that any recommendation or opinion offered by representatives of the Practicum in the future will not constitute a guaranty.

6. **RESPONSIBILITIES OF LAW FIRM AND CLIENT:** In order for us to assist you effectively and efficiently, we expect that you will provide us with the factual information you have which relates to the subject matter of this engagement, and that you will make any appropriate business or technical decisions. We believe that you should be actively involved in the strategy and management of your legal affairs and our goal is to encourage candid and frequent communication between us. We will consult with you at appropriate junctures as the engagement progresses. Ordinarily, such consultations are conducted in person or by telephone, but if you desire that we communicate in writing, including by email, in a particular instance, please let us know. In addition, we may on occasion choose to communicate with you in writing.

You also agree to promptly review and return draft copies of documents sent to you by the Practicum with any corrections and/or feedback and provide the Practicum with requested information in a timely manner. Clients need to attend scheduled meetings with the student assigned to the case, and call the student if they need to cancel a scheduled meeting. In the course of this engagement, you may be asked to read and perhaps to sign various legal documents. Please read the documents carefully so that you thoroughly understand them. If you have any question whatsoever, you should address it to us immediately.

7. **WORKING WITH STUDENTS:** You understand that the reason the Practicum does not charge legal fees is that it is operated by a Boalt Hall Lecturer in Residence and Attorney, William Kell; the Practicum is staffed by Boalt Hall students working under Attorney Kell’s supervision (with additional supervisory assistance for the Haas MBA students provided by Richard MacBride, JD/MBA).

While all work product will be reviewed by a licensed attorney and an MBA, you understand and agree that you will be meeting and interacting with a law or MBA student assigned to your case, who will assist in the work completed by the Practicum as part of this representation. These students are not licensed attorneys. We will perform all services in an ethical and professional manner and will do our best to meet your timing requirements. However, you understand and acknowledge that, due to the exam and vacation schedules of an academic institution and the unpredictability of scheduling by
governmental agencies, another student and/or attorney may, of necessity, continue the work on the case. Work also may be delayed during summer and winter vacations. In addition, the facts and circumstances of your representation may be used for teaching purposes. If this is done, measures will be taken to prevent anyone not associated with the Practicum from identifying you, your business or any of your proprietary or confidential information.

8. ATTORNEY FEES AND COSTS: You will pay no fees for the assistance provided under this agreement. However, any additional fees required by government agencies or other private persons or agencies unaffiliated with the Practicum (e.g., CA fees for filing articles of incorporation) are solely your responsibility. We will inform you in advance of any need to incur any government or private fees so that you can choose to incur them or not.

9. INFORMAL ADVISORS: From time to time, the Practicum Supervising Attorney may seek input on client cases from a small group of four Alumni advisors (the “Mentors Group”) who have agreed to contribute, on a pro bono basis, their experience in transactional law and business management. This seeking of input is designed to enhance the quality of the Practicum’s work. Despite this input, you agree that the attorney-client relationship shall include only the Practicum Supervising Attorney and Practicum Students working under his supervision. It is agreed that seeking this input from these experienced Alumni or other advisors does not establish an attorney-client relationship with these Alumni or other advisors, nor make them responsible for your case.

10. CONFIDENTIALITY: You authorize the Practicum to communicate with you and to send and receive confidential communications to you and from you. Your information will only be shared with the Practicum Students and the small group of informal advisors (the “Mentors Group”) to the Practicum course. This advisory group, while not in an attorney-client relationship with you or with the Practicum, have agreed to treat your information as confidential and proprietary, and not to use or share your information with others without your consent. We will ask your consent before sharing confidential information with anyone beyond the people described above.

11. ELECTRONIC COMMUNICATIONS: Email, Fax and other forms of electronic communication are increasingly important business tools, and we make appropriate use of them in communicating with our clients. However, there are risks associated with them. While we have no reason to suppose that our own email or other electronic communication systems are not secure, you should be aware that information sent or stored electronically might be accessed by third parties. We may when appropriate communicate with you by email unless you ask us not to. Please note that email can be subject to delays and non-delivery; in appropriate circumstances you should confirm with us that we have received and read your email communication. We have measures in place to protect against sending
or receiving viruses, but we cannot guarantee that these will be completely effective. You should take your own precautions against possible virus infection.

12. RETURN OF FILES: After this representation has ended, you may request the return of your files. We will, upon your written request, deliver to you your files and other items related to the matters on which we provided legal advice. You will need to sign a receipt acknowledging delivery of these items. You agree that you will retain such files for at least three years, and that we will have access to these files and items upon request for any reasonable purpose. Unless we receive a written request to deliver your files to you, we will retain your files for five years following the conclusion of this engagement. If you do not request the files in writing before the end of that five-year period, upon the expiration of that period we will have no further obligation to retain the files, and may in our discretion destroy the files without further notice to you.

13. TERMINATION; RIGHT TO WITHDRAW: You shall have the right to terminate and discharge the Practicum at any time. Any such termination or discharge of the Practicum must be in writing. In addition, you agree that the Practicum may withdraw from representing you by sending you notice of withdrawal in writing. The Practicum may withdraw (1) if the Practicum decides to cease practice, (2) if evidence discloses that your case is without legal merit, (3) if the Practicum determines that it does not wish to further represent you, (4) if you do not reasonably cooperate with the Firm regarding your case, (5) if you breach this Agreement, or (6) for any reason authorized by law or the California Rules of Professional Conduct.

14. ENTIRE AGREEMENT: This agreement contains the entire agreement between you and the Practicum. No other agreement, statement, or promise made on or before the effective date of this agreement will be binding on the parties.

15. GOVERNING LAW; VENUE: This Engagement Letter and any issue arising out of our engagement shall be governed in all respects by the laws of the State of California without reference to its principles of conflicts of laws. Any action brought under this Engagement Letter shall be brought in the federal or state courts in or for Alameda County, California, and you and we hereby consent to the exclusive jurisdiction of such courts and venue, which you and we both hereby agree is convenient.

16. EFFECTIVE DATE OF AGREEMENT: The effective date of this agreement will be the date on which the Practicum is in receipt of one copy of the agreement signed by you. The attorney-client relationship will commence on the effective date of this agreement. The Practicum can only provide significant legal assistance on your behalf starting after the effective date of this agreement.
THE FOREGOING IS AGREED TO BY THE PARTIES:

For the Client: United Prosperity

Date__________________________

(Signature on File)

Bhalchander Vishwanath, Founder

For the Practicum:

Date__________________________

(Signature on File)

William Kell, Supervising Attorney
New Business Counseling Practicum
New Business Counseling Practicum

420 Boalt Hall, Berkeley Law School
University of California, Berkeley, CA 94720

William A. Kell, Supervising Attorney
Licensed to Practice: CA, NY, MA, IL

May 29, 2008

Bhalchander Vishwanath
United Prosperity

Dear Bala,

United Prosperity (UP) was referred to the Boalt Hall New Business Counseling Practicum by the East Bay Community Law Center. United Prosperity initially sought legal assistance in connection with entity formation and business planning. At our first interview, issues related to fiscal sponsorship, regulatory compliance (securities, tax, international transactions), website use, and contracting (with the philanthropic social investors (PSIs), banks, field partners, and borrowers) were also identified as in need of attention.

In the attached memorandum, I address the procedural issues related to website use and to contracting with the PSIs. You will receive another memorandum under separate cover written by my partner, Justin Winegar, which will address regulatory compliance issues relating to securities and tax law. Finally, together we have prepared a sample set of terms of use that contains much of the substance of the contracting that will need to take place between United Prosperity and the PSIs and other website users.

As to the attached memorandum, United Prosperity needed a way to contract with the PSIs that would be low on transaction costs (due to the high volume of contracting expected), but high on enforceability (due to the high level of liability concerns). UP also needed a way to enforce terms of use for its website in such a way as not to dissuade would-be users, given the public-domain / public interest spirit of UP and the microfinance industry in general. In sum, the attached memorandum identifies a nascent trend towards the enforceability of clickwrap website contracting, but concludes that clickwrap website contracting is still the safest method. Clickwrap is recommended for contracting with the PSIs on all transactions and with website users on high-risk transactions. In contrast, browseware may be considered for contracting with website users on low-risk transactions (e.g., those that allow the website user to use UP’s model contracts).
It has been a very rewarding experience to work with United Prosperity this semester. I have learned a lot and have applied my knowledge toward a noble end—assisting UP in providing a path to prosperity for people with few resources. Though my work with UP has officially come to a close, I welcome any further questions or updates regarding UP. While the Practicum will be operating during the Summer at only limited capacity, you should keep Supervising Attorney Bill Kell updated about any developments. Bill will continue to be available should you need assistance before a new Practicum team can be assigned in September.

Best wishes,

Steve Chang-lung Chiu
Practicum Associate

*Reviewed and Approved by Supervising Attorney William Kell*
MEMORANDUM

TO: Bhalchander Vishwanath, United Prosperity
FROM: Steve C. Chiu, Practicum Associate
CC: Practicum Associate Justin Winegar; Supervising Attorney William Kell
DATE: May 31, 2008
RE: Analysis of Website Contracting Issues for United Prosperity

INTRODUCTION

United Prosperity (UP) was referred to the New Business Counseling Practicum by the East Bay Community Law Center. This past semester, I was enrolled in the New Business Counseling Practicum course and was assigned to the United Prosperity project based on my interest in working with a start-up organization. I partnered with fellow Practicum student, Justin M. Winegar, on this project. At our initial interview, several issues were identified including those related to fiscal sponsorship, regulatory compliance (securities, tax, international transactions), website use, and contracting (with philanthropic social investors, banks, field partners, and borrowers).

In the attached memorandum, I address the legal issues related to website use and to contracting with philanthropic social investors (PSIs). The purpose of this memorandum is to give you guidance in placing a terms of use agreement on UP’s website and building proof of user assent into the contracting process in a way that balances legal efficacy against user aversion to formal contracting requirements. This memorandum will begin with a recap of the facts relevant to the research I performed before moving into the results of that research. To conclude, this memorandum will summarize the recommended options and issues to consider in choosing among the options.

RELEVANT FACTS

United Prosperity seeks to incentivize banks to make loans to microfinance institutions by guaranteeing the repayment of those loans using collateral gathered in small amounts from many members of the public ("philanthropic social investors"). United Prosperity’s business model relies in large part upon the solicitation of monetary contributions from philanthropic social investors via its website. United Prosperity’s website will also provide services to non-philanthropic social investor web users, including public domain model contracts for those seeking to initiate similar enterprises and ideas for involvement beyond the contribution of funds for credit support.
SUMMARY OF RESEARCH

Contracts governing the terms of philanthropic social investors’ monetary contributions and the proper use of the website are absolutely necessary. As mentioned above, though a discussion of the actual substance of such contracts will occur separately, this memorandum will address the procedure to take to ensure the enforceability of such contracts.

An Introduction to Terms: Clickwrap Versus Browsewrap

Website providers typically present terms of use for web-based transactions involving goods or services in one of two ways. (1) The legally-preferred “clickwrap” agreement provides notice of the website’s terms of use in a textbox (often a pop-up), which requires users to actively assent to the agreement before they can access the goods and services—this assent can take the form of clicking on an “I accept” icon. 1 (2) The newer and less legally well-established “browsewrap” agreement involves providing notice of terms and conditions by placing a hyperlink on the homepage—users passively bind themselves to these terms by some conduct prescribed in the license, such as visiting interior pages on the site. 2 Issues presented by such methods of contracting revolve around the notice and assent requirements of contract law.

Enforceability of Browsewrap Agreements – Notice and Proof Requirements

While courts have generally held clickwrap agreements to be valid, courts have less clearly supported the enforceability of browsewrap agreements because they do not require the consumer to view the agreement’s terms or to manifest assent. 3 However, courts have thus far held browsewrap agreements enforceable if

(1) the website provides sufficient notice of the terms of the agreement (i.e., by making online agreements easily accessible and conspicuous) 4 and

(2) there is sufficient proof that a user accessed an online agreement. 5

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1 Specht v. Netscape Communications Corp., 306 F.3d 17, 22 & n.4 (2d Cir. 2002).
3 Id.
4 Id. at 982; Register.com, Inc. v. Verio, Inc., 126 F. Supp. 2d 238, 247-48 (S.D.N.Y. 2000). This analysis follows the reasoning of the U.S. Supreme Court in Carnival Cruise which upheld the validity of forum-selection clauses in adhesion (i.e., not-negotiated) contracts, so long as the clause was reasonable and the licensee had notice. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).
Notice Requirement

With respect to the notice requirement, although only a few courts have examined the validity of browsewrap agreements, they have found sufficient notice where the link to the terms of the license

(1) is on the home page,

(2) is visible without scrolling to the bottom of the page, and

(3) looks like a hyperlink (i.e., the text of the notice is underlined or in color).\(^6\)

Proof Requirement

With respect to the proof that a user accessed the terms of an online agreement, there is little guidance to help us determine what constitutes proof. Generally, the more action required on the part of the website user, the more likely a court will hold that a contract has been formed. The court in Ticketmaster Corp. v. Tickets.com, Inc. stated that “a contract can be formed by proceeding into the interior web pages after knowledge (or, in some cases, presumptive knowledge) of the conditions accepted when doing so.”\(^7\) In a few recent cases, the courts’ reasoning seems to emphasize the notice requirement while deemphasizing the proof of assent requirement.\(^8\) So, while it is not clear exactly what constitutes proof that a user accessed an online agreement, it is clearly important to provide notice of the terms, as well as to require website users to take significant action to increase the chances that they will be deemed to have entered into the agreement.

California Law

Since United Prosperity will be a California corporation, it is useful to examine California law regarding web-based contracting.

\(^{6}\) Pollstar, 170 F. Supp. 2d at 982; Register.com, 126 F. Supp. 2d at 247. The requirement that the link to the terms of the license be visible on the homepage without scrolling was affirmed in Specht v. Netscape Communications Corp., 306 F.3d 17 (2d Cir. 2002).


\(^{8}\) In Pollstar v. Gigmania, the website provider placed a notice on its homepage that users would be bound by a license agreement reachable through a hyperlink if they continued onto the site. Pollstar, 170 F. Supp. 2d at 974. The district court acknowledged that many visitors to the site may not have seen the notice. Pollstar, 170 F. Supp. 2d at 981. However, analogizing to ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), which held that users of software were subject to the shrink-wrap contract that was contained within the software packaging (despite their not having reviewed it before purchase), the court held that the license agreement claim survived dismissal and could be valid because “people sometimes enter into a contract by using a service without first seeing the terms.” ProCD, Inc., 86 F.3d at 982. Ultimately, the contract in Pollstar failed, because the link to it was not sufficiently obvious and not because the court thought that browsewrap licenses themselves were unenforceable. Similarly in Register.com v. Verio, a website provider used a browsewrap license to impose terms of use on the use of data from its site. Register.com, Inc., 126 F. Supp. 2d at 242-43 (“By submitting this query, you agree to abide by these terms.”). The district court held that the web user assented to the agreement by conduct because he did not argue that he was unaware of the terms and because he performed the conduct that the license specified as indicating assent. Register.com, Inc., 126 F. Supp. 2d at 248. This reasoning appears to place the burden of proof of lack of assent on the website user.
General California Contract Law

The California statute that is most relevant to the issue of web-based contracting is contained within California Commercial Code §2204(1):

*A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract...*

Since mere conduct may be the basis of contract formation, it may be possible to contract in the absence of a formal agreement. In the context of web-based interactions, the conduct that is required to accept clickwrap licenses (e.g., clicking on an “accept” icon next to a list of terms and conditions) or browswrap licenses (e.g., using the interior web-pages of a site whose homepage has a link to website terms and conditions) appears to constitute conduct sufficient to form a contract. Possible interpretations of satisfactory “conduct” are discussed further in the section regarding California case law below.

There are no California regulations dealing directly with website-based contracting.

Web-Based Contracting in California

California cases dealing with the enforceability of website-based contract clauses generally find them to be enforceable, subject only to general contract law requirements. Generally, California's common law is clear on the point that "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious."

As you will see from reading about the two following cases, the use of browswrap does appear to satisfy obviousness and conspicuousness requirements.

In *Net2Phone, Inc. v. Superior Court*, the California Court of Appeal looked at the threshold issue of whether a contract clause was enforceable when it was only accessible via the internet and had the characteristics of a take-it-or-leave-it (adhesion) clause. The court stated that it did

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9 While the PSI’s transaction with United Prosperity is not likely to be deemed to be a sale of goods, this statutory scheme nevertheless provides the most concrete guidance for developing contracts so that they will likely be enforceable in CA, regardless of the subject matter.

10 Though no California regulations deal directly with the enforceability of website-based contract terms, many California regulations dealing with various types of business transactions allow for one contracting party to ask another to refer to disclaimers and contract provisions on its website. For example, 8 C.C.R. § 32613(c) instructs any user of California’s Public Employment Relations Board’s web-based unfair practice complaint filing system to agree to a disclaimer. It must be noted that the fact that the state relies on the validity of website-based default contract provisions for state business does not necessarily mean that the state also finds such contract provisions valid in private commercial use. However, this fact certainly implies that the state’s regulatory scheme gives at least tacit support to the use and validity of website-based default contract provisions.

not think it unfair to require certain contract terms to be accessed via hyperlink, which it acknowledged was “a common practice in Internet business.”

In Schlessinger v. Holland-America NV, the California Court of Appeal upheld the validity of a cruise line’s contract terms, even though such terms had not been reviewed by the consumer and could only be accessed on the cruise line’s website. The appeals court decided that the consumer had adequate notice, based on the following facts:

(1) Sample contracts were available on cruise line’s website.

(2) The cruise line provided travel agents with cruise brochures for distribution to potential customers that stated the following: “A copy of the form of cruise contract will be provided upon request or can be viewed on our Web site: www.hollandamerica.com. Please note that the contract includes a clause specifying certain courts in the State of Washington as the exclusive forum of resolving disputes.”

(3) The provision above also appeared on the cruise line’s website.

This court stated the following rationale for its decision: “In the present case the trial court reasonably found that [plaintiff] had ample opportunity to familiarize herself with the terms of the contract via [defendant]’s web site or by requesting a copy of the contract from her travel agent. She simply failed to take advantage of these opportunities.”

The fact that these California court decisions seem to support the enforceability of a browserwrap contract implies that a browserwrap contract meets the obviousness and conspicuousness requirements that are set forth under California’s general contract law.

SUMMARY OF OPTIONS AND RECOMMENDATIONS

When choosing between clickwrap and browserwrap agreements, the clickwrap option is more legally sound. It must be noted that there does exist a trend of increasing support for browserwrap agreements in federal courts and that there is also support for browserwrap licenses in California state courts. However, since this area of law is not well-settled, it would only take a contradictory Supreme Court decision or the enactment of a new statute or regulation to completely reverse the trend of support for browserwrap contracting. Therefore, browserwrap contracting is to be approached with caution.

In deciding whether to use clickwrap or browserwrap in establishing agreements with the users of UP’s website, a balance must be made between the potential liability that UP would incur

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14 Id. at 555.
15 Id. at 559.
without a properly executed contract and the transaction costs UP must expend to properly execute a contract. One must also consider the typical user’s aversion to contracting formalities.

With respect to the contract governing the contribution of funds by philanthropic social investors, the liability could reasonably be deemed to be quite high—if this is the case, then a clickwrap contract may be most appropriate.

With the terms of use governing the mere use of UP’s website by a user not contributing funds, the liability may be high or low, depending on what functions and services the website is designed to perform in the future. If the liability is low, one may not want to dissuade website users by forcing them to acknowledge that they have become familiar with the terms and conditions of the website. This may be especially of concern given UP’s stated desire to share its work and ideas with others who wish to start similar microfinance ventures. Therefore, a browswrap web user contract may be an option if the website usage can be thought of as a low-risk activity.

As to the content and organization of UP’s terms of use, I should note that the UP terms of use agreement that my partner and I have drawn up currently combines terms applicable to both philanthropic social investors and basic UP website users in one agreement due to the large number of overlapping sections. If you decide you would prefer two separate agreements for any reason (e.g., to improve conciseness and readability, so that one may be employed via browswrap and the other via clickwrap, etc.), the sections may be divided as follows:

**Philanthropic Social Investor Sections:**

- Participation in the Program (and all subsections)
- Disputes with Field Partners and Borrowers

**Web User Sections:**

- Proprietary Rights / Confidentiality
- Acceptable Use

**Common Sections** (to be included in both agreements):

- Introductory Sections
- Disclaimers
- Limitation of Liability
- Disputes with UP
- Indemnity
- Term / Termination
- Entire Agreement / Severability.
WORK FOR NEXT TERM

The work we performed has revolved around threshold issues dealing with business structure, regulatory compliance, and contracting between United Prosperity and the general public (philanthropic social investors and basic web users). Work to be performed by others in the future should involve the contracting and negotiations that will take place among United Prosperity, Lenders, Field Partners, and Borrowers. Future research may also focus on the establishment of an India subsidiary and any regulatory compliance issues that such an action may raise.

CONCLUSION

As I mentioned before, I was very excited to be able to work with United Prosperity this term. Though I did not come into this project with much knowledge about microfinance or securities law, I have had the opportunity to pick up a great deal of knowledge while working with my partner and in discussions with various experts. While the challenges and opportunities to learn were great, the most rewarding part about working on this project is knowing that I have contributed, in small part, to a promising organization with a great cause.

Though my work with United Prosperity has officially come to a close, I welcome any further questions or updates regarding UP. Specifically, do not hesitate to contact me if you have any questions about the substance of this memorandum or any work that I performed. I look forward to hearing good things about United Prosperity in the future.

*Reviewed and Approved by Supervising Attorney William Kell*
IMPORTANT NOTE: THE FOLLOWING IS A DRAFT FOR INTERNAL CONSIDERATION ONLY – THIS DOCUMENT SHOULD NOT BE USED ON THE UP WEBSITE AND/OR WITH THIRD PARTIES WITHOUT ADDITIONAL CONSULTATION WITH THE PRACTICUM SUPERVISING ATTORNEY OR OTHER COUNSEL FOR UNITED PROSPERITY

UNITED PROSPERITY TERMS OF USE AGREEMENT

Welcome to UnitedProsperity.org, a California non-profit public benefit corporation (together with its officers, directors, agents, employees, partners and their respective affiliates, collectively, "United Prosperity"). This Terms of Use Agreement (the "Agreement") is a contract between you and United Prosperity and governs all transactions between you and United Prosperity, as well as your use of the unitedprosperity.org website (the "Website") and all UP services.

For a downloadable copy of this Agreement, please click here: [INSERT HYPERLINK].

I. General Matters

   A. Notice of Agreement and Terms. By using the Website, you agree to be bound by this Agreement, whether or not you become a philanthropic social investor, participate in United Prosperity's microfinance and microenterprise credit support program (the "Program") or otherwise use the Website (in each such capacity, a "User"). If you wish to become a philanthropic social investor, participate in the Program or otherwise become a user of the Website, you must read all of the terms and conditions in, and linked to, this Agreement (including the Privacy Policy).

   B. Superceding Effect; Modification. This Agreement supersedes any previous Agreement to which you and United Prosperity may have been bound. This Agreement may be modified by United Prosperity in its sole discretion from time to time and such modifications will become part of this Agreement and will be effective once posted by United Prosperity on the Website. Your participation in the Program and use of the Website will be subject to any such modifications. You should review the Website and this Agreement from time to time for any modifications.

   C. Binding Effect. This Agreement will be binding on, inure to the benefit of, and be enforceable against the parties and their respective successors and assigns. Neither the course of conduct between parties nor trade practice shall act to modify any provision of the Agreement. All rights not expressly granted herein are hereby reserved. Headings are for reference purposes only and in no way define, limit, construe or describe the scope or extent of such section.

II. Definitions

"Philanthropic Social Investor": An individual who either a.) contributes funds to United Prosperity to be used to mobilize capital in order to make loans available to Borrowers or b.) donates money to United Prosperity to be used to support UP’s mission.

"Lender": A bank or other source of credit that will lend money to Borrowers (via Field Partners, where appropriate) once it receives credit support from United Prosperity.

"Credit Support": An amount of money that a Philanthropic Social Investor contributes to United...
Prosperity to allow UP to mobilize capital in order to make loans available to Borrowers. This money may or may not be repaid to the Philanthropic Social Investor depending on the various factors described below in Sections IV.E.1 through 4, Section IV.J, and in Appendix A. THE PHILANTHROPIC SOCIAL INVESTOR SHALL DERIVE NO PROFITS OR INTEREST FROM THEIR CREDIT SUPPORT. THE CREDIT SUPPORT IS NOT A SECURITY.

"Field Partner": Any of various existing international organizations which makes determinations regarding the desirability of lending to certain Borrowers. These organizations include, but are not limited to, microfinance institutions, co-operatives, Non-Governmental Organizations, not-for-profits and in some cases, banks which lend directly to Borrowers.

"Borrower": An economically disadvantaged aspiring entrepreneur who receives loans from Lenders once United Prosperity provides the Lenders with credit support.

III. United Prosperity Mission Statement

A. General Purposes. The purposes of this corporation are (1) to eradicate poverty by mobilizing capital to finance micro-businesses of poor families and communities throughout the world, provided that such activities are consistent with this corporation’s exempt purposes; and (2) to engage in any other charitable, scientific, literary and educational programs and activities that further such purposes.

B. Activities. United Prosperity offers low-cost and low-risk guarantees to commercial banks. United Prosperity will enable US Philanthropic Social Investors, using United Prosperity’s website, to provide credit support used to guarantee loans issued by emerging Field Partners to poor entrepreneurs (Borrowers) in developing countries. With UP’s guarantees, Field Partners would then be able to access Lender financing and expand their lending to Borrowers. By executing this mission, United Prosperity will become the first organization to enable the credit-supporting public to provide loan guarantees via the internet and make a significant difference in the growth of microfinance opportunities.

IV. Participation in the Program

A. Relationship with Philanthropic Social Investors and Borrowers. United Prosperity manages the Website, which matches you and other persons (each, a "PHILANTHROPIC SOCIAL INVESTOR" and, collectively, "PHILANTHROPIC SOCIAL INVESTORS") with low-income entrepreneurs in developing countries (each, a "Borrower" and, collectively, "Borrowers") in need of affordable capital. IN MOST INSTANCES, THESE BORROWERS ARE CONSIDERED "RISKY" BY LENDERS FOR VARIOUS FACTORS, INCLUDING, BUT NOT LIMITED TO THE BORROWERS' LACK OF FORMAL GOVERNMENT-ISSUED IDENTIFICATION OR CREDIT HISTORY, FINANCIAL INSTABILITY, GEOGRAPHIC LOCATION, AND POLITICAL FACTORS.

B. Risks Involved. EVEN WHEN BORROWERS REPAY THEIR LOANS, THERE IS A RISK OF FRAUD, FIELD PARTNER INSOLVENCY, OPERATIONAL RISKS, REGULATORY CHANGES, LITIGATION, AND OTHER UNPREDICTABLE RISKS WHICH MAY HINDER REPAYMENT OF FUNDS TO UNITED PROSPERITY AND THEIR RETURN TO A PHILANTHROPIC SOCIAL INVESTOR.

C. Lack of Warranty. BY PARTICIPATING IN THE PROGRAM OR OTHERWISE USING THIS WEBSITE, YOU HEREBY ACKNOWLEDGE AND AGREE THAT (A) UNITED PROSPERITY MAKES NO REPRESENTATION, WARRANTY, COVENANT OR GUARANTEE THAT ANY
FUNDS YOU CONTRIBUTE VIA THE WEBSITE WILL BE REPaid AND (B) FUNDS
CONTRIBUTED VIA THE WEBSITE BEAR A HIGH RISK OF NON-REPAYMENT.

D. Disclaimer – Due Diligence. UNITED PROSPERITY DOES NOT ITSELF CONDUCT DUE
Diligence WITH RESPECT TO THE INDIVIDUAL BORROWERS. INSTEAD, UNITED
PROSPERITY TAKES A CONSERVATIVE PROBATIONARY APPROACH TO CONTRACTING
WITH EACH FIELD PARTNER, WHICH IN TURN CONDUCTS DUE DILIGENCE WITH
RESPECT TO THE INDIVIDUAL BORROWERS. (UNITED PROSPERITY’S PROTOCOL FOR
CONTRACTING WITH FIELD PARTNERS IS DETAILED BELOW.) HENCE, UNITED
PROSPERITY IS IN NO WAY RESPONSIBLE FOR DUE DILIGENCE WITH RESPECT TO THE
INDIVIDUAL BORROWERS.

1. Field Partners who work with United Prosperity are typically screened by banks apart from
United Prosperity. United Prosperity itself conducts due diligence of Field Partners before we
start working with them.

2. The following is an example of the process and protocol UP uses to screen Field Partners.
This example shall not be construed so as to force UP to comply with any of the specific
steps outlined below or so as to limit UP from utilizing any other methods it deems necessary
in contracting with Field Partners.

a. Borrower repays loans to Field Partner every week/fortnight/other specified period

b. Field Partner repays loan to the Lender
   i. Deposits repayment in custodial account
   ii. Submits repayment report to United Prosperity and Lender
   iii. Uploads Unpaid principal balance every month

c. Field Partner submits Lender repayment report and uploads Unpaid principal balance on
guaranteed loans every month

d. Field Partner submits monthly defaults file

e. UP will put Field Partner’s status on hold, and suspend the provision of further
guarantees if any of the following events occur:
   i. The delinquencies or defaults exceed a certain threshold on a deal
   ii. Payment to Lender is not made or is insufficient
   iii. Unpaid principal balance file or defaults file are not uploaded
   iv. Fraud is detected

f. Field Partner management needs to submit a ‘Root Cause and Action Taken Report’ in
order for its status to be taken off hold
United Prosperity will then evaluate if the Field Partner’s status should be taken off hold

E. Issuing of Guarantees and Loan Disbursement. You understand that United Prosperity identifies existing Field Partners that work in low-income communities and have a mission to reduce poverty by providing affordable loans to low-income Borrowers. Any funds contributed by you or any other Philanthropic Social Investor will be used in one of the ways described below (in Sections IV.E.1 through 4, and Appendix A) depending on the agreements UP has negotiated with Borrowers, Lenders, and Field Partners:

1. Issuing of Guarantees. (Preferred Model) – Backed by your funds, UP will issue a guarantee to a selected LENDER. This guarantee will enable Borrowers’ local Field Partner(s) to leverage additional capital from the LENDER that will serve as a loan to selected Borrowers. United Prosperity aggregates funds from multiple Philanthropic Social Investors via the Website and issues a guarantee backed by credit support from these funds (excluding the interest earned, if any, on such funds while they are held in United Prosperity’s account, which is contributed to fund United Prosperity’s operations) to the LENDER. Based on UP’s guarantees, the appropriate Field Partner(s) will work with the LENDER to mobilize capital for ultimate disbursement to selected Borrowers.

2. Loan Disbursement. (Alternative Model) – Any funds contributed by you or any other Philanthropic Social Investor will be used by United Prosperity to create a loan fund that can be disbursed to Field Partner(s) for ultimate disbursement to Borrower(s). United Prosperity aggregates funds from multiple Philanthropic Social Investors via the Website and transfers these funds (excluding the interest earned, if any, on such funds while they are held in United Prosperity’s account, which is contributed to fund United Prosperity’s operations) to the Field Partner(s) for disbursement to selected Borrowers. Note: In this model, Field Partners may or may not conduct due diligence as described in section ___ above, depending on the agreement reached between UP, Lenders, Field Partners, and Borrowers.

3. Joint Account. (Alternative Model) – Any funds contributed by you or any other Philanthropic Social Investor will be aggregated and (excluding the interest earned, if any, on such funds while they are held in United Prosperity’s account, which is contributed to fund United Prosperity’s operations) placed in a bank account to be held jointly by UP and Lender. UP will agree to approve Lender withdrawals from this account in the event of a default by the Borrower, equal in amount to that which is not to be satisfied by Field Partner(s) or the Lender. The Lender will agree to approve withdrawals of funds by UP from this account upon repayment by Borrowers and/or field partners as applicable.

4. Other Alternative Models. UP may use any funds contributed by you or any other Philanthropic Social Investor according to any other model of guaranteeing, lending, or otherwise mobilizing capital for Borrowers that UP deems to comport with its mission (including combinations of different models). These models will be listed in Appendix A to this agreement as appropriate.

F. Loan Collection and Repayment. As Borrowers repay the Loans, the Field Partner(s) will post repayments to the Website. Repayments will be made by Borrowers in periodic installments, depending on the terms of the applicable Loan. You understand, however, that you may be able to retrieve whatever repayment, if any, United Prosperity collects at the end of the Loan term in one lump sum or in any other periodic installments provided for in United Prosperity’s sole discretion. Any amounts received from Borrowers as repayment will be distributed among the Philanthropic Social Investors on a pro rata basis in accordance with the amounts contributed by such Philanthropic Social Investors to the Borrowers. You hereby acknowledge the philanthropic purpose of any credit support you provide and agree that neither United Prosperity, its Field
Partner(s) nor the Borrower(s) will be obligated to pay any interest or other fees or amounts to you or any other Philanthropic Social Investor in connection with any funds you contribute.

G. **Tax Deductibility.** Information provided herein is not intended to be tax or legal advice. **YOU UNDERSTAND THAT YOU ARE SOLELY RESPONSIBLE FOR DETERMINING THE PROPER TAX TREATMENT FOR ANY FUNDS YOU CONTRIBUTE THROUGH THE WEBSITE AND THE PROGRAM. UNITED PROSPERITY HAS NOT AND WILL NOT PROVIDE ANY TAX OR LEGAL ADVICE TO YOU IN CONNECTION WITH ANY FUNDS YOU MIGHT CONTRIBUTE.** You understand that United Prosperity is a non-profit public benefit corporation. United Prosperity has APPLIED FOR exemption with the Internal Revenue Service as AN ORGANIZATION THAT SHOULD QUALIFY AS a public charity under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended from time to time. You acknowledge, however, that because you are providing credit support and not donating any money, you are probably not eligible to receive a tax deduction as might otherwise be available in connection with a charitable contribution to a tax-exempt public charity. For treatment of any capital loss resulting from nonrepayment by Borrowers, please consult your tax adviser. This Agreement does not attempt to define the tax implications of participating in the Program.

H. **Records of Funds Contributed for Credit Support.** Records of the funds you contribute for credit support (including this Agreement and any repayment history) will be kept by United Prosperity and will be made available to you at any time throughout the term of your support...

I. **Compliance with Federal Law.**

1. To the extent applicable, each party to this agreement is in compliance, in all material respects, with the (a) Trading with the Enemy Act, as amended, and each of the foreign assets control regulations of the United States Treasury Department (31 CFR, Subtitle B, Chapter V, as amended) and any other enabling legislation or executive order relating thereto, and (b) Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act of 2001) (the "Patriot Act"). No part of the proceeds of the funds contributed hereunder will be used, directly or indirectly, for any payments to any governmental official or employee, political party, official of a political party, candidate for political office, or anyone else acting in an official capacity, in order to obtain, retain or direct business or obtain any improper advantage, in violation of the United States Foreign Corrupt Practices Act of 1977, as amended.

2. You agree that United Prosperity may, if necessary to comply with the USA Patriot Act or in connection with a government subpoena or court order, disclose information about you to the appropriate governmental agency. You also agree that it may be necessary for UP to check the information you provide against the the Office of Foreign Assets Control (OFAC) list of Specially Designated Nationals (SDNs).

J. **Principal Loss Scenarios.**

1. You understand and hereby consent (without any notice thereof) to any restructuring of the repayment plan and/or, in United Prosperity's sole discretion, any extension of the length of the term of the Loan to the Borrower(s) in order to increase the chances that the funds you contributed are repaid. United Prosperity will deem a Loan to be in default if it is not repaid within three (3) months after the agreed upon maturity date of such Loan (United Prosperity and the applicable Field Partner reserve the right to extend such Loan's maturity date upon mutual agreement under special circumstances).
2. In this case, each applicable Philanthropic Social Investor will have the option to recover whatever funds have been repaid up to that point.

3. If for any reason less than 100% of the funds you contribute is repaid, you agree that United Prosperity and its Field Partners shall have no liability therefore, and you hereby release and forever hold harmless United Prosperity and its Field Partners for any loss you may incur. You should consult with your accountant and/or tax advisors to determine the appropriate tax treatment of such a loss.

V. Proprietary Rights; Confidentiality.

A. Trademark, Service Marks and other Property Rights. "United Prosperity" and the "United Prosperity" logo are trademarks and service marks of United Prosperity. United Prosperity owns and retains all proprietary rights in the Program, the Website and all material and information posted thereon ("Content"). The Website contains the copyrighted material, trademarks and other proprietary information of United Prosperity and its licensors. Except for that information that is in the public domain or for which you have been given express written permission, you may not copy, modify, publish, transmit, distribute, perform, display, or sell any such proprietary information.

B. License Regarding Use of Posted Information. If you post any messages or other information on the Website, you agree that such messages and information shall be considered Content, and you shall be deemed to have automatically granted, represented and warranted that you have the right, power and authority to grant to United Prosperity an irrevocable, perpetual, non-exclusive, fully-paid, worldwide license to: (a) use, copy, perform, display and distribute such information and content; (b) prepare derivative works of, and/or incorporate into other works, such information and content; and (c) grant and authorize sublicenses of the foregoing.

C. Agreement to Use of Account Information. You acknowledge, consent and agree that United Prosperity may, at its sole discretion and to the extent permitted by law, access, read, preserve and disclose your account information, usage history and submitted Content in order to: (a) comply with any applicable law, regulation, legal process, or governmental request; (b) respond to claims that any Content violates the rights of third parties, including intellectual property rights; (c) enforce this Agreement and investigate potential violations thereof; (d) detect, prevent, or otherwise address fraud, security, or technical issues; (e) respond to your requests for customer service; or (f) protect the rights, property, or personal safety of United Prosperity, its users, or the public.

VI. Acceptable Use.

A. Grant of Use. In the spirit of doing our part to alleviate poverty, United Prosperity offers the Resource Documents and its contents into the public domain for informational purposes. We do not claim any copyright to this Website or its contents. Permission to reproduce, use and distribute the Resource Documents on this website is granted. Note: This provision applies only to Resource Documents. NO permission to use personal information relating to Borrowers, Field Partners, Lenders, and other parties reflected on this website is granted.

B. No Commercial or Other Non-Compliant Use. The Website is for use in connection with the Program and in furtherance of UP’s mission and may not be used by you in connection with any commercial endeavors except as previously approved in writing by United Prosperity. Use of the Website and participation in the Program shall be in strict compliance with this Agreement,
United Prosperity's Privacy Policy, all other procedures and guidelines set forth on the Website and applicable law.

C. **No Use for Advertising, Solicitation, or Unauthorized Transmission or Collection of Information.** You may not engage in advertising to, or solicitation of, any User, Field Partner, Borrower or any other Person to buy or sell any products or services through the Website. You may not transmit any chain letters or junk email to any User, Field Partner, Borrower or any other Person. Illegal and/or unauthorized uses of the Website, including collecting the name, email address or any other personal or confidential information of any User, Field Partner, Borrower or any other Person by electronic or other means for any reason, including, without limitation, the purpose of sending unsolicited email and unauthorized framing of or linking to the Website, will be investigated and appropriate legal action will be taken, including, without limitation, civil, criminal and injunctive redress.

D. **Violation of Agreement – Unauthorized Use of Information.** Although United Prosperity assumes no obligation to monitor the conduct of any User off the Website, it is a violation of this Agreement to use any information obtained from the Website in order to harass, abuse, or harm another person, or in order to contact, advertise to, solicit, or sell to any User, Field Partner, Borrower or other Person without their prior explicit consent. In order to protect such persons from such advertising or solicitation, United Prosperity reserves the right to restrict the number of emails that a User may send to others through the Website in any 24-hour or other period to a number that United Prosperity deems appropriate, in United Prosperity's sole and absolute discretion.

**VII. Disclaimers.**

A. **General Disclaimer.** United Prosperity is not responsible, and shall have no liability, for any incorrect or inaccurate Content posted on the Website or any liability, cost or expense you may incur in connection with the Program, whether caused by any User, Field Partner, Borrower or other Person or by any of the equipment or programming associated with or utilized in the Program. United Prosperity is not responsible for the conduct, whether online or offline, of any User of the Website or any other Person. With respect to the Website, United Prosperity assumes no responsibility for any error, omission, interruption, deletion, defect, delay in operation or transmission, communications line failure, theft or destruction or unauthorized access to, or alteration of, any communications. Under no circumstances will United Prosperity be responsible for any loss or damage, including personal injury or death, resulting from any use of the Website or participation in the Program, any Content posted on the Website or transmitted to, or any interactions between, any Users of the Website, whether online or offline. United Prosperity neither represents, warrants, covenants guarantees, nor promises any specific results from use of the Website or the Program.

B. **Content or Information “As is” THE WEBSITE, INCLUDING ANY CONTENT OR INFORMATION CONTAINED WITHIN IT OR ANY SERVICE OR ADVICE PROVIDED IN CONNECTION WITH THE PROGRAM, IS PROVIDED “AS IS” WITH NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT. YOU ASSUME TOTAL RESPONSIBILITY AND RISK FOR YOUR USE OF THIS SITE AND SITE-RELATED SERVICES.

C. **No Representation or Warranty as to Third Party Data.** UNITED PROSPERITY MAKES NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO ANY THIRD PARTY DATA PROVIDED TO UNITED PROSPERITY OR ITS TRANSMISSION, TIMELINESS, ACCURACY OR COMPLETENESS, INCLUDING BUT NOT LIMITED TO
IMPLIED WARRANTIES OR WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. UNITED PROSPERITY WILL NOT BE LIABLE IN ANY WAY TO YOU OR TO ANY OTHER PERSON FOR ANY INACCURACY, ERROR OR DELAY IN OR OMISSION OF ANY THIRD PARTY DATA OR THE TRANSMISSION OR DELIVERY OF ANY SUCH THIRD PARTY DATA AND ANY LOSS OR DAMAGE ARISING FROM (A) ANY SUCH INACCURACY, ERROR, DELAY OR OMISSION, (B) NON-PERFORMANCE OR (C) INTERRUPTION IN ANY SUCH THIRD PARTY DATA DUE EITHER TO ANY NEGLIGENT ACT OR OMISSION BY UNITED PROSPERITY OR "FORCE MAJEURE" OR ANY OTHER CAUSE BEYOND THE CONTROL OF UNITED PROSPERITY.

VIII. Limitation of Liability. You understand that any and all decisions made by you with respect to the Program are yours alone. United Prosperity cannot and does not verify the accuracy of information from Field Partners, other Users or Borrowers. United Prosperity shall not be responsible, or have any duty or obligation to, or liability for: (a) decisions or interactions resulting (directly or indirectly) from participation in the Program; or (b) any damages, costs, losses or expenses a User incurs as a result (directly or indirectly) of making a Credit Support or as a result (directly or indirectly) of utilizing the Program or information received in connection with the Program. In addition, in no event will United Prosperity be liable to you or any third person for any damages, costs, losses or expenses, including any lost capital, lost profits or special, incidental, consequential or punitive damages arising from your use of the Website or participation in the Program, even if United Prosperity has been advised of the possibility of such damages, costs, losses or expenses.

IX. Disputes

A. Disputes with Field Partners, Borrowers. You are solely responsible for your interactions with any Field Partners, any other User (even to the extent prohibited hereby) or any Borrower and any disputes that may result from such interactions. United Prosperity reserves the right, but has no obligation, to monitor disputes between you and such persons.

B. Disputes with United Prosperity.

1. If there is any dispute about or involving United Prosperity, the Website or the Program, by using the Website, you agree that the dispute will be governed by the laws of the State of California without regard to its conflict of law provisions. You agree to personal jurisdiction by and venue in the state and federal courts located in the San Francisco, California.

2. You agree that any and all disputes or controversies of any nature between you, United Prosperity, any Borrower or any Field Partner arising at any time shall be decided by a reference to a private judge, mutually selected by you, and as applicable, United Prosperity, such Borrower or such Field Partner (or, if they cannot agree, by the Presiding Judge in the Northern District of the State of California) appointed in accordance with California Code of Civil Procedure Section 638 (or pursuant to comparable provisions of federal law if the dispute falls within the exclusive jurisdiction of the federal courts), sitting without a jury, in the Northern District of the State of California; and you hereby submit to the jurisdiction of such court. The reference proceedings shall be conducted pursuant to and in accordance with the provisions of California Code of Civil Procedure §§ 638 through 645.1, inclusive. The private judge shall have the power, among others, to grant provisional relief, including without limitation, entering temporary restraining orders, issuing preliminary and permanent injunctions and appointing receivers. All such proceedings shall be closed to the public and confidential and all records relating thereto shall be permanently sealed. If during the course of any dispute, a party desires to seek provisional relief, but a judge has not been appointed at that point pursuant to the judicial reference procedures, then such party may apply to the in the Northern District of the State of California for such relief. The proceeding before the
private judge shall be conducted in the same manner as it would be before a court under the rules of evidence applicable to judicial proceedings. The applicable parties shall be entitled to discovery which shall be conducted in the same manner as it would be before a court under the rules of discovery applicable to judicial proceedings. The private judge shall oversee discovery and may enforce all discovery rules and order applicable to judicial proceedings in the same manner as a trial court judge. You agree that the selected or appointed private judge shall have the power to decide all issues in the action or proceeding, whether of fact or law, and shall report a statement of decision thereon pursuant to the California Code of Civil Procedure § 644(a). The private judge shall also determine all issues relating to the applicability, interpretation and enforceability of this paragraph; and

3. You waive, to the maximum extent not prohibited by law, any right you may have to claim or recover in any legal action or proceeding referred to in this section any special, exemplary, punitive or consequential damages.

X. Indemnity. You agree to indemnify and hold United Prosperity harmless from any loss, liability, claim, or demand, including reasonable attorney’s fees, made or incurred by any third party due to or arising (directly or indirectly) out of your use of the Website or participation in the Program or arising from a breach of this Agreement.

XI. Agreement Term; Termination.

A. Effective During Use and Post-Participation. This Agreement will remain in full force and effect while you use the Website or participate in the Program as a User and, notwithstanding anything herein to the contrary, this Agreement will remain in effect after your participation in the Program and status as a User is terminated. Whether or not you are and remain eligible to participate in the Program may be determined by United Prosperity in its sole and absolute discretion.

B. Termination Process. You may terminate your participation and status as a User at any time and for any reason by sending a written notice of termination to United Prosperity, such notice to be effective within 30 days of receipt by United Prosperity. United Prosperity may also terminate your participation in the Program and status as a User at any time and for any reason, effective upon transmission of notice to you at the email address you provide to United Prosperity. If your participation in the Program is terminated by United Prosperity, you agree not to use the Website any further.

C. Termination: No Effect on Repayment. PLEASE NOTE: TERMINATION OF YOUR PARTICIPATION IN THE PROGRAM AND TERMINATION OF YOUR STATUS AS A USER DO NOT ENTITLE YOU TO AN EXPEDITED REPAYMENT OF ANY FUNDS YOU CONTRIBUTED FOR CREDIT SUPPORT. TO THE EXTENT POSSIBLE, TERMINATION WILL INVOLVE REMOVAL OF YOUR INFORMATION FROM UP’S DATABASE (E.G., REMOVAL OF YOUR PHILANTHROPIC SOCIAL INVESTOR PROFILE FROM THE WEBSITE, REMOVAL FROM EMAIL LISTS, ETC.). THE FUNDS YOU CONTRIBUTED IN RELATION TO YOUR CREDIT SUPPORT WILL BE REPAYED, IF AT ALL, ACCORDING TO OUR USUAL CUSTOMS AND PRACTICES AS DESCRIBED IN THIS AGREEMENT.

XII. Entire Agreement; Severability. This Agreement, accepted upon use of the Website and further affirmed by becoming a User, contains the entire agreement between you and United Prosperity regarding the use of the Website or the Program. If any provision of this Agreement is held invalid, the remainder of this Agreement shall continue in full force and effect.
XIII. Contact Information. Please contact us at [INSERT EMAIL ADDRESS] with any questions regarding this Agreement.

*Reviewed and Approved by Supervising Attorney William Kell
New Business Counseling Practicum

420 Boalt Hall, Berkeley Law School
University of California, Berkeley, CA 94720

William A. Kell, Supervising Attorney
Licensed to Practice: CA, NY, MA, IL

May 31, 2008

Bhalchander Vishwanath
UnitedProsperity.org
100 Daphne Ct.
Pleasant Hill, CA 94523

Re: Legal Research for United Prosperity

Dear Bala,

It has been a pleasure working with you this semester. I was fortunate enough to take the New Business Counseling Practicum course at Boalt this semester and be assigned to work on your case along with Steve Chiu by Professor William Kell.

At our first interview in February we identified a variety of issues for which United Prosperity would like legal help. At the time your primary needs were the following: entity formation, fiscal sponsorship, website terms of use, regulatory compliance, securities law issues, tax issues, drafting of guarantee contracts, and setting up a subsidiary in India. Our team has concentrated its work this term principally on drafting the Terms of Use Agreement for the website and its philanthropic social investors(PSIs), and researching the securities law, tax, and regulatory issues that United Prosperity will encounter.

My research efforts were focused primarily on securities and tax law issues, with secondary considerations given to regulatory and contractual matters. Attached are two memoranda that share the fruits of this research. In the first memo focusing on securities and tax issues, I note that, assuming careful choice of its activities and terminology used, UP is unlikely to be subject to securities regulation. As to tax matters, I recommend that UP should not offer its philanthropic social investors a charitable tax deduction for the credit support they provide.

In the second memo, I have set out a number of important contractual and regulatory issues that UP should be aware of in setting up its relationships with Lenders and the PSIs. The information and recommendations included in the memo should be seen as preliminary in nature, meriting additional research by the Practicum or by experienced pro bono counsel. However, the information contained therein offer important guidance that should assist your efforts to create strong contractual relationships with these stakeholders.
Please keep Supervising Attorney Bill Kell informed about any future actions or decisions you make related to the above issues. In addition, please do no hesitate to contact Bill with any questions that may arise. As we have previously discussed, I will be away during the summer, but if my schedule permits I may be able to work with the Practicum for United Prosperity again next school year. In any event, it has been an incredibly rewarding experience for me to have had the opportunity to work with an inspiring organization like United Prosperity. I have learned a lot in the process, and I sincerely hope that our work will be useful to United Prosperity. It is satisfying to contribute to such a worthy cause. I wish you the best of luck and success in your future endeavors.

Sincerely,

Justin M. Winegar
Practicum Associate

*Reviewed and Approved by Supervising Attorney William Kell*
MEMORANDUM

TO: Bhalchander Vishwanath, United Prosperity (UP)  
FROM: Justin Winegar, Practicum Associate  
CC: Practicum Associate Steve Chiu, Supervising Attorney William Kell  
RE: Analysis of Tax and Securities Issues with UP Social Investor Transactions  
DATE: May 31, 2008

INTRODUCTION

United Prosperity came to Boalt’s New Business Counseling Practicum through a contact at the East Bay Community Law Center, and my personal involvement in assisting United Prosperity stemmed from my enrollment in the Practicum course. The legal issues that are covered in this memorandum were identified primarily at our initial interview in February. Subsequent meetings, review of United Prosperity’s business plan, and consultations with outside legal professionals approved by United Prosperity produced additional issues that merit research.

This first of two memos focuses primarily on securities and tax law issues regarding the relationships with the philanthropic social investors (PSIs). The memo will begin by recapping the facts relevant to the issues I researched and then offering a brief conclusion. This will be followed by a detailed summary of the legal research, and then a more thorough discussion of the options and recommendations on how to deal with the relevant securities and tax issues. Throughout, we have strived to tailor our advice to best fit the unique needs of United Prosperity.

RELEVANT FACTS

United Prosperity, in keeping with its mission to alleviate world poverty and suffering, will serve as a microfinance intermediary. UP plans to utilize the power of social networking to pool funds from “philanthropic social investors” (or “PSIs”) to provide guarantees to banks in developing countries. With this leverage, the banks will be able to lend additional capital to microfinance institutions (“MFIs”) at lower rates, who in turn will lend to poor microfinance entrepreneurs (“MFEs”) in the developing countries.

A typical PSI could go on UP’s website, select a group of MFEs that he or she would like to help, and provide a credit support of $25. That $25 would be aggregated along with credit support from other like-minded social investors by UP to provide the collateral for a guarantee to a local bank that will lend to an MFI that in turns lends to the group of MFEs. Once the MFEs have repaid their loans and the guarantee is cancelled, UP will return the $25 back to the original philanthropic social investor, or give them the opportunity to keep that money in the system and guarantee other loans. It is important to note that the $25 would be returned without any payment of interest.
The MFI will cover most defaults by MFES from their internal funds built up for such a purpose. Where, however, the defaults reach a certain threshold that the MFI is not able to cover, UP’s guarantee will be invoked and UP will step in to pay for part of the defaulted loan. In such a case the philanthropic social investor would lose all or part of his or her $25 because it would not be paid back.

As our work has progressed this term, the exact name and legal definition UP uses to characterize the $25 contribution has undergone significant changes. The term that I refer to as “credit support” was originally characterized as a “gift,” “investment,” “loan,” “guarantee” or some combination thereof. This ambiguity arose because the $25 contribution shares many features of, and at times can appear like, an interest-free loan, the gift of a loan guarantee, or a gift with a reasonable expectation of repayment. As we will see below, the definitional characterization of the various terms\(^1\) involved has substantial legal implications\(^2\).

Please review the above facts for accuracy, as they form the basis for our recommendations.

**RESEARCH QUESTIONS PRESENTED**

- In the transactions between United Prosperity and the philanthropic social investors, will UP be deemed to be offering the sale of securities?

- What is the best way to define the terms “philanthropic social investor” and the “loan” that he or she will provide?

- Will a philanthropic social investor be able to receive a tax deduction as a charitable contribution?

**BRIEF CONCLUSION**

- United Prosperity will not likely be deemed to be offering securities for sale to social investors.

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\(^1\) In the research and legal analysis section below I have chosen to maintain the older terminology (e.g. “social investor” instead of “PSI” and variants of “loan/guarantee” instead of “credit support”) in order to show the development of the line of thinking that allowed us to arrive at the newer terminology. This will also help UP in complying with legal obligations in constructing new terms in case those that we recommend are unacceptable for aesthetic, marketing, or other reasons.

\(^2\) The following comment is from an earlier draft of this memo, but is preserved here as a reminder that UP’s application for federal tax exemption (Form 1023) needs to utilize the research findings in this memo, in order to be adequately cautious in describing the terms of the transactions with the PSI’s. At this time, the terminology and description used to refer to the above $25 gift/loan appears to be inconsistently presented in United Prosperity’s Form 1023. United Prosperity refers to it alternately as a social investor “investing” $25 or allowing a social investor to “guarantee loans or lend” to a MFE and sometimes to “guarantee loans and lend.” The words guarantee and lend appear side-by-side almost throughout the text. Supervising Attorney Bill Kel has agreed to work with your law firm (per Julie Sherman) to ensure that the final Form 1023’s language describing the transactions with the PSIs integrates the knowledge gained from our research.
• "Philanthropic social investor" seems to be an adequate name for the "social investors" on UP’s site, and "credit support" should be an appropriate name for the "loans" contributed by the website’s philanthropic social investors.

• It would not be advisable to advertise a tax deduction as a charitable contribution for any credit support provided by philanthropic social investors.

SUMMARY OF RESEARCH AND LEGAL ANALYSIS

Securities Law Issues

_Is United Prosperity offering securities to social investors?_ If UP is not offering securities, then the securities laws will not apply. If UP is offering securities, it will have to comply with various registration requirements of the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as the various state "Blue Sky" securities regulations. If UP is deemed to be offering securities it may be possible for them to avoid the regulatory burden of complying with the registration and reporting requirements by seeking one of several stock offering exemptions that are available. As will be discussed further below, this will likely be unnecessary since it is my opinion that UP is not offering securities to the patrons of its website.

_What is a security?_ Section 2(a)(1) of the Securities Act of 1933 ("Securities Act") defines the term security as "any note, common stock, treasury stock, a security feature, bond, debenture, evidence of indebtedness...investment contract...or, in general, any interest or instrument commonly known as a 'security'." The list is much longer than that which I have included here, and the term is defined at such lengths because the definition of security is meant to have a broad, expansive interpretation. A broad definition allows adaptability for purposes of the underlying policy rationale—protection of the investing public and orderly functioning of our capital markets. There are two landmark court cases that the SEC uses to define what is a security: _SEC v. W.J. Howey Co.,_ 328 U.S. 293 (1946) and _Reves v. Ernst & Young_, 494 U.S. 56 (1990). If UP’s transactions with the PSIs adequately differ from the characteristics of "offering securities" described in both of these tests, then UP will likely be found not to be offering securities.

_Will UP pass the Howey test?_ In _Howey_, the court held that a combination of a land sales contract, warranty deed, and service contract for fractional interests in an orange grove constituted an investment contract and thus a "security" for purposes of the Securities Act. The court defined an investment contract as "a contract, transaction or scheme whereby [1] a person invests his money [2] in a common enterprise and [3] is led to expect profits [4] solely from the efforts of a promoter or third-party" (numerated prongs added). This four-prong test has come to be known as the _Howey_ test, and the court provided some guiding policy rationale when utilizing the test to make such a determination. The test is meant to embody "a flexible rather than static principal, one that is capable of adaptation to meet the countless invariable schemes devised by those who seek the _use of the money of others on the promise of profits_" (emphasis added). In addition, the court placed "an emphasis on economic reality" in disregarding form and looking to the substance of the transaction.
It is likely that the "social investments" United Prosperity is offering do not meet the definition of an investment contract (and thus a security) within the Howey test. While it can be said to meet prongs (1), (2), and (4) of the test, it fails on the third prong. A social investor's money is invested in a common enterprise and depends solely upon the efforts of a third-party (United Prosperity); however, social investors are not led to expect profits. Thus while the social investment shares many formal aspects with that of a security, at the heart of the transaction there is no expectation of profit. Since the test looks to the "economic reality," a mere personal satisfaction in knowing that one has done a good deed is not enough to qualify as a profit.

Will UP pass the (Reves) "family resemblance" test? In Reves v. Ernst & Young, the court found that demand notes issued by a farmers' cooperative were securities within the meaning of the Securities Exchange Act of 1934. While courts use the Howey test to determine whether an investment contract is a security, the court in Reves formulated the test used to determine whether a note qualifies as a security. The court adopted a base presumption that all notes are securities. Recognizing, however, that not all notes are in fact securities, the court adopted a list of notes that expressly are NOT securities:

- consumer financing;
- home mortgages;
- short-term loans secured by assets of a small business;
- character loans to bank customers;
- short-term secure financing of accounts receivable;
- short-term account debts incurred in the ordinary course of business; and
- commercial bank loans for current operations.

In addition, showing that a note bears a "family resemblance" to that list of notes could lead a court to add a new instrument to the list, thus rebutting the presumption that a note is a security.

Unlike the Howey test, where all four prongs must be met, the family resemblance test is a multifactor balancing test. Thus an instrument need not satisfy each of the factors to be deemed a security. Like the Howey test, the family resemblance test also contains four factors:

1) **Motivations.** A court will first look to the motivation that would prompt a reasonable buyer and seller to enter into a transaction. If the seller's purpose is to raise money for general business use or to finance investments, and the buyer "is interested primarily in the profit the note is expected to generate" then the instrument will likely be deemed a security (emphasis added).

2) **Plan of Distribution.** Next, courts examine the "plan of distribution" of the note to determine if there is "common trading for speculation or investment." The threshold to establish common trading is low, however, in that all that is necessary is that the notes be offered and sold to a "broad segment of the public."
3) **Reasonable Expectations of the investing public.** Courts consider instruments to be securities on the basis of public expectations, even if an economic analysis of the underlying instruments might suggest that they are not in fact "securities."

4) **Existence of an Alternate Regulatory Scheme.** Existence of a comparable regulatory regime (e.g. ERISA for pension plans or the FDIC for certificates of deposit) reduces the risk to investors and renders the application of the securities acts unnecessary.

In *Reves*, the court focused primarily on the first and third factors. It found that the farmers’ cooperative was selling securities because one of the "primary inducements" offered to investors was an interest rate above the rate paid by local banks. Regarding the third factor, the court found it dispositive that the cooperative advertised the notes as "investments." The court noted that the "fundamental essence" of a security is its character as an investment.

Applying the family resemblance test to United Prosperity’s "social investments," it is likely that a court would not find that United Prosperity is offering securities as long as United Prosperity is careful in utilizing terminology that does not create the impression that a security is being offered. While there is a plan of distribution since UP’s loans would be offered to a broad segment of the public (factor 1), and there is no existence of an alternate regulatory scheme (factor 4), the first and third factors would seem to weigh more heavily. Social investors lack the necessary motivation: they are not "interested primarily in the profit the note is expected to generate." The loans are interest-free, so profit cannot be a primary inducement. In terms of the third factor, United Prosperity will have to be careful to make sure that the public understands clearly that they are not purchasing an "investment" or "security." Thus some tailoring of the language in UP’s terms of use and on its website may be necessary. If a note has the appearance of a security to the average person, then that person would also expect the protections of the securities laws, and as such registration would be required. Assuming appropriate steps are taken in designing terms of use and website language, UP will likely not project such an illusion because of the proper disclosures it will make in its transactions with social investors.

*Can and should UP seek a registration exemption under SEC or State law?* As I expect UP to carefully describe its terms of use and website language in light of the above, I have not extensively researched the various registration exemptions. The unlikely event that UP will be deemed to be offering securities combined with the high cost and administrative burden in seeking and maintaining such exemptions makes doing so impractical and unadvisable. It is comforting to note, nevertheless, that most state securities laws do contain an explicit exemption from registration for nonprofit 501(c)(3) corporations such as United Prosperity. In addition, section 3(a)(5) of the Securities Act lists as exempt from registration securities of "a corporation described in section 501(c)(16) of [the Internal Revenue Code] and exempt from tax under section 501(a) of such Code." United Prosperity will also escape being defined as an "Investment Company" within the meaning of the Investment Company Act of 1940 by an explicit exemption for charitable organizations contained in section 3(c)10(B) of the Act.
Tax Considerations

Will social investors receive a tax deduction? In general, if certain requirements are met, charitable contributions are deductible by the donor in the year given. Section 170 of the Internal Revenue Code, which governs the tax treatment of charitable contributions, makes an important distinction between donations of goods and donations of services. The former are deductible, whereas the latter are not. Contributions in cash are deductible up to 50% of a taxpayer’s adjusted gross income and contributions in the form of property are deductible up to 30%; however, contributions of a taxpayer’s volunteer services or the use of his property are not deductible. In addition, the contribution must be made to a recognized charitable organization such as a government, religious, educational, philanthropic, etc., entity. There may be no deduction, however, for gifts designated to specific individuals even though it is funneled through a charitable organization. There is also no deduction allowed if the donor receives something of value in return for his contribution. In general, courts have found deductible those contributions given with “detached and disinterested generosity,” with no expectation of economic benefit in return.

Of the three main ways that we have characterized a social investor’s $25 contribution, it is unlikely that United Prosperity will be able to advertise tax deductibility under any of the options.

1. Social investors provide an interest free loan.

There was initially some thought that social investors could deduct the interest they could have earned had they invested their money in, for example, a treasury note. There is however no case law to support this assertion because, as an expert in the tax treatment of tax exempt entities opined, forgone interest is not deductible as a charitable contribution. This can also be conceived of as the taxpayer giving the use of his property, i.e. money, and since the money is returned it is not a charitable contribution as defined above (mere use is not enough).

What happens in case of a default, where a social investor in effect loses his money because it is not returned to him? Since the social investor is not likely to be deemed to be in the business of making such loans, the lost money could be deducted as a non-business bad debt under I.R.C. §166. Non-business bad debts are deducted as a capital loss, and thus they can be used to offset capital gain in an unlimited amount and ordinary income up to a $3000 maximum each year pursuant to I.R.C. §1211. That loss may be carried over to subsequent years to offset capital gains but is still subject to the $3000 limitation on deductions from ordinary income.

Due to the way our tax system is structured, most people would prefer to realize and report income in the form of long-term capital gains (taxed currently at 15%) and make

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3 Winters v. Commisioner, 468 F.2d 778 (2d Cir. 1972).
4 (1) an interest-free loan (2) donation of a loan guarantee, and (3) a donation with a reasonable expectation of repayment
5 Consultation with attorneys Al DeLeo and Bert Lazero, both of whom are experienced practitioners who teach tax law at UC Berkeley Law School.
deductions from ordinary income since ordinary income is taxed at a higher rate (currently 25%-35% for most people). A standard charitable contribution is deductible against ordinary income, and thus the opportunity to make such a deduction may prove to be an incentive for people to donate to charitable causes.

If UP characterizes a social investor’s contribution as an interest-free loan, there will be no up-front charitable deduction from ordinary income. Any loss from a defaulted loan could only be deducted as a capital loss. Thus the tax treatment here will not provide much of an extra incentive for social investors to contribute funds.

2. **Social investors donate a loan guarantee**

Initially there was some thought that social investors could receive a tax deduction for their forgone interest plus the fair market value of the loan guarantee that they donate. The IRS seemed to be trending in this direction with its 1990 letter ruling #9113009, but this letter ruling was reversed in 1994 by a subsequent letter ruling (#9409018) in which the IRS itself seemed unclear on the matter. Thus while treating the contribution as the donation of a loan guarantee may have at one time theoretically circumvented the loan issues in scenario (1), in modern practice the deductibility of a guarantee is treated the same as that of a loan. Thus there would be no immediate deduction and any loss resulting from a default would be treated as described above.

3. **Social investors make a donation with an expectation of repayment.**

It is theoretically possible that social investors could receive a tax deduction under this model at the time the “donation” is made for the amount of the donation. Upon repayment, however, the social investor would have to remember to include that amount in his or her gross income. This is an application of the complicated “Tax Benefit Rule,” a creation of both statutory and case law. According to the tax benefit rule, a recovery of an amount previously deducted from gross income must be included in a subsequent year, but only to the extent that the amount actually resulted in a tax benefit (i.e. reduced the tax owed in the earlier year). Complying with this rule, if the social investor even knows about such rule, would be administratively complex for a social investor. Thus this form of defining a social investor’s “donation,” while it may appear to provide a tax incentive in the form of a deduction, may result in multiple cases of tax fraud by those who are not aware that they must include their recovery in their gross income and an administrative headache for those who are aware of the tax benefit rule.

Moreover, the IRS has a policy of looking at substance over form. That is, the substance of a transaction is more important than whatever different procedural steps are taken or creative names are employed. Consequently, the IRS utilizes something referred to as the “step-transaction” doctrine to collapse several different transactions into one if it appears they are substantially linked. Therefore they may see the $25 “donation with expectation

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6 The analysis for this section is the same as would be if the contribution is characterized as a “credit support.”

7 This was the opinion of one of the above tax professors who specializes in exempt organizations, explaining why I had been unable to find any case law to support scenario (2).

of repayment" as a fancy term for what is essentially a loan, and collapse the two transactions into one and treat it as an interest-free loan for tax purposes (which as described above would not get a charitable contribution deduction).

SUMMARY OF OPTIONS AND RECOMMENDATIONS

Securities Law Issues

If United Prosperity is careful in wording the language in their agreements, on their website and their advertisements, they will likely not be deemed to be offering securities and thus will not need to seek an exemption from registration. Crucial here is the need not to create an impression to the public that securities are being offered. Firm disclosures must be made regarding the fact that no interest is offered, and that altruism is the primary motivating factor. The lesson from the third factor of the family resemblance test is that words matter—the particular word you choose goes a long way with the SEC.

Therefore much thought has been given to renaming the various terms involved such as "social investor" since United Prosperity must be careful not to give the appearance of, or promote the misunderstanding that they are offering security-like investments. In coming up with alternative names, we have had to balance the legal concerns against concerns both of style, marketing, and message. For example, a word like “donor” may be considered “safe” from a legal perspective, but fails to convey UP’s message of offering the public a more active and participatory role in alleviating poverty around the world. A word like “credit supporter,” also safer from a legal standpoint, fails for stylistic reasons in that it is overly technical and thus may lack appeal to the general public.

At this juncture, we wholeheartedly recommend the use of the term “credit support” to describe the subject matter of the transactions with the PSIs. The term “philanthropic social investor,” which we understand UP favors at this time, does attempt to strike a balance between implying the active, participatory nature of a PSI’s involvement and the charitable motivations for such involvement. However, we must note that there is still a risk of misunderstanding any time the word “investor” or “investment” is used. Therefore, should UP retain the “philanthropic social investor” terminology, UP’s terms of use and all other language used on the website must be proactive and clear in describing the subject of the transaction with the PSIs as solely “credit support.” “Credit support” seems an ideal definition for a PSI’s contribution (rather than “loan” or “social investment”) because it will not appear like a security to the general public. Overall, this term is the most effective in describing the true nature of a PSI’s contribution: a PSI provides credit support to backstop a guarantee issued by UP to a bank.

9 Alternate names for “social investor” may still be considered such as (but not limited to) “philanthropic lender,” “philanthropic participant,” “microfinance advocate,” etc. Alternate names may also be considered for the $25 “credit support” by a social investor such as “philanthropic loan,” “charitable loan,” “recoverable grant,” “social capital,” etc.
Tax Considerations

While it may be theoretically possible, we do not recommend offering social investors a tax deduction for their social investments/credit support. Although direct donations are eligible for a charitable deduction, the transaction here is best viewed for tax purposes as an interest-free loan and as such cannot be deducted from ordinary income as a charitable contribution. In cases of default, any loss can, however, be deducted as a capital loss.

It is advisable to have a provision in the contract with social investors reminding them not to take a charitable tax deduction, that United Prosperity does not offer tax advice, and to consult with a tax professional if they have any questions. It may also be useful to remind people that instances of default are treated as a standard capital loss deduction.\(^{10}\)

NEXT STEPS

Our work has concentrated primarily on the interface between United Prosperity and its philanthropic social investors. The team next semester (and/or an experienced pro bono attorney that the Practicum could try to arrange) should probably focus on the relationship between United Prosperity and the various banks, MFIs, MFIs, and MFI networks. Professor Kell will be limited in what he can do over the summer, but if feasible, the next step would be to help draft guarantee contracts between United Prosperity and banks in developing countries. Fortunately, as of this writing, it appears that Professor Kell has been able to arrange for pro bono attorney representation from O’Melveny and Meyers (which has provided some assistance with our research) regarding this aspect of UP’s activities. Consistent with this, we will seek your consent to share your file and this memo with O’Melveny in order to facilitate that firm’s representation.

CONCLUSION

It was great to have the opportunity to assist United Prosperity this semester. It is a truly noble and worthy cause, and I wish you the best of luck. For me personally it has highlighted the importance of pro-bono legal work in jumpstarting exciting and innovative new organizations for purposes of social good. While my work for UP may be officially concluding, please feel free to contact me with any questions and I will do my best to answer them or to put you in touch with those who can. Please also do not hesitate to contact Professor Kell with any questions regarding the advice contained in this memorandum, if you notice any errors, or any other issues that arise in the course of your operations.

\(^{10}\) The Terms of Use contract that we have drafted for you will have such provisions.
MEMORANDUM

TO: Bhalchander Vishwanath, United Prosperity (UP)
FROM: Justin Winegar, Practicum Associate
CC: Practicum Associate Steve Chiu, Supervising Attorney William Kell
RE: Preliminary Analysis of Contractual and Regulatory Issues for UP Relationships with Banks and Philanthropic Social Investors
DATE: May 31, 2008

INTRODUCTION

United Prosperity was referred to the Practicum by the East Bay Community Law Center. Our initial interview in February and subsequent meetings identified additional issues that merited research, particularly re: UP’s plans to enter into contractual arrangements with foreign banks (hereafter “Lenders”). In addition, as we continued working with UP, we thought it prudent to inquire into federal regulatory issues that might arise with relationships with philanthropic social investors (PSIs) and Lenders.

Our research for UP this term has focused primarily on the relationship between UP and the philanthropic social investors (PSIs). However, we have also gathered information and formed some preliminary recommendations as to related contractual and regulatory issues involving UP’s links with the PSIs and Lenders. The following memo, second of two from me, first recaps the relevant facts, then summarizes our initial research and makes recommendations for future UP activities and further legal work on UP’s behalf. As with both memos, we have strived to tailor our advice to best fit the unique needs of United Prosperity.

RELEVANT FACTS

As described in the accompanying memos by me and Steve Chiu, United Prosperity is a non-profit organization designed to expand microfinance opportunities for poor microfinance entrepreneurs (“MFEs”) in developing countries. UP plans to utilize the power of social networking to pool funds from “philanthropic social investors” (or “PSIs”) to provide guarantees to local banks (Lenders), which will add additional capital to microfinance institutions (“MFIs”) and/or MFEs in the developing countries.

While the aforementioned will serve as UP’s primary model for doing business, UP also intends to utilize other methods to achieve their goal of facilitating lending to all entrepreneurs in need. These other methods are, in order of preference, the bank partnership model, lending directly to a local bank that in turn lends to a poor entrepreneur (thus eliminating the MFI intermediary), and lending directly to a poor entrepreneur. The bank partnership model is very similar to UP’s primary model (UP is
still providing a guarantee to a local bank), except that the local bank will lend directly to the MFE and the MFI acts merely as a servicing agent (i.e. the MFI does not make a loan in this model, but still serves to provide the link between a bank and an MFE). UP’s preferences represent the level of risk and due diligence it would have to undertake as it moves from acting as intermediary guarantor, to a guarantor, to a direct lender. Thus, UP prefers only to use these secondary methods where its primary model is not viable, and only in a small amount of cases. As a last resort, UP will serve as a direct lender.

United Prosperity will at first meet most of its capital needs from donations. As operations expand, it will look more to the “credit support” provided by its social network of philanthropic social investors on its website to serve as the pool of capital that will backstop guarantees for loans by MFIs and banks across the world. A typical PSI could go on UP’s website, select a group of MFIs that he or she would like to help, and provide a credit support of $25. That $25 would be aggregated along with credit support from other like-minded social investors by UP to provide the collateral for a guarantee to a local bank that will lend to an MFI that in turns lends to the group of MFIs. Once the MFIs have repaid their loans and the guarantee is cancelled, UP will return the $25 back to the original philanthropic social investor, or give them the opportunity to keep that money in the system and guarantee other loans.

The MFI will cover most defaults by MFIs from their internal funds built up for such a purpose. Where, however, the defaults reach a certain threshold that the MFI is not able to cover, UP’s guarantee will be invoked and UP will step in to pay for part of the defaulted loan.

Please review the above facts for accuracy, as they form the basis for our recommendations.

PRELIMINARY ANALYSIS AND RECOMMENDATIONS

We have gathered the following information and formed some preliminary recommendations as to certain contractual and regulatory issues involving UP’s above-described relationships with the PSIs and Lenders. This initial overview is meant to flag important issues that warrant additional research, and that UP should bear in mind as it develops these important stakeholder relationships.

Contractual Issues

While operating using standby letters of credit with Lenders may be “easier” from a regulatory standpoint, you identified them as the least desirable option in terms of United Prosperity’s business operations because of their cost and the fact that UP must essentially cede control of the funds to a local bank. After a preliminary consultation with various practitioners in the field, it appears that United Prosperity does not face any major legal hurdles in making loan guarantee contracts directly with local banks. We were cautioned, however, about banks’ reluctance to enter into such direct guarantee
contracts, and that negotiating such arrangements may be a slow and painful process. Using a letter of credit to collateralize a portion of the guarantee may be a viable alternative as UP is exposed to less risk and the benefit of speed may outweigh the cost (which can be passed on to the MFI). Another option is the use of a joint custodial cash collateral account.

For whichever method UP chooses to use to guarantee loans, the following is a list of five main points of negotiation to consider in your deliberations with Lenders:

1) Under what conditions will the guarantee be called?

2) Where will the collateral reside?

3) How much collateral needs to be posted/pledged?

4) How will you handle currency fluctuations (and possible currency collapse in some countries)?

5) Under what conditions will the guarantee be cancelled (in case of a direct guarantee contract) and how will UP regain sole possession and control of its cash collateral (in case of an LC or joint account)?

Other Regulatory Concerns

While there appear to be no major regulatory obstacles to UP’s plan of business operations, there are a few regulations that are applicable to most United States corporations operating internationally.

Federal Patriot Act. To comply with the USA Patriot Act, UP should make sure to keep accurate records of all its transactions, and be sure to save at least the name and address of the philanthropic social investors in their database. Since UP is not a financial institution, most of the burden in complying with the Patriot Act will likely be shifted to UP’s and its partners’ banks (the responsibility for compliance should be carefully described in any agreements arranged between UP and such banking institutions).

Federal Foreign Corrupt Practices Act. In order to comply with the Foreign Corrupt Practices Act (FCPA), neither UP nor anyone employed by UP should make any payments to foreign officials for the purpose of obtaining or keeping business, or gaining any other advantage. I realize that this suggestion is probably unnecessary at this stage, but it is something to be aware of as UP grows and begins to interact with a variety of different countries. Supervision of all UP employees and agents in this regard will be critically important.

Regulation by the Federal Office of Foreign Assets Control (OFAC). While the issue never arose regarding any of the legal topics that I researched, one of your emails alerted
us to the fact that it may be necessary for United Prosperity to screen philanthropic social investors in order to comply with its application for 501(c)(3) status. While I am not able to make a recommendation at this time regarding what steps you should take (I think Hanson Bridgett is handling this issue), it may be helpful to know that such screening does not appear to be much of an administrative burden. The task of screening appears to involve checking to see if a potential philanthropic investor appears on the Office of Foreign Assets Control (OFAC) list of Specially Designated Nationals (SDNs). This is a list of individuals and entities whose assets are blocked and with whom U.S. persons are generally prohibited from dealing. If checking the list turns out to be mandatory, a computer program can run any searches and smooth out the process. The following link directs you to the OFAC webpage of frequently asked questions and includes the actual SDN list, references computer programs, and even directs you to an OFAC Starter Kit:


NEXT STEPS

The above research into contractual and regulatory issues can and should be expanded by a future Practicum team, which will be available to UP starting in September 2008. Next semester’s team (and/or an experienced pro bono attorney that the Practicum could try to arrange) should probably focus on the relationship between United Prosperity and the various Lenders, MFIs, MFEs, and MFI networks. Professor Kell will be limited in what he can do over the summer, but if feasible, the next step would be to help draft guarantee contracts between United Prosperity and banks in developing countries.

Fortunately, as of this writing, Professor William Kell has arranged for additional pro-bono counsel through O’Melveny and Myers, which should be able to provide additional assistance with the following contractual and regulatory issues as UP continues to move forward with its business activities in the interim. Consistent with this, we will seek your consent to share your file and this memo with O’Melveny in order to facilitate that firm’s representation.

*Reviewed and Approved by Supervising Attorney William Kell and Christopher Kirkham, O’Melveny and Myers

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1 This is the email regarding a similar organization, Wokai