Question 1

On April 1, Pat, a computer software consultant, entered into a written services contract with Danco, Inc. to write four computer programs for use by Danco in controlling its automated manufacturing machines. The contract provided that Danco would pay Pat $25,000 on completion of the work and that the programs were to be delivered to Danco no later than May 1. The contract stated, "This is the complete and entire contract between the parties, and no modification of this contract shall be valid unless it is in writing and signed by both parties."

Pat entered into the contract in anticipation that it would lead to significant work from Danco in the future, and he consequently turned away opportunities to take on more lucrative work.

On April 15, Pat called Chelsea, the President of Danco, who had executed the contract on behalf of Danco, and told her, "I'm having some problems with program number 3, and I won't have it ready to deliver to you until at least May 8 – maybe closer to May 15. Also, I have some doubt about whether I can even write program number 4 at all because your computer hardware is nearly obsolete. But I'll get programs numbers 1 and 2 to you by May 1."

Chelsea said in response, "I'm sorry to hear that. We really need all four programs. If you can't deliver until May 15, I guess I'll have to live with that."

On April 28, Pat called Chelsea and said, "I've worked out the problems with programs numbers 3 and 4. I'll deliver them to you on May 12."

Chelsea responded, "I've been meaning to call you. I'm going to start looking around for another consultant to do the work because I consider what you said in our April 15 telephone discussion to be a repudiation of our contract. My lawyer tells me that, because of the language in the contract, nothing I said to you in that conversation matters. You repudiated the contract, so we don't owe you anything."

Can Pat prevail in a suit against Danco for breach of contract, and, if so, what is the measure of his damages? Discuss.

Answer A to Question 1

The issue is whether Pat has a valid contract with Danco and whether Danco has breached such contract, and what damages Pat is entitled to as a result.

Service Contract

Contracts for services are governed by the common law. Although a computer program could be considered a good, the UCC only applies to tangible, movable goods. Therefore, the UCC does not apply and the contract, if any, is governed by the common law.

Elements of a Contract

In order to have a valid contract, there must be mutual consent and consideration. There was mutual consent here, because Pat offered to write four computer programs for use by Danco, and Danco accepted the terms of Pat's offer in a written agreement between the two. The consideration requirement is satisfied because there was a bargained-for exchange: four computer programs in exchange for $25,000. Thus, there was an offer, acceptance and valid consideration; a valid contract exists between Pat and Danco.

Statute of Frauds does not apply

The Statute of Frauds requires that any contract for goods greater than $500, or services which may take longer than one year to be performed, must be in writing, and signed by the party to be charged. Here, the contract is for services, and was to only take one month to perform. Thus, the Statute of Frauds does not apply. Although the agreement is in writing this was not necessary.

Time of the essence

The contract stated that the work was to be completed and delivered to Danco "no later than May 1." Thus, if this is considered to mean that time is of the essence, then performance after such time could be considered a material breach of the contract. However, contracts are generally given a reasonable time for performance under the

common law, and if time was not of the essence then Pat has a reasonable time to finish his work. In any case, this condition was waived as discussed below.

April 15th call form Pat

Danco claims that Pat anticipatorily repudiated the contract when he called on the 15th of April saying, "I won't have it ready to deliver to you until at least May 8th—maybe closer to May 15." A contract is anticipatorily repudiated when a party unequivocally manifests an intention to not perform the agreement by words or conduct. Here, although the contract specified performance by the 1st of May, Pat indicated that he would perform at least half of the services by that time, and indicated he would complete the other two within a couple weeks. Thus, he did not unequivocally manifest an intention to not perform the contract, but merely requested an extension of time, or modification of the contract. Thus, Danco could not treat the contract as breached but could ask for assurances that the contract would be performed.

Attempted Modification of the Contract

Chelsea, who has authority to bind Danco because of her implied apparent authority as President, manifested assent to the modification when she said "I guess I'll have to live with that." A modification under the common law, however, requires additional consideration to be valid. Here, there was no change in the form of consideration, or any additional consideration by Pat to be given extra time; therefore, the modification attempt was invalid. The oral nature of the modification was not a problem, because this is a services contract and the modification did not bring the services to beyond one year, as required for the Statute of Frauds to apply.

Waiver of condition to perform on May 1st

Danco may claim that its duty to pay Pat was expressly conditioned on performance by May 1st; therefore no payment is due. As a condition precedent, no duty to pay would arise until it is met. However, Pat will counter that Chelsea, as President, waived the condition by saying "I guess I'll have to live with that." Even if a condition is not met, it may be waived by the party benefited by the condition. Thus, Danco must pay Pat as promised under the agreement because the condition was orally waived by the

president of the company. Since the Statute of Frauds does not apply, this oral waiver was valid.

April 24th call: Anticipatory Repudiation

On April 24th, when Pat made assurances that the contract would be performed by the 12th of May, Chelsea responded by saying that she was "going to start looking around for another consultant" and that the company did not owe Pat anything. Pat may treat this as an anticipatory repudiation of the contract, because it manifests an unequivocal intention not to perform. He may thus, at this point, stop performance and sue for breach of contract. In the alternative, he may wait to sue for breach of contract on the date when performance is due, or ignore the repudiation and encourage Danco to pay for the programs.

Integration Clause and Parol Evidence Rule

Danco claims that no evidence of oral agreements will be allowed because the writing was intended to be a final expression of the agreement, and therefore fully integrated. The parol evidence rule, however, only bars oral evidence prior to or during negotiations leading to the writing. Any subsequent oral modifications or agreements are admissible; thus, Pat may validly admit evidence of waiver of condition and anticipatory repudiation in the conversations on May 1st and April 24th.

Expectation damages

Because Pat had a valid contract, which Danco breached by anticipatory repudiation, he is entitled to compensatory damages to put him in the position had this wrong and resulting damage not occurred. Such damages must be caused by the breach, [be] foreseeable, and certain. Pat must also have mitigated any unnecessary damages. Here, the damages are certain ($25K) and foreseeable as a result of Danco's breach, because this is what the parties expressly agreed to as payment.

Consequential damages

Pat will also claim right to consequential damages, because he turned away opportunities to take on more lucrative work in anticipation that the job would lead to future work. These damages lack certainty, however, and were not foreseeable at the time of contract formation. Danco was not aware of Pat's other opportunities to take on more lucrative work. Therefore, they will not be awarded.

Restitutionary Damages

In the alternative, Pat may seek return of any unjust enrichment of Danco should the court find fault with the contract, or that Pat breached. He would be entitled to the amount that Danco unfairly benefited: if Danco was given the two programs in the case at hand, Pat may seek recovery for the value of the benefit to Danco.

Answer B to Question 1

Can Pat Prevail Against Danco for Breach of K?

Applicable Law

Pat has entered into a services contract ("K") to perform work for Danco between April 1 and May 1 or, alternatively, May 15. Thus, this K will be governed by common law rules.

Formation

For Pat to win on a breach of K claim, he must first show there was a valid contract. A valid contract requires an offer, acceptance and consideration. In this case, the first line of the facts state that Pat entered into a written services K with Danco, to write software programs in exchange for $25,000. The facts imply a valid offer was made and properly accepted. Both parties have provided consideration, a bargained-for legal detriment, when Pat agreed to perform services he was not legally required to do and Danco agreed to pay Pat without having a legal obligation to do so. Thus, a contract was likely made.

Terms

A contract at common law must also state material terms with definiteness. In an employment services contract, the primary term needed is duration. Here, the K calls for services to be provided for one month and then the K will end. Thus, duration has been provided and the contract will not fail for lack of material terms.

Statute of Frauds

This is a services K which will end, by its terms, [and/or] can be finished within one year of its inception. Thus, the Statute of Frauds will not apply. The Statute of Frauds, if applicable, requires a K to be in writing and its subsequent modifications to be in writing as well, pursuant of the Equal Dignitaries doctrine.

Modification Clause (generally not valid in CL outside SOF)

The facts state that the written K has a clause in it, however, stating that the initial written services contract signed by Pat and executed by Danco's President, Chelsea, "is the complete and entire contract between the parties and no modification of this contract shall be valid unless written and signed by both parties." Generally, at common law, clauses which seek to invalidate modifications that are not in writing are themselves not valid. Thus, though the contract states as much, a court will still allow evidence of oral modifications, particularly in light of the Parol Evidence Rule. This is important because the facts state that the contract was later sought to be modified orally by Pat, which I will discuss two sections below.

Parol Evidence

Parol Evidence Rule ("PER") states that generally, where a written contract is intended to be a complete and final integration of a K, that no evidence may be admitted outside of the four corners of the contract to establish whether a breach has occurred. However, an exception exists for subsequent modifications. In this case, as noted above, the K states that it is intended to be the "complete and entire contract," language sufficiently similar to that required under the PER. However, to the extent that the contract was later modified, the court will allow at common law for evidence, whether oral or written, to be admitted to establish any subsequent modification agreed to by the parties.

Modification without Consideration

Pat, after signing the K, called Danco and told them that he wasn't sure he could complete the K on time and would need 8 to 15 extra days to finish the project, as well has voicing concerns of his ability to finish it at all. Chelsea replied, "if you can't deliver until May 15, I guess I'll have to live with that."

Danco will want to argue that Pat's failure to provide for the four programs he agreed to write by the stated date of May 1 will constitute a material breach, thus entitling them to avoid their obligation to perform on the contract. However, Pat will want to introduce this evidence as showing a modification to the original agreement. While the PER will

not bar this evidence, the modification Pat seeks to establish occurred without any subsequent consideration. Generally, at common law, consideration is required for a subsequent modification to be considered valid. However, courts have generally been willing to find that consideration when both parties limit their right to assert their rights and sue on the original contract. Here, Danco's President, likely authorized to negotiate and make contractual agreements on behalf of Danco, appears to have agreed to the modification by stating, "I guess I'll have to live with that." Thus, Pat will argue Danco agreed to limit its rights to sue based on the original May 1 deadline, constituting consideration. However, Chelsea did not explicitly agree. Danco would likely argue that she was simply stating that, at that time, she could not legally compel Pat to finish and was thus simply stating her acknowledgment that she would have to wait until May 8 or 15 for the programs, but not that she would be willing to ignore Pat's failure to abide by the K. Further, Pat does not appear to have limited his own consideration in this modification. He still appears to have the full right to demand $25,000. Thus, Danco will likely succeed in asserting that this modification, even if admissible, is not valid.

Waiver to Time is of the Essence Clause

Generally, a "time is of the essence" clause is a clause in a K that asserts a necessity for the contract to be finished, or one party to perform fully, by an established date. Here, Pat is faced with a deadline of May 1, though the contract does not explicitly state that time is of the essence, but merely provides for the deadline. If Danco wishes to assert that Pat's failure to finish by May 1 constitutes a material breach pursuant to the terms of the contract, Pat should then argue that Danco waived its right to that deadline and the time is of the essence clause when Chelsea said she would have to live with Pat's tardiness. Again, Danco will argue this does not constitute an explicit waiver. This is a close situation because of the vagueness of the statement, but a court will likely side with Pat that the deadline was waived by Chelsea, who as President of Danco is authorized to alter the K with Pat.

However, waiver usually occurs once a time is of the essence clause has passed. Thus, a court may deem the waiver argument is not as sufficient as an estoppel argument.

Estoppel

Even if Pat cannot assert a waiver claim, which usually occurs after a term has not been agreed to, Pat can assert an estoppel argument. Estoppel occurs when one party makes assurances that the other party can be reasonably, objectively expected to rely on, and the other party does so to their detriment. In this case, Chelsea's claims are vague and imply her acceptance of Pat's tardiness. A reasonable person, when told that the other person expecting earlier delivery, will "live with" later delivery would assume that statement to imply acceptance. Pat indeed relied on that assertion and continued to perform his services, which is to his detriment. If he were in material breach and were told so and that he would be sued in such a manner, he would not be required to continue to perform fully. Pat continued to work for 13 days after his April 15 discussion of his problems with Chelsea and announced he would finish the services he was expected to perform on May 12. Thus, Pat's estoppel claim should succeed, and the modification will thus be included in the K.

Anticipatory Repudiation

Danco will alternatively argue that Pat gave Danco an anticipatory repudiation when he announced he could not perform his services by May 1. When a party asserts it will not perform its contractual obligations prior to deadlines stated in a K, giving the other party his reasonable grounds to believe the K will not be performed, the party notified will have the right to cease its own performance and sue for breach of K unless it has already performed fully. Alternatively, the party has the right to seek assurances from the party concerned about its potential failure to perform before continuing on the contract. In this case, Danco has not yet paid Pat so it has not fully performed. Danco will assert that Pat's statements constitute an anticipatory repudiation because he not only told Danco he was worried about the deadline, but also that their hardware was so obsolete that he may not even be able to finish 50% of the contract at all. Pat will assert that Danco made assertions in response that it would live with Pat's tardiness. However, Danco will argue that it only discussed the tardiness and not the potential failure to provide two of the software programs at all. Danco has a strong argument. However, Pat was told Danco would live with his tardiness and Danco never requested any further assurances of Pat's work. In addition, Danco never discussed concerns

about Pat's inability to finish the 3rd and 4th software programs. Finally, Pat told Danco it would deliver programs 1 and 2 by May 1. Danco told Pat prior to that date, on April 28, that it would not accept his work and was going to look for an alternative software consultant because of Pat's April 15 phone call. Thus, they did not even wait until May 1 to determine if Pat could deliver. While Danco will argue that it was not required to wait because of Pat's anticipatory repudiation, without any discussion to Pat implying that they would not allow him to miss the May 1 deadline, a court will not accept Danco's argument of anticipatory repudiation.

In fact, because Danco announced it would not pay him for his services prior to even the May 1 deadline, Pat himself will use the anticipatory repudiation claim to be able to assert his right to sue on the contract prior to the modified deadline date of May 15 (or May 12, which he claimed would now be his end date). He will be able to sue prior to that date as he has not fully finished performance and they have anticipatorily repudiated.

Thus, Pat's claim of estoppel will hold on the modification during his April 15 phone call. Based on this modification, Pat will have a valid claim for breach of K because he appeared to be able to finish the contract by the modified deadline and, prior to doing so, Danco repudiated its agreement. Thus, Danco breached its K obligations and Pat is entitled to damages.

If so, what are Pat's Remedies?

Pat's likely remedies are legal remedies, or money damages.

Compensatory Damages

Pat should be entitled to compensatory damages, which are designed to place the plaintiff in the position they expected to be in had the contract been properly performed by the defendant. To obtain them, he must show that Danco caused the damages, that they were foreseeable, that the damages are certain and that they were unavoidable. Causation, particularly but-for causation, requires that, but for Danco's actions, Pat would not have been injured. If it is clear Danco breached the K, then but-for causation follows that but for the breach, Pat would not be injured, as he would have been fully

paid. Further, it is foreseeable that Pat would be injured by Danco failing to pay him for his services. Pat will be suing for the contract price of $25,000 likely, and these are certain given the terms of his contract. Finally, Pat must show the damages were unavoidable, meaning he must seek to mitigate these damages if at all possible. Usually, in an employment K case, this requires the employee to seek other employment. However, based on the unique services he provided Danco and the relatively short time left on his contract, he will be able to show his damages were unavoidable. The court may, however wish to determine that Pat did not destroy his work for Danco or stop working prior to Danco's breach. Also, to the extent that Pat's failure to meet his original deadline injured Danco, his damages will be reduced. The facts give no mention of any specific injury caused by Pat's tardiness.

Consequential Damages

In addition to the contract price, Pat may wish to claim additional consequential damages, which are damages that do not arise specifically from the breach but are foreseeable by the defendant at the time the contract was made that the plaintiff would likely suffer if it were to breach. In this case, Pat will argue that he turned down other opportunities to finish this contract in the relatively short amount of time he was given. It would be reasonably foreseeable that, were Pat to not be paid on the contract, Pat will argue, he would not only lose that contract price but also the value of the work he turned down to perform that work. Danco will likely argue that these are merely opportunity costs which Pat gave up and were reflected in the contract price which he accepted. While Pat did likely lose out on additional work, Danco will probably win this argument unless Pat can show with specificity and certainty that he had contracts offered to him in excess of his contract price that were only turned down as a result of his agreement to work for Danco, and that he could not have taken those contracts once his work with Danco was finished.

Punitive Damages

Punitive damages are designed to punish the defendant and are based on the notion that the defendant maliciously violated its agreement. In this case, Chelsea consulted with her attorney, who told her that Danco was not liable to execute the contract. The

facts thus do not imply that Chelsea or Danco acted in any way other than negligently in breaching its contractual duties, and thus punitive will not be available.

Restitutionary Damages

If Pat for some reason could not succeed in his breach of K, he could likely obtain restitutionary damages so long as he delivers his completed software to Danco. Restitution, or "quasi-K," allows for a plaintiff to recover if a K (or modification in this case) is not deemed valid, by showing that he conferred a benefit upon the defendant, that a reasonable person would expect to be paid, and that it would be unjust to allow the defendant to be enriched freely for the plaintiff's efforts. In this case, so long as Pat delivers the software to Danco, he will be able to show he conferred the benefit of the software, and a reasonable person would expect to be paid for writing computer software for a company. It would be unjust to allow a company to obtain these services freely when it told the writer they would be paid, and thus Pat will be able to assert his quasi-K claim if he for some reason could not assert his breach claim. The damages will be the value of the work he provided them, not the contract price.

Specific Performance (not available)

Specific Performance is not applicable here because Pat's claim is primarily for money damages and, even if it were not, there is an adequate legal remedy (money) which will suffice.