

QUESTION 8

Kravat is a manufacturer of men's ties. Clothier operates a men's clothing store. Kravat telephoned Clothier and told him that he was closing out the stock of last year's ties. "I have six dozen silk ties of assorted patterns. I will let you have them for \$80 a dozen, F.O.B. destination." Clothier replied, "I'll take them."

The next day Kravat mailed the following letter:

This will confirm our contract for six dozen silk ties of assorted patterns at \$80 per dozen, plus shipping charges, for immediate shipment, payment on delivery.

(Signed) Kravat.

Clothier did not reply to this letter which he received two days after it was mailed.

Kravat shipped the ties to Clothier's place of business and enclosed an invoice that billed Clothier for \$507— six dozen ties at \$80 a dozen, plus \$27 shipping charges. Clothier accepted the ties, made no complaint about them or the charges, but he has refused to pay anything to Kravat.

A month later, when Kravat complained about not having been paid, Clothier admitted that he owed him \$480, but contended that he did not owe the \$27 because "I never agreed to pay the shipping charges."

QUESTION:

Discuss Clothier's contractual liability.

DISCUSSION FOR QUESTION 8

"Ties" are manufactured items which are movable at the time of identification to the contract and therefore are goods under U.C.C. 2-105(1). As such, the Uniform Commercial Code governs this transaction.

The U.C.C. requires that any contract for the sale of goods with a price greater than \$500 must be in writing pursuant to the statute of frauds. U.C.C. 2-201. However, this requirement is satisfied between merchants if a written confirmation of the contract is received within a reasonable time. U.C.C. 2-201(2). A writing is sufficient even if it omits or incorrectly states a term. U.C.C. 2-201(1).

Both Kravat and Clothier are "merchants" as that word is used in the Uniform Commercial Code as they are persons who deal with, and hold themselves out as having knowledge about, ties. U.C.C. 2-104(1).

It is clear that a contract was entered into as a result of the telephone conversation between Kravat and Clothier. All essential terms of the transaction were agreed upon. U.C.C. 2-204. The agreement on the term: "F.O.B. destination," reflects that Kravat must ship the goods to Clothier and bear the cost of doing so. U.C.C. 3-319(1)(a).

In the written memorandum, which he sent on the day following the agreement, however, Kravat inserted a term different from the agreement by stating that Clothier would bear the costs of shipping. This different term does not change either the fact that the parties had a contract or the terms of that contract. U.C.C. 2-207(1). The different term, however, does operate as an offer to modify the contract that had been entered into. U.C.C. 2-207(2). Although the provisions of 2-207(2) refer only to "additional" terms, the majority of courts construing this subsection have said that it applies to "different" as well as to "additional" terms, relying upon comment 3 to U.C.C. 2-207. Farnsworth, Contracts, at 162. The "different term" becomes part of the contract unless Clothier has already objected to it or does so within a reasonable time after he has notice of it, or unless the term materially alters the contract. U.C.C. 2-207(2). Clothier waited more than a month after having received notice of the "different term" before objecting to it. That is likely to be seen as not within a reasonable time.

Because the "different term" increases the cost of the goods by only about 6%, it is unlikely that a court would find that the change materially altered the contract. By remaining silent, therefore, Clothier has accepted the offer to modify the contract by changing the contract price from \$480 to \$480 plus the shipping charges of \$27, and probably is liable for the entire \$507.

Examinee# _____

Final Score _____

SCORESHEET FOR QUESTION 8
~~ASSIGN ONE POINT FOR EACH STATEMENT BELOW~~

SCORE SHEET

1. Since this transaction is for the sale of goods, it is governed by the Uniform Commercial Code. 1. _____
2. Statute of frauds applies when goods are valued over \$500. 2. _____
 - 2a. Recognize issue that goods are valued over \$500 only if one adds in shipping. 2a. _____
3. Statute of frauds satisfied between merchants by subsequent writing. 3. _____
4. Both parties are merchants under the provisions of the Uniform Commercial Code. 4. _____
5. F.O.B. destination means that Kravat must bear the cost of shipment. 5. _____
6. Different term:
 - 6a. does not change the fact that a contract exists. 6a. _____
 - 6b. operates as an offer to modify the contract. 6b. _____
7. A different term will become part of the contract if:
 - 7a. It is not objected to within a reasonable time period, and 7a. _____
 - 7b. It is not a material alteration of the contract. 7b. _____

QUESTION 1

Spud is a produce wholesaler who regularly does business with Dan's Diner, Inc. (Diner). On September 15, Diner's authorized buyer orally agreed with Spud to buy all the potatoes in "bin 15" at Spud's warehouse, to be delivered at Diner's place of business on October 1, for \$1,000. The next day Diner received the following writing signed by Spud: "This confirms our sale to you of all the potatoes in our bin 15 for October 1 delivery." Diner did not reply to this writing.

On October 2, Spud tendered all of the potatoes from bin 15 to Diner at Diner's place of business, but gave no reason for being a day late with the delivery. Diner refused to accept or pay for any of the potatoes.

Between September 15 and October 2, the bottom dropped out of the potato market. On September 15 the market value of the potatoes in bin 15 was \$1,000; on October 1, it was only \$500. The one day delay in delivery did not harm Diner or its business in any way, and Diner admits that the price-drop was its only reason for refusing to accept the potatoes.

Spud sued Diner for breach of contract.

QUESTION:

Discuss the claims and defenses of the parties in this action.

DISCUSSION FOR QUESTION 1

Potatoes are things movable at the time of their identification to the contract, and, therefore, are "goods." U.C.C. §2-105(1). Since the contract between Spud and Diner is a transaction in goods, it is governed by the Uniform Commercial Code. U.C.C. §2-102.

Since Spud is a dealer in potatoes, and Diner buys potatoes and uses them in its business, and, therefore, holds itself out as having knowledge of potatoes, both parties are "merchants" with respect to potatoes, and the Uniform Commercial Code provisions governing merchants are applicable to this contract. U.C.C. §2-104(1).

Since this contract is a contract for the sale of goods for a price of \$500 or more, it must be in writing and signed by the party against whom enforcement is sought. U.C.C. §2-201(1). Although there is a writing, it is not signed by Diner, the party against whom enforcement is sought. There is, however, an exception to the signature-requirement. The exception provides that in dealings between merchants, if a writing confirming the contract is sent by one merchant and received by the other, then the statute of frauds is satisfied unless the merchant receiving the confirmation gives the other written notice of objection to its contents within ten days of its receipt. U.C.C. §2-201(2). Here, there was a written confirmation signed by Spud. Since both parties are merchants, and since Diner did not object to the contents of the writing within ten days after having received it, then the writing satisfies the statute of frauds against Diner even though Diner failed to sign it.

The writing in this case does indicate that a contract of sale has been made and contains a quantity term. It, therefore, satisfies the requirements of the statute of frauds even though it does not contain all of the contract terms. U.C.C. §2-201(1). The phrase "...all the potatoes in our bin 15..." is a sufficient statement of the quantity term to satisfy the statute. Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 5th Cir., 1975. Diner's statute of frauds defense, therefore, will fail.

Because this is not an installment contract, the provisions of U.C.C. §2-601 rather than §2-612 are applicable with respect to the buyer's rights on improper delivery. Where the seller's tender of the goods in any respect fails to conform to the contract, the buyer can reject the whole. U.C.C. §2-601(a). Since Spud was a day late in tendering the goods, the tender failed to conform to the contract and under the perfect tender rule (U.C.C. §2-601) Diner was entitled to reject all of the potatoes.

There has, however, been much criticism of the rule in those cases where the buyer tries to use the rule solely to escape a bad contract. Some courts have applied the good faith requirement (U.C.C. §1-203: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.") These courts have said that a buyer is acting in bad faith, with respect to the enforcement of the

DISCUSSION FOR QUESTION 1
Page 2

contract under the provisions of 2-601, if the reason for rejecting the goods is solely to escape from a bad contract. Printing Center of Texas v. Supermind Pub. Co., Inc., 669 SW2d 779 (Tex.App. 1984). Diner admits that the one-day delay did not harm it in any way and that the price-drop is its only reason for rejecting the potatoes. "... (T)he courts' manipulation have so eroded the perfect tender rule that the law would be little changed if 2-601 gave the right to reject only upon 'substantial' non-conformity." White & Summers, Uniform Commercial Code, (4th Ed. 1995), §8-3b. p. 301. It is clear that the one-day delay in delivery was not a substantial non-conformity. It is unlikely, therefore, that Diner can use the late delivery to justify its refusing the tender of the potatoes and its defense of late tender of delivery will fail.

Spud, therefore, should succeed in his breach-of-contract action against Diner.



21202

Essay 1 GradeSheet**Seat**

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Score

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Please use blue or black pen
and write numbers clearly

1. A contract was formed because elements of a contract are present, offer, acceptance and consideration. 1. _____
2. The sale of potatoes is a sale of goods, and, therefore, is governed by the Uniform Commercial Code. 2. _____
3. Both Spud and Diner are merchants within the meaning of the Uniform Commercial Code. 3. _____
4. The contract is for more than \$500 and thus within the statute of frauds of Article 2 of the Uniform Commercial Code. 4. _____
5. Since Diner did not raise any objections to it, Spud's signed written confirmation of the contract will satisfy the statute of frauds as against Diner if it is sufficient to satisfy the statute as against Spud. 5. _____
6. The term "all potatoes in bin 15" is a sufficient, specific quantity term and indicates that a contract has been made, to satisfy the statute of frauds. 6. _____
7. If the writing is otherwise sufficient, but lacking a price, the Court will apply a contract price. 7. _____
8. The contract is governed by §2-601, the perfect tender rule. 8. _____
9. Because the delivery of the goods was one day late, it did not conform to the contract. 9. _____
10. Under the provisions of §2-601, Diner was entitled to reject the whole delivery. 10. _____
11. Diner was required to act in good faith in the enforcement of the contract. 11. _____
12. Spud may recover damages from Diner measured by the difference between market price and contract price (\$500). 12. _____

QUESTION 4

For several years, Arcane has sold goods to Billy Bob on thirty day credit terms. Recently, however, Arcane heard that Billy Bob was not paying suppliers and was about to go out of business. Arcane called Billy Bob to ask about the rumor and to seek payment for goods which Arcane had delivered to Billy Bob over thirty days ago. Billy Bob told Arcane not to worry, his business was good, so good, in fact, that he wanted to place a substantial new order. Arcane took the order, but only on the condition that Billy Bob pay C.O.D. for the new order, and at the same time pay all Arcane's outstanding invoices. Arcane also asked Billy Bob to send him a letter stating that he was not going out of business. Billy Bob agreed to the terms set out by Arcane.

The new order was scheduled to be delivered in two shipments. When the first shipment was delivered, the delivery service neglected to get the C.O.D. payment. Five days later, but before the second shipment was delivered to Billy Bob, Arcane discovered that Billy Bob filed bankruptcy after he received the first shipment of goods. Billy Bob never sent the confirmation letter indicating his intent to stay in business.

QUESTION:

What rights and remedies are available to Arcane to recover the goods from Billy Bob, and what steps, if any, should be taken to preserve those rights and remedies?

DISCUSSION FOR QUESTION 4

Generally speaking, tender of delivery of goods is a condition of the buyer's duty to accept goods and pay for them. UCC 2-507(1). A buyer must pay at the contract rate for any goods accepted and which are not either rejected or are the subject of any breach. UCC 2-607. Because Billy Bob has received some goods that were not rejected or subject of any breach, he is required to pay for them.

If the seller discovers a buyer is insolvent, he may refuse delivery except for cash. He may also stop delivery if that is possible. UCC 2-702(1) and 2-705. In this case, Arcane did not stop the delivery of the first shipment, but did demand payment C.O.D. for the new goods and the amounts owing on previously delivered goods. Arcane also may stop delivery of the second shipment.

Where a seller discovers a buyer has received goods on credit while he is insolvent, the goods may be reclaimed upon demand made within ten days after the receipt of goods. UCC 2-702(2). Thus, Arcane should make immediate demand for return of the recently shipped goods and follow up by attempting to gain possession. In re Colacci's of Am., 490 F2d 1118 (10th Cir. 1974). If Arcane successfully reclaims the last goods sold, Arcane will have no other remedies with respect to them. UCC 2-702(3).

UCC 2-702(2) also provides that if a written misrepresentation of solvency has been made within three months before delivery, the 10-day limitation does not apply. However, any representation of solvency by Billy Bob, to the extent that it occurred, was verbal and not written, and therefore the three months extended time would not be available to Arcane to claim the newly shipped goods. UCC 2-702(2) goes on to state that except for remedies provided therein, a seller cannot base a right of reclamation on a buyer's fraudulent or innocent misrepresentation of solvency or intent to pay. Therefore, it does not appear that Arcane can make a claim for fraud that would enhance its right to reclaim the goods; although Arcane could argue that the misrepresentation was fraudulent in a claim for damages. See, seller's remedies in general, UCC 2-703, including right to damages.

Because no written representation of solvency was given to Arcane by Billy Bob prior to the shipment of goods thirty or more days ago, the extended time for reclamation of those goods is not available. Consequently, Arcane is outside the ten day limit with regard to the goods delivered thirty or more days ago and therefore has no right to reclaim those goods. Thus, Arcane will have to file a claim (excluding reclamation) in bankruptcy court for the goods delivered more than thirty days ago (e.g., any goods delivered more than 10 days ago).



21453

Essay 4 GradeSheet**Seat**

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Score

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Please use blue or black pen
and write numbers clearly

1. This dispute is governed by Article 2 of the UCC. 1. _____
 - 1a. This was a sale of goods between merchants. 1a. _____
2. Seller who questions buyer's ability to perform may seek assurances. 2. _____
3. If the seller discovers a buyer is insolvent, seller may refuse to deliver the goods except for cash. 3. _____
4. Seller may also stop delivery, prior to receipt by buyer, if that is possible. 4. _____
5. Where buyer has received goods on credit while insolvent, the goods may be reclaimed upon demand made by seller within ten days after the receipt of goods. 5. _____
6. If a written misrepresentation of solvency has been made within three months before delivery, the 10-day limitation does not apply. 6. _____
7. Except for the ten day demand (or elimination of the ten day requirement because of a written misrepresentation of solvency), a seller cannot base a right of reclamation on a buyer's fraudulent or innocent claim of solvency or intent to pay. 7. _____
8. Arcane may not reclaim goods delivered 30 days ago, or any goods delivered more than 10 days prior to demand for reclamation. 8. _____
9. Arcane may be able to argue that the misrepresentation was fraudulent in a claim for damages for the goods delivered more than 30 days ago. 9. _____
10. If Arcane successfully reclaims the last goods sold, he will have no other remedies with respect to those goods. 10. _____

QUESTION 9

Sampson owned property on which he stored used mining equipment and some open barrels of chemicals. Sampson entered into a written contract, signed by both parties, to sell the equipment to ChemCo which specialized in the purchase and resale of mining equipment. The purchase price for the equipment was the transfer of a compressor from ChemCo to Sampson worth \$17,500 and, in addition, ChemCo agreed to pick up and dispose of three of the barrels of chemicals on the property.

After the contract was signed, ChemCo called Sampson and advised him that they would pick up the equipment but would not pick up the chemicals; that Sampson must deliver the chemicals to ChemCo's place of business. ChemCo delivered the compressor to Sampson and picked up the used mining equipment, but did not pick up the barrels of chemicals. Subsequently, Sampson loaded the open barrels onto one of his trucks to deliver them to ChemCo. On the way to ChemCo, Sampson's truck hit a pothole and the barrels tipped, dumping the chemicals into the street. Alone, the contents of the barrels were not dangerous, but when mixed, they produced an extremely toxic substance.

ChemCo refused to accept the barrels with the remaining chemicals and the authorities determined they were Sampson's responsibility. Sampson expended \$30,000 in legal fees defending an EPA claim for the improper transportation of hazardous wastes and \$20,000 for the cost of cleaning up the spilled chemicals.

QUESTION:

Discuss whether Sampson can recover the cost of the cleanup and the amount he expended for legal fees from ChemCo.

DISCUSSION FOR QUESTION 9

This question deals with the sale of goods which is controlled by the Uniform Commercial Code. Mining equipment and the chemicals are identifiable and existing goods within the meaning of the Uniform Commercial Code [U.C.C. §2-105(1)] and, therefore, the Buyer-Seller contract is a contract for the sale of goods governed by Article 2 of the Uniform Commercial Code. U.C.C. §2-102.

Consideration for the sale of goods may be payable in money, goods or otherwise. U.C.C. 2-304. The transfer of the compressor to Sampson is therefore legal consideration. "If it is payable in whole or in part in goods, each party is a seller of the goods which he is to transfer."

To comply with the statute of frauds, a contract for the sale of goods with a value of more than \$500 must be in writing and signed by the party against whom enforcement is sought. U.C.C. 2-201. This contract meets those requirements.

The first issue to be addressed is whether there was a breach of the contract between Sampson and ChemCo when ChemCo refused to pick up the chemicals as agreed in the contract. Because Sampson waived this provision of the contract by agreeing to deliver the chemicals to ChemCo's place of business, there was no breach. Although an attempt to modify or rescind a contract must be in writing and signed by the parties, it may operate as a waiver if by conduct the party intends to relinquish a known right. U.C.C. 2-209. Here, Sampson's attempted delivery of the chemicals, acts as a waiver of ChemCo's legal duty to pick up them up.

Second, did ChemCo breach the contract when it refused to accept the barrels from Sampson? After Sampson waived ChemCo's obligation to pick up the chemicals, the risk of loss did not pass to ChemCo until the chemicals were delivered to ChemCo's place of business. U.C.C. 2-503. Since the spill occurred before the barrels were delivered, the risk of any loss remained with Sampson. In addition, since there had been a change in the goods as agreed under the contract, ChemCo has no legal duty to accept the altered goods. ChemCo agreed to receive 3 barrels of chemicals. Once the barrels spilled, the goods as agreed to were no longer in existence. Therefore, all damages from the spill and clean-up remain with Sampson.

Even if ChemCo breached the contract, Sampson is a seller of the chemicals and his rights under the U.C.C. are limited to those of a seller against a breaching buyer. UCC 2-703. He may: stop delivery of the goods; resell and recover damages based on the difference of the contract price and the resale price; recover the profit on the sale; or cancel the contract. In addition, under 2-710, Sampson may recover incidental damages which include commercially reasonable charges incurred in stopping delivery, and charges for the transportation, care and custody of the goods after ChemCo's breach. There are, however, no provisions for a seller to recover consequential damages from a breaching buyer. Consequential damages include any loss resulting from general or particular requirements and needs of which the seller had reason to know, and injury to person or property proximately resulting from the breach. The consequential damages here would be the cost of the cleanup but no such costs are recoverable by the Seller of goods. (U.C.C. 2-715). U.C.C. 1-106(1): "...neither consequential or special nor penal damages

DISCUSSION FOR QUESTION 9
Page Two

may be had except as specifically provided in this title or by any other rule of law." Sampson's damages for the cost of the cleanup were not incidental to ChemCo's refusal to accept delivery of the chemicals, but instead were incurred as a result of Sampson's improper handling and transportation of the chemicals. ChemCo had no control over the means by which Sampson chose to deliver the chemicals. The damages suffered by Sampson in the cleanup were not related, or incidental, to ChemCo's refusal to accept the chemicals.

Similarly, Sampson's legal fees of \$30,000 to defend the EPA claim are not recoverable as incidental damages under 2-710. Without a contract provision to the contrary, attorney fees are not incidental damages under 2-710.



21741

Essay 9 GradeSheet**Seat**

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Score

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Please use blue or black pen
and write numbers clearly

1. Mining equipment and the generator are goods and the sale of these goods is controlled by the Uniform Commercial Code. 1. _____
2. General contract principles may apply to the service element of this transaction. 2. _____
3. Consideration for the sale of goods may be payable in money, goods or otherwise. 3. _____
4. To comply with the statute of frauds for the sale of goods with a value of more than \$500, the contract must be in writing and signed by the party against whom it is to be enforced. 4. _____
5. Identification of issue of anticipatory repudiation. 5. _____
6. Modification of a contract must be in writing. 6. _____
7. Modification of the contract must be in good faith. 7. _____
8. Even if not modified in writing, there may be a waiver based on conduct. 8. _____
9. Risk of loss remained with Sampson until the chemicals were delivered to ChemCo's place of business. 9. _____
10. Expectation damages - placing the non-defaulting party into as good a position as it would have been without the breach. (Value to Sampson of picking up and disposing of chemicals.) 10. _____
11. Sampson's cleanup costs were not related to any breach by ChemCo's but were related to Sampson's improper transportation of the hazardous chemicals. 11. _____
12. Legal fees are not recoverable unless provided by contract. 12. _____

QUESTION 7

Subzero, a manufacturer of air conditioners, in response to an inquiry from Big Appliances, a retail seller of large appliances, sent the following letter:

Per your request, we are pleased to quote
you 1000 air conditioners at \$175 each.

Upon receiving this letter, Big sent Subzero its purchase order for 1000 air conditioners. Included on the back of the Purchase Order Form were the following provisions:

1. By accepting this order, seller expressly warrants that the goods provided are fit for the ordinary purposes for which they are used.
2. All disputes arising out of this agreement shall be submitted to binding arbitration.

When Subzero received Big's Purchase Order Form, Subzero immediately returned an Acknowledgment of Order Form which included the following language:

THANK YOU FOR YOUR ORDER. BEFORE ACCEPTING GOODS FROM CARRIER, MAKE SURE THAT EACH ARTICLE IS IN GOOD CONDITION. THIS IS NOT AN INVOICE. AN INVOICE WILL BE SENT TO YOU WITHIN A FEW DAYS. OUR ACCEPTANCE OF YOUR ORDER IS EXPRESSLY MADE CONDITIONAL ON YOUR ASSENT TO THE FOLLOWING TERMS. SELLER MAKES NO WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE MATERIAL, WORKMANSHIP, OR QUALITY OF THE GOODS SPECIFIED HEREIN.

Big made no objection to Subzero's acknowledgment. Within two weeks, Big accepted and paid for the air conditioners. Almost all of the air conditioners proved to be defectively manufactured. Big gave notice of the defects and served a demand for arbitration. Subzero refused to arbitrate.

QUESTION:

Discuss the rights and obligations of each party, and any damages to which the parties may be entitled.

DISCUSSION FOR QUESTION 7

A contract for the sale of air conditioners is a contract for the sale of goods and thus the provisions of Article 2 of the UCC will apply. A contract for the sale of goods can be made in any manner sufficient to show agreement. A manifestation of willingness to enter into a bargain, however, is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent. Restatement (Second) of Contracts §26. A price quotation is usually a statement of intention to sell at a given price. *Id.*, comment c; *Calamari & Perillo On Contracts*, 5th Ed. (2003) at 43. Absent other circumstances, even if the word “quote” is used in a letter addressed to only one person, it is commonly understood to mean that an offer is invited. *Interstate Indus. v. Barclay Indus.*, 540 Fd2d 868 (7th Cir. 1976). In the present case, Subzero’s response merely stated its price for 1000 air conditioners. It did not use the words “we offer” or “we will sell” which would have manifested a present intent to sell. Therefore, the letter constituted preliminary negotiations and was not an offer.

Big's purchase order is an offer to purchase 1000 air conditioners at \$175 each and proposes an express warranty and arbitration. It manifested the required present intent to enter into a contract and is sufficiently definite. (2-204, 2-208).

Subzero's acknowledgment is not an acceptance of Big's offer, but a counter offer. Section 2-207(1) provides that a definite and seasonable expression of acceptance, or a written confirmation which is sent within a reasonable time operates as an acceptance, even though it states terms additional to or different from those offered or agreed upon, unless acceptance is EXPRESSLY MADE CONDITIONAL on assent to the additional or different terms. Subzero's acknowledgment did contain a statement that it was expressly conditioned on assent to its terms, including the warranty disclaimer. Such an expressly conditional acceptance would not result in the formation of a contract. White and Summers, Uniform Commercial Code, at 33.

Between merchants additional terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received. In this case both parties are merchants under the UCC. UCC section 2-207 (2) expressly notes that even between two merchants additional terms will not become part of the contract if the offer expressly limits acceptance to the terms of the offer once a commercial undertaking has in fact been closed.

Under section 2-207(3), conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract although the writings of the parties do not otherwise establish a contract. Here, however, the writings of the parties do not establish a contract. Big made an offer to Subzero, and Subzero replied with a counter offer (expressly conditional acceptance). The contract between Big and Subzero was not formed until both parties perform, Subzero shipping the air conditioners and Big accepting and paying for them.

In the case where conduct by both parties creates the existence of a contract, the terms of the contract would be those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any provisions of the UCC. 2-207(3). There would be

no arbitration of the claims since only Big's offer (purchase order) contained this provision. Likewise there would be no express warranty that the air conditioners were fit for their ordinary purposes. Subzero's warranty disclaimer would also not be included since it only appeared in its acknowledgement. Since the seller is a merchant, there would be an implied warranty of merchantability under UCC 2-314, which among other things, requires that goods are fit for the ordinary purposes for which such goods are used. UCC 2-314(c).

Where the buyer has accepted goods as Big has done in this case, it can recover damages "for any non-conformity of tender the loss resulting in the ordinary course of events from seller's breach." UCC 2-714(1). In this case, Big can bring suit for breach of warranty for the defective air conditioners. The measure of Big's damages will be the "difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." UCC 2-714(2). Big should also be able to recover any incidental damages such as expenses incurred in the return of the air conditioners and also consequential damages. UCC 2-715(1). Incidental damages could include (i) expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected; (ii) any commercially reasonable charges, expenses or commissions in connection with effecting cover; and (iii) any other reasonable expenses incident to the breach. Cover is defined in UCC 2-712(1) as the reasonable purchase of or contract to purchase goods in substitution for those due from the seller if made in good faith and without unreasonable delay. Big could also seek consequential damages for any loss of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover.

ESSAY Q7

SEAT

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ISSUE	POINTS AWARDED
1. The contract for the sale of air conditioners is a contract for the sale of goods and is governed by Article 2 of the UCC.	1. ○
2. Subzero and Big are both merchants under the UCC.	2. ○
3. Subzero's first letter to Big was not an offer to sell; it merely was an invitation to make an offer.	3. ○
4. Big's purchase order was an offer (sufficiently definite).	4. ○
5. Subzero's acknowledgement was NOT an acceptance but a counter offer.	5. ○
6. Between merchants, additional terms become part of the contract unless:	
6a. offer expressly limits acceptance to the terms of the offer;	6a. ○
6b. they materially alter it;	6b. ○
6c. notification of objection to them has already been given or is given within a reasonable time after notice of them is received.	6c. ○
7. Even though this is a sale between two merchants, no additional terms would be included in the contract since Subzero expressly limits acceptance. UCC 2-207	7. ○
8. Even though the writings of the parties did not establish a contract, a contract was formed by the conduct of the parties. UCC 2-207(3).	8. ○
9. The terms of the contract are those upon which the writings of the parties agree plus those supplied by the UCC. UCC 2-207(3).	9. ○
10. The writings do not agree on arbitration or express warranty, thus:	
10a. No arbitration provisions in the contract;	10a. ○
10b. No express warranty in the contract.	10b. ○
11. The Uniform Commercial Code supplies an implied warranty of merchantability. UCC 2-314.	11. ○
12. Big's remedy is actual damages equal to the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had as warranted. UCC 2-714	12. ○
13. Big may also be entitled to recover incidental damages which could include expenses reasonably incurred in inspection, transportation and care of the rejected goods, cover and any other incidental expenses reasonably incurred from the breach.	13. ○
14. Big could seek consequential damages if at the time of contracting the seller had reason to know of such loss and Big could not reasonably prevent such loss by cover. UCC 2-715(2).	14. ○
15. Cover is defined as the reasonable purchase of substitute goods.	15. ○

QUESTION 2

In a signed writing, Wholesaler contracted to deliver to Baker "10,000 pounds of granulated cane sugar on the fifth day of each month during the calendar year," for Baker's use in his baking business. During the first four months of the year Wholesaler made the following deliveries:

January 5-----9,950 pounds
February 5----9,960 pounds
March 5-----10,010 pounds
April 5-----9,980 pounds

After each delivery, Wholesaler billed Baker only for the amount delivered, and Baker, without complaint, accepted each delivery and paid the amount billed.

On May 4, Wholesaler attempted to deliver 9,700 pounds of sugar to Baker and explained to him that he would deliver the remaining 300 pounds the next day. Baker refused to accept the delivery. On May 5, Wholesaler again attempted to make a delivery. This time he had a total of 10,000 pounds of sugar. Baker refused to accept that delivery as well and canceled the contract.

QUESTION:

Discuss Wholesaler's chances of success if he sues Baker for breach of contract.

DISCUSSION FOR QUESTION 2

Sugar is "goods" within the definition of U.C.C. §105. Goods are defined as all things movable at the time they are identified as the goods to be sold under the contract. This contract for the sale of sugar is a "transaction in goods," under the provisions of §2-102. This contract, therefore, is governed by the provisions of Article 2 of the Uniform Commercial Code.

Since the contract calls for goods to be delivered in lots and to be separately accepted, this is an "installment" contract under the provisions of the Uniform Commercial Code and §2-612 governs whether an installment may be rejected. In addition, the first four deliveries under the contract establish a "course of performance," and, therefore, under the provisions of §2-208(1), these performances are relevant in determining the meaning of the agreement. The express language of the agreement calls for delivery of 10,000 pounds of sugar each month. Because the first four deliveries were not exactly 10,000 pounds, but were accepted nonetheless, the course of performance indicates that Baker was satisfied with "about 10,000 pounds" each month. The code provides that wherever reasonable, the express language of the contract and the course of performance should be construed as consistent with each other. §2-208(2). In this case, therefore, it seems reasonable to construe "10,000 pounds" to mean "about 10,000 pounds." The courts have been lenient in using this kind of construction. Nanakuli Paving & Rock Co. v. Shell Oil Co., Inc., 664 F.2d 772 (9th Cir. 1981).

In an installment contract, a buyer can reject an installment only if the nonconformity **substantially impairs** the value of *that installment* and **cannot be cured**. The **whole** contract is breached if the nonconformity **substantially impairs** the value of the **entire contract**. Assuming that the delivery of only 9,700 pounds of sugar substantially impaired the value of the May installment, Baker was entitled to reject the delivery, provided that Wholesaler did not give adequate assurance of curing the defect. In this case, however, Wholesaler did give assurance of curing, and did cure by delivering 10,000 pounds of sugar on May 5. §2-612(2). Baker, therefore, was not entitled to reject either the May 4 or the May 5 delivery.

Further, Baker was entitled to cancel the contract only if the delivery on May 5 was defective and constituted a defect that substantially impaired the value of the whole contract, or, if the first four installments were defective, and cumulatively with a defective May 5 installment, constituted a substantial impairment of the whole contract. §2-612(3). Because the first four installments were not defective, and even if the May 4 delivery was defective, the May 4 delivery did not substantially impair the whole contract. Further, that delivery was cured on May 5. By rejecting the May 5 delivery and canceling the contract Baker was guilty of breach of contract, and, therefore, Wholesaler should succeed in his breach-of-contract action.

When Baker repudiated or refused to accept the sugar, Wholesaler was entitled to recover incidental damages plus either a) the difference between the contract price and the market price, or b) the difference between the contract price and the resale price of the goods. If damages based on these methods do not make Wholesaler whole, Wholesaler may recover lost profits plus incidental damages. §§2-706, 2-708, 2-710.

ESSAY Q2

SEAT

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ISSUE	POINTS AWARDED
1. The contract concerns a <u>transaction in goods</u> , and, therefore, Article 2 of the <u>U.C.C. controls</u> .	1. ○
2. Acceptance of the first four installments established a <u>course of performance</u> .	2. ○
3. Wherever reasonable, course of performance and the express language of the contract should be construed as consistent with each other.	3. ○
4. The quantity term of the contract should be construed to be "about 10,000 pounds per month."	4. ○
5. The contract is an <u>installment contract</u> , and, therefore, is controlled by U.C.C. §2-612.	5. ○
6. A buyer can reject a defective installment in an installment contract if it substantially impairs the value of that installment and the seller does not give assurance of a cure.	6. ○
7. Because Wholesaler gave adequate assurance of the cure on May 4 and did cure the defective installment on May 5, Baker was not entitled to reject the installment.	7. ○
8. A buyer may cancel an installment contract only if the non-conformity of one or more installments substantially impairs the value of the whole contract.	8. ○
9. Because the first four installments were not defective, and the May 5 installment was cured, the value of the whole contract was not substantially impaired.	9. ○
10. Baker was not entitled to reject the May 5 installment nor cancel the whole contract, and, therefore, Wholesaler should succeed in his action against Baker.	10. ○
11a. Wholesaler is entitled to recover <u>incidental damages</u> ,	11a. ○
11b. plus either the difference between the contract price and the market price, or	11b. ○
11c. the difference between the contract price and the resale price of the goods.	11c. ○
12. If damages based on these methods do not make Wholesaler whole, Wholesaler may recover <u>lost profits plus incidental damages</u> .	12. ○