

San Luis Obispo College of Law  
Contracts

Fall 2023

Prof. M. Loker

**Instructions:**

Answer Two (2) Essay Questions

Answer 20 MBE Questions

Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

### 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 20<sup>th</sup> 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 20<sup>th</sup> 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 and specific performance. The radio station contends that the contest was merely a promotion and there was no binding contract.

Discuss.

Question Two

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."

Discuss.

**Answer Outline for Question One**  
**Fall 2023 Contracts Exam**  
**SLO**

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 20<sup>th</sup> song). Fred accepted the offer because he was the first caller to correctly identify the 20<sup>th</sup> 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  
Fall 2023 Contracts Exam**

**Professor Goldner**  
**Kern County College of Law**

**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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86 - AN IMPRESSIVE GRASP  
OR LAW/FACT HERE

## GOVERNING BODY OF LAW

Contracts are governed either by the common law or the Uniform Commercial Code ("UCC"). The UCC governs contracts for the sale of goods. Goods are movable and tangible items. The common law governs contracts for services, real estate deals, and all other transactions not governed by the UCC.

Here, the agreement at issue is for the reward of a Tesla in exchange for being the first caller into a radio station to correctly identify the 20th song played on the radio that day. This is an agreement for services, not a contract for the sale of goods, so the agreement is governed by the common law.

## FORMATION

A contract is a legally enforceable agreement that contains a promise or set of promises, for the breach of which the law provides a remedy or the performance of which the law in some way recognizes as a duty. A contract is the manifestation of mutual assent to the essential terms of an agreement by the contracting parties. A valid contract requires an offer, acceptance, and consideration.

## OFFER

An offer is a promise or set of promises to do or refrain from doing some specified thing to a specified offeree. Offers consist of words or conduct signifying commitment with specified and definite terms. The offer creates the power of acceptance. The offeror is the master of the offer. A bilateral offer requires the offeree to notify the offeror of its acceptance prior to beginning performance. A unilateral offer to an offeree is accepted

upon the offeree's full performance, and the offeree is expected to express acceptance by beginning performance.

Advertisements and promotions are generally not considered valid offers; they usually are classified as invitations to negotiate. Advertisements do serve as a valid offer if they include essential terms, specify an offeree, and outline a manner of acceptance. In the *Leonard v. Pepsico* case, the advertisement from Pepsico that indicated it would provide a jet to customers who redeemed their Pepsi points was clearly a joke. The court in that case held that obvious jokes are not valid offers. Further, in the famous *Lucy v. Zehmer* case, the court held that the subjective intent of the offeror is not relevant. The offeror cannot urge that they were not being serious and claim that an offer was not genuinely extended, and that the offeree should have known that the offeror did not really mean it. If a reasonable person in the shoes of the offeree would have interpreted the offeror's offer as a true manifestation of intent to contract with specified terms that created the power of acceptance in the offeree, the offer is valid.

Here, the announcement of the contest on the radio constitutes a valid offer. The offer specified that only one person can accept the offer, and it detailed how that one person can go about acceptance. It outlined that the first person to call in and correctly identify the 20th song played by the station that afternoon will win a Tesla automobile. The individual wishing to accept had to (1) be the first person to call in, and (2) correctly identify the 20th song the radio station played. Further, the Tesla is an essential term for what the offeree would be accepting if they won pursuant to the terms outlined in the broadcast. The radio station's intent to contract is clear, and the requirements for how to accept the offer are explicit. Thus, all of the requirements of a valid offer are present.

The radio station's announcement is a valid offer. Specifically, the offer was a unilateral offer that was to be accepted via performance by an offeree being the first caller to correctly identify the 20th song played that afternoon.

## ACCEPTANCE

Acceptance is a manifestation of agreement to the terms of an offer. Acceptance can be by word, deed, or both, depending on whether the offer is bilateral or unilateral. An offer that does not indicate a specific means of acceptance can be accepted in any reasonable manner. Generally, an offeree must notify the offeror of its acceptance before beginning performance. In a unilateral offer, which is what is present here, the offeree accepts the offer by performance. Further, the unilateral offer is deemed accepted upon full performance and completion.

Here, the specified means of accepting the offer was that someone had to be the first person to call in and correctly identify the 20th song played by the station that afternoon. If they achieved both (1) being the first caller, and (2) correctly identifying the 20th song played on the station that day, they will win a Tesla automobile. Before Fred was even able to accept the offer, he took substantial steps toward accepting the offer by taking the day off of work to stay home and listen to the radio. The marker of his valid acceptance was when he was indeed the first caller and correctly identified the 20th song. His conduct met the requirements outlined by the offer made by the radio station. He complied with the specified manner of acceptance set forth by the offeror and completed full performance to establish his valid acceptance.

Fred's participation and victory in the contest is sufficient to establish valid acceptance to the radio station's unilateral offer. Notably, his acceptance is further demonstrated and confirmed by the disc jockey on the radio who stated that Fred had 24 hours to pick up his prize. This statement can serve as confirmation or acknowledgment of Fred's full performance of the unilateral offer to validate his acceptance.

There is valid acceptance by Fred to the radio station's offer.

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## CONSIDERATION

Consideration is the bargained for exchange of reciprocal legal benefit/detriment between the parties. Consideration is required to demonstrate that the agreement is not simply a gift to one party by the other party. Consideration does not need to be completely fair and balanced, but both parties must contribute and perform in some way.

Here, the consideration outlined in the offer is clear. Fred had to be the first to call in and correctly identify the 20th song played in the radio, then go down to the radio station after he won *in exchange for* a Tesla to be provided by the radio station. Further consideration flowed from Fred to the radio station because the contest was intended to promote KROCK radio station and generate new listeners. This was the benefit to the radio station, while the benefit to Fred was the Tesla. The detriment to the radio station was obtaining a Tesla to provide to Fred, while Fred's detriment was to be the first to call in, correctly identify the 20th song, then go down to the radio station within 20 hours to claim his prize.

There is sufficient consideration to support the contract.

## BREACH

A validly formed contract has been established, however, the agreement fell apart when Fred visited the radio station to claim his prize. Fred may establish the breach by asserting misrepresentation by the radio station or introducing parol evidence. The radio station would also likely want to introduce parol evidence, as well as assert defenses of mistake and Statute of Frauds (discussed in more detail below in "Defenses")

## MISREPRESENTATION

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Misrepresentation can be asserted as both a cause of action within a breach of contract claim or an affirmative defense to a breach of contract claim.

Here, Fred will likely argue that the radio station misrepresented the prize of the Tesla. The broadcast did not state or infer that the prize will be anything other than a new Tesla. There was nothing about the broadcast that suggested that the prize would be a toy car. Fred was devastated when the general manager gave him a toy model of a Tesla automobile that was no more than 5 inches long. Fred will argue that the radio station misrepresented the prize of the contest. Further, he will likely assert that their misrepresentation was particularly problematic because the radio station still received a benefit from Fred's conduct in accepting the offer. Specifically, the radio station still got what they wanted out of the contest (promotion for the station and new listeners).

Fred has a strong claim for misrepresentation to establish the radio station's breach of their validly formed contract.

PAROL EVIDENCE

~~(NOT A DISCOURSE)~~ OF REGARD

Parol evidence is extrinsic evidence that can be introduced to support the parties' interpretations of a contract. The evidence consists of evidence of oral agreements or other writings of agreements that did not make it into the final contract. To be introduced, the oral agreement must not pertain to the crux of the agreement (it must be a collateral agreement), it must not contradict the written agreement, and it must not be the kind of agreement that would be expected to be contained within the final written agreement.

Here, the agreement was entirely oral; there were no written agreements at all. The only evidence of such an agreement would be if there was audio retained from the contest, as

well as Fred's text messages with his friends and coworkers to share the good news. There may also be documentation from Fred's use of vacation days to take the day off of work.

If Fred can introduce parol evidence to establish that there was no indication that the prize was a toy Tesla as opposed to an actual automobile, he can probably establish breach by the radio station of their validly formed contract.

PROMISSORY ESTOPPEL

~~FOR A DEFENSE~~ DISREGARD

A plaintiff can make a claim for promissory estoppel if one of the elements of the contract is missing and they meet certain criteria to allow their recovery. Typically the missing element here is consideration, but it is not strictly consideration. To succeed, the party seeking recovery must establish the existence of (1) a promise, (2) foreseeable reliance on the promise, (3) actual or detrimental reliance on the promise, and (4) injustice without enforcement.

Here, a promise has been established by the radio station's offer. It was foreseeable that Fred would rely on the radio station's promise not only because he complied with the requirements for accepting, but also because the disc jockey on the radio announced him as the winner and gave him 24 hours to pick up his prize. Fred actually and detrimentally relied on the promise in numerous ways. First, he used a vacation day from work to stay home and listen to the radio that day. Although this was before his acceptance, he used another vacation day from work to collect his prize. Even further, Fred promised to take each of his friends and coworkers for a ride in his new Tesla. When it was determined that he would only be getting a toy Tesla, Fred was humiliated and quit his job. Fred's actual reliance on the promise is significant and abundantly clear. Whether there would be injustice without enforcement can be argued. While objectively it would probably not be an injustice to not award someone a Tesla, Fred's foreseeable and heavy actual reliance on the promise would make it unjust to forego enforcing the radio station's promise.

Fred meets all four elements of promissory estoppel.

## CONCLUSION

Fred established a validly formed contract with the radio station, there is a breach of the contract by the radio station, and Fred has established his need for recovery. Fred will likely prevail on a breach of contract claim against the radio station.

## SPECIFIC PERFORMANCE

A party can sue for specific performance in most real estate/land transactions, contracts for the sale of goods, or situations in which there is not an equitable remedy available. Parties are generally barred from prevailing on a claim for specific performance in "unique" situations.

Here, Fred's best remedy is probably under a breach of contract claim to recover for damages against the radio station. The contest may qualify as a unique situation barring specific performance.

## RADIO STATION'S DEFENSES

The radio station's assertion that the contest was merely a promotion and there was no binding contract is unlikely to prevail. For the reasons described above in "Offer", the promotion provided essential terms and indicated who is the specified offeree. This is sufficient to surpass being merely a promotion or advertisement that is an invitation to deal. For all of the reasons stated above, there was a validly formed contract. The radio station, however, can present the following affirmative defenses:

### MISTAKE

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A party may seek rescission of a contract based on a mutual or unilateral mistake. A mutual mistake is when both parties are mistaken as to the agreement; a unilateral mistake is when one party is mistaken as to the agreement. To rescind a contract based on mutual mistake, the party seeking relief must establish that (1) the mistake concerns a basic assumption of the contract, (2) an essential term of the agreement would be materially impacted (usually the price) and (3) the party seeking relief did not assume the risk of the mistake, i.e. the party seeking relief was not consciously ignorant. To rescind a contract based on a unilateral mistake, the same criteria above apply, plus an element of (4) it would be substantively unconscionable to enforce the agreement despite the mistake.

Here, the radio station may argue that the contract should be void because the parties were mutually mistaken. The Tesla prize is both a basic assumption of the contract and an essential term that is materially impacted (real car vs. toy car significant difference in value). They would also assert that they were not consciously ignorant; it was simply a misunderstanding between the parties. They will probably assert that the word "Tesla" is ambiguous and constitutes voiding the contract.

They may also assert that there was a unilateral mistake based on the above criteria, in addition to it being substantively unconscionable for them to be required to provide Fred with an actual Tesla automobile.

The final outcome of the breach of contract claim will most likely come down to the trier of fact's decision as to Fred's assertion of misrepresentation versus the radio station's insistence of a mistake.

### STATUTE OF FRAUDS

The Statute of Frauds is a defense to contracts that establishes certain contracts must be in writing. These contracts are agreements relating to "MYLEGS", meaning marriage,

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agreements that cannot be performed within one year, land, executors, guarantors, and contracts for the sale of goods over \$500.

The radio station may assert that Fred's claim based on the contest violates the Statute of Frauds because it was an oral agreement for a Tesla, which is sure to cost over \$500. This assertion likely will not be successful, because the radio station was not selling Fred a Tesla. It was the consideration by the radio station in exchange for Fred's participation and victory in their contest.

## **OTHER ARGUMENTS BY THE RADIO STATION**

### PAROL EVIDENCE

As previously mentioned, the radio station may also request to introduce parol evidence to support their interpretation of the agreement. Just as Fred will argue that there was never any indication that the Tesla was a toy car, the radio station would probably like to introduce the same evidence to demonstrate that their offer never specified that the Tesla was a real car.

**END OF EXAM**

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## GOVERNING BODY OF LAW

82- THESE WERE TRICKY FACTS BUT  
TO HANDLE THEM WITH  
RELATED TO THOSE FACTS  
TO THE LAW

Contracts are governed either by the common law or the Uniform Commercial Code ("UCC"). The UCC governs contracts for the sale of goods. Goods are movable and tangible items. The common law governs contracts for service, real estate deals, and all other transactions not governed by the UCC.

Here, the agreement is for both the sale of goods and services. Jonathan was performing a service by making a suit for Mike's wedding day, and the suit is a good that was going to be sold to Mike. Mike and Jonathan live in a jurisdiction that has not adopted the UCC. If they did, the predominant factor test would be applied to establish whether the agreement was for goods or services. The factors to look at are the contract language, billing terms, allocation of costs, and the nature of the final product to be delivered. Because the UCC is not adopted in Mike and Jonathan's jurisdiction, and because a service is predominantly the issue of the contract, this contract is governed by the common law.

## FORMATION

A contract is a legally enforceable agreement that contains a promise or set of promises for the breach of which the law provides a remedy or the performance of which the law in some way recognizes as a duty. A valid contract requires an offer, acceptance, and consideration.

## OFFER

An offer is a promise or set of promises to do or refrain from doing some specified thing to a specified offeree. Offers consist of words or conduct signifying commitment with specified and definite terms. The offer creates the power of acceptance. The offeror is the

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master of the offer. A bilateral offer requires the offeree to notify the offeror of its acceptance. A unilateral offer to an offeree is accepted by the offeree's full performance.

Here, none of the discussions that occurred inside the store constitute a valid offer. Jonathan measured Mike and promised to contact him in a week with a price for suit in the fabric Mike selected. Despite his specific use of the word "promise", his statement is not an offer. It was merely a statement to Mike indicating that he would be making an offer at a later time.

The valid offer comes from Jonathan's text message #1 on November 22, 2023, which states "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." This offer contained all of the essential terms that Mike could accept.

Thus, there is a valid initial offer.

## ACCEPTANCE

Acceptance is a manifestation of agreement to the terms of an offer. Acceptance can be by word, deed, or both, depending on whether the offer is bilateral or unilateral. An offer that does not indicate a specific means of acceptance can be accepted in any reasonable manner. In common law contracts, counteroffers and conditional acceptances are both deemed rejections of the initial offer. Once a party rejects an offer or makes a counteroffer, the original offer is considered dead and is no longer acceptable if the offeree changes its mind. An acceptance with additional terms is generally viewed as a rejection. The common law maintains the mirror image rule, which states that the offeree's acceptance of an offer must be a mirror image of the offeror's offer and its essential terms. Here, there are many counteroffers made and rejected that eventually lead to a valid acceptance.

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First, Mike's statement to Jonathan in text message #2 stating "I'll pay \$2,000" is a counteroffer to Jonathan's initial offer. Therefore, Mike rejected Jonathan's offer. At this stage, there is no longer an offer on the table by Jonathan. The current offer between the parties is Mike's offer to pay \$2,000 for the suit. Mike did not comment on whether he accepted or rejected Jonathan's note of a delivery date or payment on delivery. At this point, it does not matter because Jonathan's offer is dead and the only offer between the parties is Mike's counteroffer of purchasing the custom suit for \$2,000.

Jonathan's response in text message #3 stating "I'll do it for \$2,500" serves as another counteroffer, and therefore a rejection of Mike's last counteroffer. Now, Mike's last offer is dead and the only offer presently on the table is Jonathan's offer to make the suit for \$2,500. Again, the other terms of the initial offer regarding method of payment and delivery have not been addressed. At common law, quantity and price are often sufficient to establish an offer. Jonathan's text message #3 is a counteroffer that created the power of acceptance in Mike.

Mike's text message #4 asked "Will you take \$2,250?" is NOT another counteroffer/rejection. If a question is posed as to a price, or any other element of an offer, it is generally seen as bargaining rather than a counteroffer. Although he is asking about a price reduction, he is not rejecting Jonathan's last offer. At this point, Jonathan's proposal of \$2,500 has been neither accepted nor rejected. Jonathan reiterated his previous offer in text message #5 when he stated "No, I want \$2,500."

Again, Jonathan's response in text message #6 is also NOT a counteroffer/rejection. He is commenting on an essential term but has neither rejected it, nor has he proposed an alternative price. At this stage, Jonathan's offer is still available for Mike to accept. Jonathan's response of "That's the best I can do" is reaffirming his offer for a third time that Mike has the power to accept.

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In text message #8 by Mike, Jonathan's offer is finally accepted. Mike began his message with "I accept your offer and I also order a second suit in dark blue, the same kind of fabric." Typically, acceptances with conditions are not acceptances; rather, they are counteroffers and rejections. However, it could be argued here that the first part of the message is an acceptance to Jonathan's last offer, and the second part of the message is a new offer from Mike to Jonathan. The reason for the distinction is that the first part of the message is pertaining to the offer for the black suit, while the second part of the message is a brand new bilateral offer to form a contract regarding a blue suit. There was no indication that Mike's acceptance of Jonathan's offer of the black suit was conditional upon Jonathan agreeing to make a blue suit. The two agreements appear to be independent upon one another.

In text message #9, Jonathan seems to agree with that sentiment. By stating, "Great! Same price, delivery, and payment as black suit," he is confirming that the essential terms of the contract for the blue suit will be the same as those agreed upon for the black suit. The contract for the black suit has been formed, while the contract for the blue suit is still in its preliminary stages. At this juncture, Jonathan's statement serves as an offer regarding the blue suit.

Mike's response in text message #10 serves as a counteroffer to Jonathan's proposal. Although he stated "Agreed. But would appreciate it if you would give me a 50% discount since I'm already buying a suit from you," he did not agree at all. Mike is rejecting Jonathan's offer to make a blue suit according to the agreed upon terms of the black suit contract. He is proposing a new counteroffer to Jonathan to provide a 50% discount on the price of the blue suit.

Jonathan's response in text message #11 serves as a new offer that created the power of acceptance in Mike. He clearly made an offer to make the blue suit for \$2,100. Mike's response of "I think \$2,100 is too high but I accept" is valid acceptance of the offer. His

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comment that he thinks \$2,100 is too high is not a counteroffer/rejection; it is merely a comment that he did not intend to serve as a rejection demonstrated by his subsequent acceptance within the same message.

Thus, there was ultimately valid acceptance for two different agreements. Jonathan and Mike formed contracts for Jonathan to make Mike a black suit for \$2,500.00 and a blue suit for \$2,100, both to be delivered by February 1, 2024, payment upon delivery.

## **CONSIDERATION**

Consideration is the bargained for exchange of reciprocal legal benefit/detriment between the parties. Consideration is required to demonstrate that the agreement is not simply a gift to one party by the other party.

Here, the consideration is money in exchange for making suits and paying to keep the suits. Jonathan would make Mike a black suit and a blue suit to purchase and keep in exchange for \$2,500 and \$2,100 respectively.

There is sufficient consideration to support the contract.

## **CONCLUSION**

There is a validly formed contract between Mike and Jonathan.

## **DEFENSES**

Here, there is no indication that Mike nor Jonathan are asserting a breach of contract claim or seeking rescission for any reason. In the event that one party alleges a breach or seeks rescission, there are potentially applicable defenses available.

## **MIKE'S DEFENSE OF UNDUE INFLUENCE OR DURESS**

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Undue influence and duress are defenses that can apply to rescind a contract. Duress is direct pressure or compulsion by one party to another to persuade them into signing the agreement. The duress can manifest physically (i.e. physically grabbing someone's hand and signing a document for them) or a party can face economic duress. Undue influence is similar to duress, but is more indirect and often extends over a longer period of time. The contracting party is influenced over time to agree to contract.

Here, Mike may later claim that he only agreed to contract due to duress or undue influence. Throughout his conversations with Jonathan, he repeatedly tries to bring the price down, specifically states that Jonathan's price is too high, requests a discount, and says in conclusion that he thinks the price is still too high, but he acquiesces and accepts. Mike may argue that he felt some pressure to accept, but this assertion probably would not be successful. Jonathan never indicated any sort of threat of what would happen to Mike if he didn't accept, and Jonathan made it pretty clear that he was firm in his numbers and it was up to Mike whether he wanted to take it or leave it.

### JONATHAN'S DEFENSE OF THE STATUTE OF FRAUDS

If something goes awry and Jonathan does not perform, and Mike sues Jonathan for breach of contract, Jonathan may assert the Statute of Frauds defense. The Statute of Frauds outlines certain types of contract that must be in writing. Included in that group is agreements for the sale of goods over \$500. Here, Jonathan and Mike's agreement is text messages. These required written agreements are usually to be signed by the parties.

**END OF EXAM**