

KERN COUNTY COLLEGE OF LAW
CONTRACTS
FALL SEMESTER 2023
PROFESSOR GOLDNER

Answer Three (3) Essay Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

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Question One

Fred is a loyal listener of KROCK radio, a well-known rock music station. One day, Fred hears his favorite KROCK disc jockey announce a contest, where the first person to call in and correctly identify the 20th song played by the station that afternoon, will win a Tesla automobile. The contest is intended to promote KROCK and generate new listeners. The broadcast does not state or infer that the prize will be anything other than a new Tesla.

Fred uses a vacation day from work to stay home and listen to the radio that day, so he can participate in KROCK's contest and win the prize. To Fred's delight, he is the first caller to correctly identify the 20th song that day, and the disc jockey announces on the radio that Fred is the winner and that he has 24 hours to appear at the station to pick up his prize. Fred immediately calls and texts all of his friends and coworkers and shares the good news with them, and he also promises to take each of them for a ride in his new Tesla. He takes the next day off from work to collect his prize.

When Fred arrives at the radio station, the general manager gives him a toy model of a Tesla automobile, not more than five inches long. Fred is devastated. There was nothing about the broadcast that suggested that the prize would be a toy car. When Fred returns to work the following day, his coworkers make fun of him. Feeling humiliated, Fred quits his job.

One month later, Fred sues KROCK radio station for breach of contract, seeking damages in an amount equal to the cost of a real Tesla automobile, plus damages for emotional distress, plus punitive damages. The radio station contends that the contest was merely a promotion and there was no binding contract.

***Question: Will Fred win his lawsuit against KROCK, and if so, why, or why not?
Please explain.***

Question Two
Fall 2023 Contracts Exam
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Jonathan is a tailor. He makes custom suits for men. Mike is getting married on February 14, 2024, and wants Jonathan to make him a suit for his wedding. On November 15, 2023, they meet at Jonathan's shop and discuss styles, fabrics, and price ranges. Mike selects an elegant black fabric. Jonathan measures Mike for a suit and promises to contact him in a week with a price for a suit in the fabric Mike selected. Mike and Jonathan live in a jurisdiction that has not adopted the Uniform Commercial Code.

On November 22, 2023, Jonathan and Mike engage in the following exchange, entirely by text:

- Text Message #1: Jonathan to Mike: "Hi Mike. Nice meeting you last week. I offer to make you a black suit for your wedding in the fabric you want, for \$3,000, to be delivered by February 1, 2024. You pay on delivery."
- Text Message #2: Mike to Jonathan: "I'll pay \$2,000."
- Text Message #3: Jonathan to Mike: "I'll do it for \$2,500."
- Text Message #4: Mike to Jonathan: "Will you take \$2,250?"
- Text Message #5 : Jonathan to Mike: "No, I want \$2,500."
- Text Message #6: Mike to Jonathan: "Your price is too high."
- Text Message #7: Jonathan to Mike: "That's the best I can do."
- Text Message #8: Mike to Jonathan: "I accept your offer and I also order a second suit in dark blue, same kind of fabric."
- Text Message #9: Jonathan to Mike: "Great! Same price, delivery, and payment as black suit."
- Text Message #10: Mike to Jonathan: "Agreed. But would appreciate it if you would give me a 50% discount since I'm already buying a suit from you."
- Text Message #11: Jonathan to Mike: "I'll do the blue suit for \$2,100."
- Text Message #12: Mike to Jonathan: "I think \$2,100 is too high but I accept."

Question: Do Jonathan and Mike have an enforceable contract? Please explain.

Question Three
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On August 1, 2023, Comfy Couches, Inc., a California corporation (“Comfy”) emails a purchase order to Cushions R Us, Inc., a Florida corporation (“Cushions”) attaching a copy of Comfy’s purchase order. The purchase order is to buy 10,000 sofa cushions to be delivered by December 1, 2023. Comfy’s purchase order includes the following terms:

- “Paragraph 7. Prevailing Party. In the event of a dispute between buyer and seller, the prevailing party will recover all of its attorney’s fees and costs.”
- “Paragraph 8. Choice of Law. In the event of a dispute between buyer and seller, buyer may recover damages to the fullest extent allowed by California law.”

On August 2, 2023, Cushions emails Comfy a confirmation form accepting Comfy’s purchase order. Cushions’ confirmation includes the following terms:

- “Paragraph 14. Disclaimer. All cushions are sold ‘as is,’ without any warranty as to quality or anything else.”
- “Paragraph 15. Venue and Choice of Law. Any trial or arbitration proceeding to resolve any disputes between the parties shall occur in Tashkent, Uzbekistan and shall be governed by the laws of Uzbekistan.”

Uzbekistan is a country in Central Asia.

Comfy’s purchase order does not include a disclaimer (“as-is”) provision or a venue (the place where the trial or arbitration will occur) provision, and does not address either of those issues. Both Comfy and Cushions deal in couch cushions.

On December 1, 2023, Comfy receives the 10,000 sofa cushions from Cushions, and immediately inspects random samples. Comfy discovers that approximately 25% of the inspected cushions contain evidence of water damage. Comfy immediately notifies Cushions about the water damage. Cushions denies any liability, relying on Paragraph 14 of its August 2 confirmation. In addition, Cushions tells Comfy that if they want to sue, “We’ll see you in Uzbekistan.”

Question: In a legal action between Comfy and Cushions, identify the terms that govern their contractual relationship, if any, and explain why they are part of the contract.

END OF EXAM

Answer Outline for Question One
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Fred's lawsuit against KROCK raises the issue of whether the radio station's on-air contest was intended to create a contract with the winning participant to award a real Tesla automobile as a prize.

Contract - The elements of a contract are offer, acceptance, and consideration.

Offer - "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it" Restatement 2d Contracts § 24.

Pursuant to § 24, the initial focus is on the offeror's manifestations (words and conduct) and not the offeror's subjective intent. The offeror's manifestations must signal to the offeree a willingness to enter into a bargain.

Section 24 also instructs that the focus is on the offeree's understanding. The issue is whether the offeree is justified in understanding that the offeror has made an offer and if so, it is an offer that the offeree can accept to form a contract. However, it is an objective "reasonable person" standard, i.e., what would a reasonable person in the shoes of the radio broadcast listener conclude after listening to the broadcast about the contest?

Advertisement as an Offer – An advertisement is not an offer unless it states a quantity and contains language of commitment. Usually, advertisements are statements of intention to sell, or preliminary proposals inviting offers. While the radio contest operated as an advertisement to generate more KROCK listeners, the fact that there could be only one winner, of a single Tesla, on a specific day, makes it an offer.

Acceptance – "(1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. (2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise. (3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise." Restatement 2d Contracts § 50.

Here, the offer (the contest) calls for acceptance by performance (to be the first caller to correctly identify the 20th song). Fred accepted the offer because he was the first caller to correctly identify the 20th song.

Consideration – Consideration is a bargained for exchange. Restatement 2d § 71. The purpose of the contest was to promote the station's business by encouraging the public to listen to its broadcast for at least 20 songs, and call in to win a Tesla. Fred entered the competition after

listening to the broadcast and the music, and nothing in the broadcast stated or inferred that the prize would be only a toy version of a Tesla.

Fred Will Prevail - The facts establish there was an offer, an acceptance, and consideration. There is a contract. Fred will prevail in his lawsuit for damages in an amount equal to the cost of a new Tesla.

Emotional Distress Damages. A party cannot recover emotional distress damages in a lawsuit for breach of contract unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result. Restatement 2d §353. It is unlikely that Fred will recover emotional distress damages.

Punitive Damages - A party cannot recover punitive damages in a lawsuit for breach of contract, unless the conduct constituting the breach is also a tort for which punitive damages are recoverable. Restatement 2d §355. In the absence of fraud, it is unlikely that Fred will recover damages for the emotional distress that he suffered, or punitive damages.

END OF ANSWER OUTLINE FOR QUESTION ONE

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Answer Outline for Question Two
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1. Applicable Law.

Jonathan is making Mike two custom men's suits. A suit is a "good." However, Jonathan is a tailor who will be making the suits, which raises the issue of whether the primary focus of their contractual relationship is for goods (menswear) or services (designing and making custom-made suits). The facts state that both parties live in a jurisdiction that has not adopted the Uniform Commercial Code. Consequently, the parties' relationship is governed by the common law and is not subject to the Uniform Commercial Code.

2. Contract.

A contract requires offer, acceptance, and consideration.

"An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."
Restatement 2d Contracts § 24.

"(1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. (2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise. (3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise." Restatement 2d Contracts § 50.

3. Responses to Offers.

An offeree's power to accept an offer is terminated when the offer is revoked, rejected, expires, or there is a counteroffer.

"(1) A counteroffer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer. (2) An offeree's power of acceptance is terminated by his making of a counteroffer, unless the offeror has manifested a contrary intention or unless the counteroffer manifests a contrary intention of the offeree." Restatement 2d Contracts § 39.

The Mirror Image Rule (common law) provides that a contract is created only after a matching offer and an acceptance. An acceptance creates a contract only if it is a mirror image of the terms of the offer. Any purported acceptance that is not a mirror image is a counteroffer. The counteroffer becomes the controlling offer and must be accepted by a mirror image acceptance to form a contract.

Responses to offers that are not counteroffers or rejections do not terminate the offeree's power of acceptance. A response that is neither a counteroffer nor a rejection may constitute a counter-inquiry, a comment on the terms of the offer, a request to modify the offer, an acceptance coupled with a request to modify the contract, an acceptance plus a separate offer, or grumbling assent (where the offeree accepts the offeror's terms while complaining about them). The test for whether a response to an offer is a counteroffer or a rejection is whether the offeror can reasonably understand that the offer is no longer valid.

4. The Parties' Texts

Here, the first two text messages constitute an offer of \$3,000 for a black suit with a counteroffer of \$2,000. Mike's counteroffer operates as a rejection and termination of Jonathan's \$3,000 offer and constitutes a new offer for \$2,000. There is no contract yet. At that moment, the only offer open is Mike's offer to pay \$2,000.

The third text message ("I'll do it for \$2,500") is a counter-counteroffer of \$2,500 from Jonathan, which acts as a rejection and termination of Mike's \$2,000 offer. At that moment, the only open offer is Jonathan's offer to make and deliver the black suit for \$2,500.

The fourth text message ("Will you take \$2,250?") is not a counteroffer. Rather, it is a counter-inquiry. At that moment, Jonathan's offer to make and deliver the black suit for \$2,500 continues to be the only open offer.

The fifth text message ("No, I want \$2,500") confirms that Mike can still accept Jonathan's \$2,500 offer.

The sixth text message ("Your price is too high") might be a rejection, if the parties' text conversation ended there. Or, it could be a comment on the terms of the offer. Here, since their text conversation continued, it is a comment on the terms of Jonathan's open offer.

The seventh text message ("That's the best I can do") is another confirmation of Jonathan's \$2,500 open offer, i.e., his counter-counteroffer.

The eighth text message ("I accept your offer and I also order a second suit in dark blue") is not a counteroffer. It is an acceptance coupled with a separate offer. At that moment, there is a contract for \$2,500 for a black suit to be delivered by February 1, 2024, plus an offer to buy a dark blue suit for \$2,500.

The ninth text message ("Great! Same price, delivery, and payment as the black suit.") is Jonathan's acceptance of Mike's offer to buy the dark blue suit, or it might be a counteroffer from Jonathan because it includes additional terms concerning delivery and payment.

The tenth text message ("Agreed. But would appreciate it if you would give me a 50% discount since I'm already buying a suit from you.") might be a counteroffer, or it might be an acceptance that requests a modification of the contract.

The eleventh text message (“I’ll do the dark blue suit for \$2,100”) is either a counteroffer from Jonathan or his agreement to modify the contract. However, an agreement to modify a contract under common law requires separate consideration to be enforceable and the fact pattern does not suggest any separate consideration was provided or agreed upon.

The twelfth text is a grumbling acceptance, which results in an enforceable contract where Jonathan is to provide Mike with a black suit and a dark blue suit by February 1, 2024, and Mike is to pay Jonathan \$2,500 (for the back suit) and \$2,100 (for the dark blue suit) upon delivery.

END OF ANSWER OUTLINE FOR QUESTION TWO

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Answer Outline for Question Three
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This question concerns the battle of the forms and UCC § 2-207.

UCC § 2-207

“(1) 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.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.”

§ 2-207 (1)

A written confirmation sent within a reasonable time is an acceptance even if it has additional or different terms from the offer, unless acceptance is expressly made conditional on assent to those additional or different terms. Here, a written confirmation was sent the day after Comfy’s offer, which is a reasonable time. UCC § 2-207 (1). Cushions accepted Comfy’s offer, even though its acceptance (the confirmation) contained additional or different terms.

Additional or Different Terms

If the confirmation terms are different from the purchase order terms, they are treated as “additional terms” if they do not contradict terms in the purchase order. They are treated as “different terms” if they do contradict the terms in the purchase order. The disclaimer and venue provisions (Paragraphs 14 and 15) do not contradict Comfy’s purchase order because the purchase order does not address either of those issues. However, the choice of law language in Paragraph 15 in Cushion’s confirmation contradicts the “California law” damages remedy provision in Paragraph 8 in Comfy’s purchase order.

§ 2-207 (2). Merchants

Comfy and Cushions are merchants because they both deal in couch cushions (a merchant includes a person who deals in goods of the kind. (UCC § 2-104(1).) Both parties are chargeable with the knowledge or skill of merchants pursuant to UCC § 2-104(3).

§ 2-207 (2) (a), (b), and (c)

Paragraphs 14 and 15 will be part of the contract unless Comfy's purchase order expressly limits acceptance to its terms, or if Paragraphs 14 and 15 are "material," or if notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

The facts do not state that Comfy's purchase order expressly limits acceptance to its terms. Similarly, the facts do not state that Comfy notified Cushions that it objected to Paragraphs 14 or 15 when it received Cushion's confirmation. This leaves us to consider whether Paragraphs 14 or 15 materially alter the contract.

Paragraph 14 Disclaimer

Paragraph 14 is a disclaimer of warranty. A disclaimer of warranty is considered a material change in most contracts. (See, e.g., Step-Saver Data Systems, Inc. v. Wyse Technology 939 F.2d 91 (1991).

Paragraph 15 Venue and Choice of Law

A contract provision that purports to set the place where the trial or arbitration of a dispute involving a California/Florida transaction will be held (a venue provision) in Uzbekistan, a foreign country, is material. Similarly, a contract provision that purports to change the law to be applied to a California/Florida transaction from California law to the law of Uzbekistan (a choice of law provision) also is material. Consequently, neither of those provisions will be part of the contract.

§2-207(3)

Even if there is no contract under §2-207 (1) and (2) based on the documents exchanged between the parties, if the parties act as if they have a contract, §2-207 (3) provides that a contract is still formed because the parties' conduct recognizes the existence of a contract. Comfy ordered, received, and inspected the cushions. Cushions manufactured and delivered them. Both parties acted as though they had a contract. Under these circumstances, the contract terms are those that the parties agree on, plus the default terms provided in UCC Article 2. Those default provisions allow the court to determine a reasonable place for choice of law and venue, which is likely to be California.

END OF ANSWER OUTLINE FOR QUESTION THREE

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Excellent! 90/100

1)

Fred vs. KROCK

Governing Law: Common law governs all contracts that do not deal with goods. The Uniform Commercial Code Article 2 governs all contracts dealing with tangible goods. Here, the subject matter deals with a radio contest and performance thereof, making it a matter to be dealt with under Common Law.

Formation - The formation of a contract requires a valid offer, acceptance, and consideration.

- **Offer** - An offeror's manifestation of intent to invite acceptance to clear and definite terms given to an offeree.
 - KROCK was the offeror in this matter because they communicated their intent through a public broadcast promote the radio station by awarding the first listener to call in and correctly identify the 20th song played by the station that afternoon. The offerees are all listeners of the broadcast. The clear and definite terms involve performance from the offeree in exchange for a Tesla automobile.
 - *Unilateral Offer* - A unilateral offer is a promise made in exchange for requested performance from the offeree.
 - The offer made by the radio station is specifically requesting acceptance by performance because it is requiring listeners to listen to the radio station for an extended period of time to be able to correctly identify the 20th song played on the air that afternoon.
 - There was a valid offer made by KROCK because there was manifestation of their intent to invite acceptance from listeners to the contest with clear and definite terms.
- **Acceptance** - An offeree's unequivocal assent to the contemporaneous terms of an offer, clearly communicated to the offeror.
 - Here, Fred accepted KROCK's offer by performing in accordance to the terms of the radio station's offer. Fred listened to the radio that day and he was the first caller to correctly identify the 20th song that day.

- **Mirror Image Rule** - An acceptance must be made by adhering to the terms of the offer in the same manner as proposed by the offeror.
 - Fred's adherence to KROCK's terms of accepting their offer fulfills acceptance in compliance with the mirror image rule.
- There was a valid acceptance to the offer made by Fred because he communicated his assent to the terms made by KROCK
- **Consideration** - A mutual assent to bargained-for exchange of legal value.
 - The bargained-for exchange was KROCK offering a Tesla automobile in exchange for a listener to devote a substantial amount of time to listening to their radio station.
 - There was consideration between both Fred and KROCK.
- **Modification** - The changing/adding of terms to an existing contract that requires additional consideration.
 - Here, after Fred had fulfilled the performance required of the offer (calling in with the right answer), KROCK added the term that Fred had 24 hours to appear at the station to pick up the prize. There was no additional consideration because KROCK already had the duty to give the awarded Tesla to Fred. Fred had to suffer the additional detriment of taking another day off from work to collect his prize.
 - This modification would not have been enforceable had Fred not been able to collect the prize within the requested 24-hour period.
- A valid contract was formed, from an objective standard. Although KROCK contended that the contest was merely a promotion and not a binding contract

Breach of Contract

- **Fraudulent Misrepresentation** occurs when a party misrepresents a material term to a contract, violating good faith and fair dealing practices.
 - Here, Fred detrimentally relied on KROCK's misrepresentation of awarding an automobile to the winner of the contest. Any reasonable person would make the assumption that the automobile being offered as the prize for the contest was an actual, drive-able vessel and not a toy model of the Tesla automobile. The radio station could argue that the broadcast did not state or infer that the prize will be
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anything other than a new Tesla, be it a toy model replica or an actual life-size automobile.

Fred would not prevail in his claim of breach of contract because KROCK delivered on their offer of awarding a Tesla automobile to the first caller to correctly identify the 20th song of the day, and therefore Fred would not be entitled to win any damages for breach of contract. Seeking damages for emotional distress and punitive damages would need to be brought in a separate action from breach of contract as they would be considered penalties against KROCK.

In the event that Fred prevailed in the action against KROCK, he may be entitled to receive one of the following remedies:

- **Specific Performance** - Specific performance is awarded in the event that legal remedy (monetary damages) would not be adequate for the plaintiff.
 - If Fred was awarded specific performance, KROCK would be ordered to deliver a life-size, drive-able Tesla automobile. In this case though, monetary damages would adequately compensate Fred because Tesla vehicles are not unique in nature.
- **Expectation Damages** - Expectation damages are awarded to make the plaintiff whole and put them in the position they would have been had the contract been completed to satisfaction.
 - If Fred was awarded expectation damages, KROCK would have had to compensate him for the value of a Tesla automobile that he had expected to receive by winning the contest.
- **Reliance Damages** - Reliance damages are awarded to make the plaintiff whole and put them back in the position they were before they had relied on the terms of the contract.
 - Since Fred had used a vacation day from work to stay home and listen to the radio, and also taken the next day off from work to collect his prize, the reliance damages would have been equal to the amount of income lost for the 2 work days.

- **Restitution Damages** - Restitution damages are awarded to a plaintiff to prevent unjust enrichment to the defendant and would be calculated based on how foreseeable, reasonable and avoidable they would have been.
 - It could be argued that KROCK's benefit from having had a listeners tune in for an extended amount of time in order to win the contest, but it would be difficult for the Fred to prove just how much enrichment he conferred upon KROCK.

Note: Misrepresentation is not part of the call of the question.

Excellent

95 *[Signature]*

2)

Governing Law

The Uniform Commercial Code (UCC) governs the sale of public goods over \$500, common law governs all other contracts. Mike and Jonathan live in a jurisdiction that has not adopted the UCC and therefore the governing law is common law.

Contract Formation & Contract Theory

A contract is formed with an offer, an acceptance and consideration between the parties. Once there is a contract, offer and acceptance there is an enforceably valid contract

Offer

An offer is a manifestation to the willingness to enter into a bargain. An offer must also have clear and definite terms, the parties must be identified and the consideration whether monetary, a possession or a promise must be made clear at the time that the offer is made. In this situation, the offer is clear in text message #1 when Jonathan states that "I offer to make you a black suit for your wedding in the fabric you want, for \$3,000, to be delivered by February 1, 2024. You pay for delivery" There were clear and definite terms to the offer by Jonathan.

Counter Offer

The common law mirror image rule states that when there is an acceptance, that the parties have an unconditionally assent to the exact terms of an offer that was set forth with no modifications or changes to the offer. A counter offer is when the offerree does not unconditionally assent to the terms of the offer that was made by the offeror. A counter offer is also essentially a rejection of the original offer and a new offer that is made by the offerree to the offeror, the offerree then becomes the offeror when a counter offer is made. If the new offerree accepts the new terms set forth in the counter offer by the new offeror, there is now a mirror image to the terms and an unconditional assent to the terms set forth in the counter offer. In this situation there were several counter offers made going back and forth through texts between Jonathan and Mike. The counter offers between Jonathan are Text Messages #2 through #7 where they go back and forth on price and then the last counter offer that is offered is for Jonathan to make the custom suit for Mike at \$2,500.

Acceptance

An acceptance is the manifestation of assent to the terms of an offer. An acceptance to an offer can either be express or implied, meaning through words or conduct. The common law mirror image rule states that when there is an acceptance, that the parties have an unconditionally assent to the exact terms of an offer that was set forth with no modifications or changes to the offer. Additionally that the parties intent to be bound to the terms of the offer by an acceptance. Text #6 may seem like a rejection which is when one party declines the offer however, he just states that the price is to high which will not be deemed as a rejection. In text #8, Mike clearly and unconditionally accepts Jonathan's offer by stating "I accept your offer and I also order a second suit in dark blue, same kind of fabric. When Mike states this, the offer has been accepted at the price of \$2,500 for the black suit and there is now a valid contract for the black suit. There is a second offer and acceptance made by Mike to Jonathan described below.

Mutual Assent

For a contract to be enforceable, there must be mutual assent. Mutual Assent does not require a subjective "meeting of the minds" but rather looks to an objective reasonable standard. Additionally what is looked at is the outward manifestation of intent of the offeror from the position of an objectively reasonable person in the perspective of the offerree. Mutual assent is present in both of these offers as the offer and acceptance are present in the correspondences between Mike and Jonathan. Mike then makes another offer to Jonathan for him to make Mike a dark blue suit of the same kind of fabric. Jonathan clarifies the terms of the offer by stating "Great, same price, delivery and payment as the black suit" Mike then makes a counter offer from the original \$2,500 price of the black suit to a 50% discount of \$1,250, Jonathan makes a counter offer at \$2,100. Mike continues to suggest in his last text that the price is too high but then accepts the price of \$2,100. As stated, there is mutual assent for both the black and the blue suit between Jonathan and Mike.

Modification of an offer

A modification of an offer may be done prior to an acceptance of an offer for a modification to be enforceable which may also be deemed more or less as a counter offer. If a party attempts to make a modification of an offer after there is a valid contract made between the parties, the modification of the offer must be accompanied with additional consideration. Another fact to bring up is in text #8, when Mike stated to Jonathan that "I accept your offer and I also order a second suit in dark blue, same kind of fabric" It may be assumed by Jonathan that they do have an enforceable contract at that point for two suits at \$2,500 each and that at this point Mike is trying to modify the offer down to a lower price for the second (blue suit). There was no extra consideration present in this exchange after text #8, so Jonathan could have pursued having Mike pay a total of \$2,500 per suit. However

as stated above, the blue suit was a separate offer as both parties continued to negotiate amongst one another.

Consideration

Consideration is a bargained for exchange between parties. A bargained for exchange can be a promise for a performance to do a specific act or from forbearance of said forth performance (unilateral). A bargained for exchange may also be a promise for a promise (bilateral). The consideration in this exchange between parties is a promise for Jonathan to make the suits for Mike for his wedding if Mike promises to pay Jonathan a price that they agree on. In this situation, the price of consideration for Mike to Jonathan is \$2,500 for the black suit and \$2,100 for the blue suit. There is enforceable consideration in this exchange between Mike and Jonathan.

Summary of a contract between Jonathan and Mike

There is a clear offer, acceptance and consideration between Jonathan and Mike. Even though there were a few counter offers that took place between the correspondence of Jonathan and Mike, all of the elements are met to have an enforceable contract between Jonathan and Mike where Jonathan will make the suits for Mike and Mike will pay Jonathan an agreed price per suit. Yes, Jonathan and Mike have an enforceable contract.

3)

Governing Law:

There are two kinds of law that govern in contracts. The UCC, article 2, is the sale of goods. A good is a moveable tangible object. A merchant is someone who has knowledge or skill within their given good. Common law will govern everything else. Here, the law that governs is UCC and both parties in this scenario are merchants due to being experts in their sale of their goods of cushions..

Offer

According to the UCC, offers are similar to those of common law which are clear and definite terms by the offeror to an identified offeree, which they have the power to accept. However, the UCC only requires there to be an identified quantity because any missing terms will be added by gap fillers by the courts to which they deem reasonable in value. If one of the terms that they are missing is the time, the courts will create a merchant firm offer to keep the offer open for 90 days.

Acceptance

Acceptance in the UCC is the unequivocal assent to the terms of the offer. Here, the mirror image rule does not apply as the UCC will include additional terms into their contracts, unlike the common law which is a rejection of the original offer and will constitute a counteroffer. Acceptance in the UCC is also created by the prompt shipment or the actual shipment itself.

Here, the prompt shipment of the goods constitute as acceptance of the offer. There was an acceptance to ship the goods; however, there were additional terms that were added to the offer which are important to take note of.

Battle of the Forms, Article 2-207(2) (a)-(c)

The additional terms of the offer in the UCC are stated in Article 2-207(2)(a)-(c) which is also known as the Battle of the Forms. The battle of the forms indicate that additional terms, if both parties are merchants, will be added to the offer so long as they do not materially alter the contract, if it expressly limits the acceptance of the contract, and that the parties object the terms in a reasonable time. If only one of the parties are not merchants, then the additional terms will be considered as mere proposals.

Here, we can see that both of the parties in this example are merchants as they are experts and knowledgeable in their goods. They each send terms to the other that state what were to occur if there were a dispute and their choice of law in case of a breach. The fact pattern demonstrates that the terms materially alter the terms of the other party. Paragraph 7 of Comfy states that in case of a dispute, the prevailing party will recover all costs, which contradicts with Paragraph 14 of Cushions state that all cushions are sold "as is" without any warranty as to the quality or anything else." In addition to the material alteration of the parties of each of their 1st terms, they contradict with their 2nd terms. Paragraph 8 of Comfy states that their choice of law given a dispute will be recovered in California Law; however, Cushions states in their 15th Paragraph that their disputes shall be governed by the laws of Uzbekistan. Each of their terms materially alter the other.

Knockout Rule, Article 2-206

If they do not follow the following, then Article 2-206 will come into play, also known as the Knock out rule, stating that if any of the terms contradict any of the other merchant's terms, then they will be knocked out of the contract. The terms that do not follow the battle of the firms.

As stated above, both merchant's terms materially alter the other as well as expressly limits their acceptance. Therefore, they will be knocked out of their contract and none of those terms will be applied to their contract.

Consideration

Consideration is when there is a bargain of legal value. Here, consideration is seen as the shipment of the 10,000 sofa cushions, also known as the acceptance of the goods. This is because there is a bargain of the legal value of the cushions being shipped to the other merchant and the promise of shipment also adds to the consideration.

Terms that govern

The only terms that govern the contractual relationship between Comfy and Cushions is the quantity and the shipment of the goods. The courts would have to fill in the gaps of any other terms that are missing with gap fillers. Although their paragraphs or terms are not titled the same, they still materially alter the other's terms. Although there is no prevailing party clause in Cushion, or no Disclaimer term in Comfy. The context of the terms materially alter the other. Comfy states that the prevailing party will recover all damages and costs; however, Cushion's disclaimer conflicts with Comfy limiting their recovery on any damages because they have no warranty on the quality or

anything else, meaning they can recovery nothing in case of a dispute. Additionally, paragraph 8 of Comfy's offer states that any dispute will be covered by California law, but Paragraph 15 of Cushion's states that the governing law will be Uzbekistan. This materially alters both paragraphs; therefore, none of these paragraphs will govern their contractual relationship, per the knockout rule.

END OF EXAM