

### Question 3

Maker produces outdoor lamps. Competition in the market focuses on durability, energy usage, and adherence to delivery schedules. Maker recently designed a light-bulb socket, with preliminary tests showing greatly improved durability.

After learning about the new socket, Newco (which had been in business six months) wrote to Maker: "We can manufacture and provide monthly delivery of top-quality sockets meeting your specifications. Please advise." Maker responded: "Can you produce 12,000 sockets to be delivered in equal monthly installments, beginning in two months?" Newco replied: "Yes. Price is \$5.00 each." Maker immediately replied: "Right. We look forward to doing business with you."

Up to this time all communications including the initial letter had been sent by fax. Maker then filled in the blank spaces on a purchase order and mailed it to Newco. On the first page, in large type, Maker inserted, "TIME IS OF THE ESSENCE." Although it was not customary in the trade to include a "time is of the essence clause" in such transactions, Newco did not object to the term.

One month later, Maker left this voicemail message for Newco: "Because you are new in the business, I'm concerned about your ability to perform. We've got bids out on new contracts, some in areas where we've never sold before. Send me two dozen sample sockets so we can test them for the new customers." Newco did not respond.

When neither the sample sockets nor the first delivery arrived by the end of the second month, Maker faxed Newco stating: "The deal's off. When we didn't receive the samples, we contracted with Oldco to supply all sockets we need at \$5.50 each." Newco replied by fax: "We had a minor problem in our machine shop. We are going to hold you to our contract. We'll get the sockets to you as soon as we can, and everything will be back on track by next month."

What are the rights and liabilities of Maker and Newco against each other? Discuss.

### **Answer A to Question 3**

#### **GOODS**

Goods are the things which are moveable at the time identified to the contract. Lamp sockets are moveable. Therefore they are goods.

#### **UNIFORM COMMERCIAL CODE (UCC)**

The UCC controls contracts dealing with goods. Therefore the provisions of the UCC, Sections 1 and 2 will apply to this contract.

#### **MERCHANTS**

A merchant is a person who deals in the goods involved in the transaction or holds himself as having special knowledge about the subject matter by occupation or by virtue of employing someone in that occupation. Certain sections of the UCC apply to merchants only. Those sections will be applicable here.

#### **CONTRACT**

An enforceable contract requires an offer, acceptance and consideration in the absence of defenses.

#### **OFFER**

An offer is a manifestation of intent to be bound to a contract. For an offer to be valid the offeror must communicate definite quantity, price and time of performance to an identified offeree. Under the UCC the quantity is the only essential term.

Here, the initial fax by Newco to Maker informed the latter of the capability. It lacked the definiteness required of an offer (no quantity). Therefore it will be regarded as a preliminary negotiation for business and not offer.

Maker's response stated quantity and some terms but ended with a query. This will most probably be construed as continuing negotiations. Therefore there is no definite offer yet.

Newco's reply, when coupled with all the previous faxes, will supply all the elements needed for a valid offer. Therefore, there is an offer to supply 12,000 sockets at \$5 each to be delivered in equal monthly installments beginning in two months from Newco to Maker.

## **ACCEPTANCE**

An acceptance is a manifest assent to the terms of the offer in the manner invited by the offeror.

Here, the response from Maker, looking forward to do business did not manifest any assent. Therefore there was no acceptance at this stage.

Maker's purchase order mailed to Newco manifested an assent. He has introduced additional terms however which fact will be discussed infra.

## **CONSIDERATION**

Consideration is bargain-for legal detriment. Here, Newco wants to sell sockets and Maker is agreeing to buy. There is promise for a promise therefore there is consideration.

## **BATTLE OF FORMS (UCC Section 207(1) and (2))**

Under the UCC as between merchants if additional terms are introduced in the acceptance memo it will become part of the contract unless:

1. the offeror limits acceptance to the terms of the offer
2. the additional terms materially alter the contract or
3. the offeror has already objected to the terms within a reasonable time.

According to UCC Section 207(1) such acceptance is still valid except the offeree limits acceptance to the different or additional terms.

Here, Maker did not limit acceptance to the additional terms. Therefore the acceptance is valid and there is a contract.

The terms of the contract will depend on whether it is determined that the TIME IS OF THE ESSENCE clause materially alters the exchange of bargain.

The trade custom does not include time is of the essence clauses. Therefore if it is found that it materially altered the contract, this additional term will not come in even though Newco did not object.

## **DEMAND FOR ASSURANCE OF ABILITY TO PERFORM**

Under the UCC a merchant may demand an assurance of ability to perform if after the formation of the contract events arise to give rise to doubts about the ability of the other

merchant to perform. The demand must be made in writing and the other merchant must comply in reasonable time, in any case within one month.

Here, Maker did not show that anything happened to cause him to doubt Newco's ability AFTER THE CONTRACT IS FORMED. Furthermore, his request was not in writing as demanded by the UCC. Therefore, it will most probably be decided that Newco was right in ignoring the request.

### **BREACH OF CONTRACT**

A breach occurs when one party whose performance is due does not perform or performs defectively.

### **ANTICIPATORY REPUDIATION**

Anticipatory repudiation occurs when one party to an executory contract declares that he will not perform before his performance is due.

Here, Maker contracted with Oldco. Therefore given all the aforementioned, Maker will most probably be found to have committed anticipatory repudiation.

### **DAMAGES**

Newco will be able to recover on the contract. He can claim his expectation damages for loss of profits on the contract.

In the unlikely event that Maker's time is of the essence clause is sustained, then he will be able to claim the cost of cover 50 cents by 12,000 and any incidental damages.

## Answer B to Question 3

### **MAKER vs. NEWCO**

#### **UCC/MERCHANTS**

The UCC applies to the sale of goods. Goods are moveable items identified at time of contracting. Since Newco (N) and Maker (M) are contracting for the production and sale of light sockets, a moveable item, the UCC shall apply.

#### **Merchants:**

Those who deal regularly in the items of the sale or that hold themselves out as experts in the field.

Here, Maker manufactures light sockets and thus regularly deals in the items of the contract. Maker is a merchant. Newco also manufactures light sockets and thus also regularly deals in the items of the contract. Newco shall also be a merchant under the UCC.

Newco may argue that they are merely subcontractors to Maker, providing a service of producing sockets. However, this may fail since Newco is a manufacturer.

Merchants under the UCC are held to a standard of good faith, fair dealing, honesty in fact and reasonable commercial practices.

#### **OFFER - Preliminary Negotiations**

When Newco wrote to Maker, "We can manufacture# ...Please advise," Newco was making an inquiry as to whether or not Maker wanted to do business.

When Maker responded "can you produce #..." Maker was also making an inquiry to see if Newco would perform.

Neither of these inquiries will be an offer.

#### **OFFER**

Present contractual intent, with definite and certain terms communicated to the offeree. Under common law, the terms are quantity, time, identity of parties, price and subject matter. Under the UCC, the required term is quantity.

Here, through preliminary negotiations – supra - when Newco replied "Yes, price is \$5.00 each," it displayed a present contractual intent.

The terms were, again know through prelims: Quantity 1 2,000; Time = per month; Identity = Newco and Maker; Price = \$5.00 each; and subject matter = light sockets. Thus, the terms are definite and certain.

The offer was communicated since N and M were communicating by fax machine.

Under the UCC, the offer is also complete: There is evidence of agreement when N said, "Yes" and the quantity term can be implied from the word "each."

Valid offer.

### **ACCEPTANCE**

Unequivocal assent to the terms of the offer. When Maker responded, "Right. Look forward #..." it manifest an unequivocal assent to term of offer, supra.

### **Modification of Acceptance/Offer**

When Maker sent the purchase order in written form and mailed it to Newco, it was also accepting Newco's offer.

Newco will argue that Maker was making an offer at this time and all prior faxes were just preliminary negotiations.

However, Newco and Maker were bound since the faxes did constitute an offer and acceptance - supra.

Newco did not respond to Maker's purchase order. Even if it were an offer, Newco was under a duty to respond since. Silent acceptance would apply since it can be inferred from the faxes that Maker at least expected to be bound contractually, and that without word otherwise, Newco would be also. Thus, Newco's silence would be an acceptance.

### **2-207 ACCEPTANCE NEW AND ADDITIONAL TERMS**

Newco will argue that Maker's purchase order was not an acceptance since it added the term, "Time is of the essence" to the purchase order.

However, under UCC 2-207, new or additional terms in an acceptance will apply between

merchants unless: 1) The original offer conditions acceptance on the terms of the offer only; 2) The offeror (N) objects to the new or additional terms within a reasonable time; or 3) The terms materially change in the original offer.

Here, Newco will argue that the Time is of Essence clause was a material change since it was not customary in the trade.

Maker will argue that competition in the market required adherence to delivery schedules, thus the term was not a material change. Further, in the original negotiations, Maker specifically asked if Newco could make 12,000 per month, thus the time element is introduced. Thus, Maker will argue that it is not a material change.

The court will likely hold it not to be a material change, supra reasons, and that valid acceptance has occurred.

### **Valid Acceptance**

### **Defense- Statute of Frauds**

Sales of goods greater than \$500 are to be in writing. Newco will argue that the faxes only resemble preliminary negotiations - supra - and are not offers or acceptances. Thus, Newco will argue that it is not bound by the contract.

### **Exception-Sufficient Memorandum**

Even if Newco did not make this argument, when Maker sent Newco the purchase order Maker will argue that it is a sufficient memorandum.

Newco will argue that for the exception to apply, it must be signed by the person sued. Newco did not sign the purchase order.

However, Maker will argue that under the UCC Written Confirmation Letter rule, the person sued will be presumed to have signed the writing if the recipient does not respond to a written confirmation of the oral contract within 10 days. Furthermore, Maker will argue that the faxes are the original writing of the contract and are sufficiently written. A fax will be considered a writing. Here, Maker will argue that it sent Newco a purchase order in writing and that Newco did not respond. Newco will have been presumed to have signed it.

## **INVALID DEFENSE**

### **MODIFICATION**

Under the UCC a modification is valid if in writing. It does not require new consideration and must be in good faith. Newco will argue that the "Time is of the Essence" clause is a modification to the faxes.

Maker will argue that under 2-207, it's part of the contract, not a mod. supra. Further, it was made in good faith, since in writing and sent to Newco. Invalid Defense.

### **UCC - REASONABLE GROUNDS FOR INSECURITY**

When reasonable grounds for insecurity exist, a merchant may request adequate assurances of performance.

#### **Adequate Assurances**

When Maker wrote to Newco asking for a sample one month before law day, it was asking for adequate assurances of the quality of the product from Newco.

Maker had reasonable grounds for insecurity because it had recently designed the socket and because Newco had only been in business for six months. Further, Maker and Newco had not done business.

Newco will argue that Maker did not have reasonable grounds for insecurity since Newco gave no indication it could not perform. It was not required to send the sample since law day was at two months out, not one month.

## **DIVISIBLE CONTRACT**

A contract where performance can be divided succinctly over time.

Here, since the contract calls for 12,000 units per month, the contract can be divided into monthly installments.

A valid contract exists.



## **CONDITIONS - EXPRESSED**

A fact or occurrence which creates or extinguishes an absolute duty to perform.

Here, the express conditions are that there be 12,000 units per month provided by Newco to Maker.

## **IMPLIED CONDITION**

Good faith - UCC - supra.

## **PRECEDENT:**

Condition to occur before duty to perform produced.

Here, Newco's duty to provide is a condition precedent to Maker's duty to pay.

## **BREACH**

### **UCC - PERFECT TENDER RULE**

Under the UCC, any deviation from a perfect tender under the contract is a breach. The aggrieved party must give notice to the breacher and provide opportunity to cure.

Here, Newco failed to deliver the 12,000 units on law day. Thus Newco breached. The breach will be considered major by Maker since it failed the time is of essence clause and minor by Newco since they could cure by next month.

Maker will argue that Newco breached the duty of good faith under UCC by not responding to the request for adequate assurances - supra.

Thus, when Maker gave notice of the breach, it will argue that Newco's failure to respond alleviates the need to wait for cure from Newco.

Newco will argue that Maker must allow it to cure.

## **REMEDIES**

General - Maker will argue that the breach was major and that it lost its expectancy. Thus, its rights were to cancel the contract, seek cover, and sue for damages between price of contract (\$5.00) and price of cover (\$5.50). Otherwise, Maker could sue for difference in

price of contract and of market at the time it learned of breach. Here, general damages were \$6, 000.

### **SPECIALS - CONSEQUENTIALS**

Those foreseeable at time of formation (H v. Baxendale).

None apparent in the facts.

### **TORT**

#### **Misrepresentation:**

Intentional misstatement of facts made to induce reliance, reliance and damages.

Here, Maker will argue that when Newco said it could make 12,000/month, it did so knowing it could not and intending to deceive. Maker relied on the misstatement when it ordered the sockets.

Newco will argue that it was a new business and didn't intend to deceive.

### **DAMAGES**

Supra.

### **REMEDIES**

Benefit of Bargain

Supra.

Out of pocket loss