THE UNIVERSITY OF TEXAS AT AUSTIN
School of Law
6 May 1992

EXAM NO. _____

CONTRACTS
FINAL EXAMINATION
Professor Russell

NAME _____

(**NOTE TO STUDENT:** It is your responsibility to remember your exam number. The Main Office will not give you your exam number, nor will they give you your grade over the counter; the grade will be mailed if you provide a self-addressed, stamped envelope, or you can order an unofficial transcript for a fee.)

(__) Check if you do not want the grade for this exam to be posted

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FINAL EXAMINATION
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EXAM NO.:_____

INSTRUCTIONS:

1. This examination consists of FOUR (4) questions on EIGHT (8) pages. Please make sure that you have all EIGHT (8) pages. For purposes of grading, the relative weight of each question will correspond roughly with the recommended number of minutes allocated to each question, namely, Question One: 60 minutes; Question Two: 50 minutes; Question Three: 15 minutes; and Question Four: 40 minutes. You should divide your time with these weights in mind. These four times add up to 165 minutes, which is 15 minutes less than the 180 minutes or three hours that you will have to complete the examination.

2. This examination is open book. You may refer to any written material that you wish.

3. **You must begin Question Two and Question Three in a new bluebook. You should include your answer to Questions Three and Four in the same bluebook. Thus, at a minimum, you will use three bluebooks.** Please be sure to put your examination number on each bluebook that you use. Do not write on both sides of the page. If you type, double space. If you write by hand, you must write legibly. Do not use pencils that are not sharp or pens that are nearly out of ink.

4. In answering each question, use judgment and common sense. Emphasize the issues that are most important. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of contract law with the facts before you. Avoid lengthy and abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think a court would resolve an ambiguous question one way rather than another.

5. You should assume that you are in a common law jurisdiction that has adopted the Uniform Commercial Code.

INSTRUCTIONS CONTINUE NEXT PAGE

6. Quality, not quantity is desired. Think through your answer before you begin to write. Keep in mind that some of your other professors do not distribute bluebooks until twenty minutes after the examination has begun. They do that in order to ensure that you think about and organize your answer before you begin writing.

7. You may <u>not</u> keep your copy of the exam questions. You must turn in your copy of the exam questions with your answer.

8. Good Luck, Thank You, and Enjoy the Summer

HONOR CODE: The study of law is an integral part of the legal profession. Students engaged in legal studies should learn the proper ethical standards as part of their education. All members of the legal profession recognize the need to maintain a high level of professional competence and integrity. A student at The University of Texas at Austin School of Law is expected to adhere to the highest standard of personal integrity. Each student is expected to compete honestly and fairly with his or her peers. All law students are harmed by unethical behavior by any student. A student who deals dishonestly with fellow law students may be dishonest in the future and harm both future clients and the legal profession. Under the honor system, the students must not tolerate unethical behavior by their fellow students. A student who knows of unethical behavior of another student is under an obligation to take the steps necessary to expose this behavior. Students in The University of Texas at Austin School of Law are governed by the Institutional Rules on Student Services and Activities. Students may be subject to discipline for cheating, plagiarism, and misrepresentation.

Question One

60 Minutes

Grant Carp, a general contractor, was preparing a bid on a large state project known as the "School Job." Bids had to be submitted by 12:00 noon, December 15th. The specifications for the various subcontracts on the School Job had been widely circulated among people in the building trades, including Paul Plummer, a plumbing contractor. On November 20, Plummer submitted to Carp an unsolicited bid to do the plumbing work in accordance with the specifications for $126,700.

Plummer's bid was submitted on his standard bid form, which Plummer's lawyer had recently prepared and which the lawyer told Plummer would give him "better protection" in the bidding process. Among other printed terms, the form provided: "This bid is an offer and is not binding on Plummer until acceptance. Acceptance shall not be deemed to have occurred until Plummer receives a copy of the bid signed by the party to whom the bid was submitted." The form also contained the following provision: "When accepted, this form becomes the contract between the parties and it is understood and agreed that it covers all agreements, express or implied, between the parties."

Carp, who had previously had successful business dealings with Plummer and who thought that $126,700 was a fair price for the plumbing, decided to incorporate Plummer's bid in his (Carp's) bid on the School Job. Therefore he did not solicit bids from other plumbing contractors, as he had been planning to do. He did not receive any other unsolicited bids on the plumbing sub-contract.

Please answer the questions in the following parts, giving your reasons. Additional facts are relevant only to the part in which they are stated and are not relevant to other parts.

(1) Suppose that without signing and returning Plummer's form, Carp incorporated Plummer's $126,700 bid in the bid he (Carp) submitted on the School Job. On the afternoon of December 15, before the state opened the bids, Plummer advised Carp that he was too busy to work on the School Job and that he therefore withdrew his bid. When the bids were opened, Carp's was the lowest, and the School Job contract was awarded to him. Carp performed the School Job, paying $135,000 for the plumbing work, the best price he was able to obtain. Does Carp have any rights against Plummer?

(2) Suppose that at 11:00 a.m. on December 15, before Carp had either signed and returned Plummer's form or submitted his own bid on the School Job, and when it was too late for him to obtain other plumbing bids, Carp received a telegram from Plummer saying that Plummer was too busy to work

on the School Job and he therefore withdrew his bid. Being reluctant to proceed without a bid on the plumbing work, which constituted about 10% of the entire job, Carp did not bid on the School Job. When the bids were opened, Carp learned that if he had submitted his bid, incorporating Plummer's bid on the plumbing subcontract, the School job would have been awarded to him as the low bidder; and he would have made an estimated $100,000 profit on the job. Does Carp have any rights against Plummer?

(3) Suppose that Carp's bid, which incorporated Plummer's $126,700 bid, was the lowest and that on December 15 Carp was awarded the School Job. Carp immediately signed a copy of Plummer's form and returned it to Plummer, who received it on December 16. Upon checking his worksheet Plummer discovered that he had made a mistake in adding a column of figures and that he had understated his bid by $1,000. He so advised Carp and said that he would not do the work unless he was paid $127,700. Upon investigation Carp discovered that the bids various plumbers had submitted to other contractors ranged from $131,000 to $155,000.

(a) Suppose Carp orally promises to pay Plummer the extra $1,000; but after the work is completed he pays him $126,700 and refuses to pay him more. Does Plummer have any rights against Carp?

(b) Suppose Carp refuses to agree to pay $127,700 to Plummer, who therefore refuses to do the work. Carp hires the plumber who submitted the $131,000 bid to another contractor and pays him that amount upon completion of the plumbing work. Does Carp have any rights against Plummer?

(4) Suppose that before Carp had either signed and returned Plummer's form or submitted his own bid on the School Job, Plummer called Carp and said he was not sure he could finish the job he was working on in time to comply with the time schedule called for in the plumbing specifications for the School Job. Carp replied: "Don't worry; if you fall behind I'll make up the time someplace else and I agree not to hold you responsible." Subsequently Carp submitted his bid to the state, was awarded the contract, and signed a copy of Plummer's form and returned it to Plummer. Plummer did in fact fall behind schedule for the plumbing work called for in the specifications. Carp was not able to make up the time and as a result he finished the School Job 10 days late. Although the state could show no actual damages as a result of the delay, it demanded that Carp pay the state $10,000 under a clause in their contract calling for "liquidated damages" of $1,000 per day for each day of delay beyond the completion date specified in the contract. Carp paid the state $10,000, which Carp would now like to collect from Plummer. Will Carp be able to recover this amount from Plummer?

END OF QUESTION ONE

Question Two

50 Minutes

BEGIN THIS ANSWER IN A NEW BLUEBOOK

On February 1, Betty Bromeliad, president of Brooklyn Bridge Botanical Business, sent out her spring catalog listing a variety of plants for sale to the retail trade. In the front of the catalog was a printed letter, signed by Bromeliad, stating that the various plants were "offered" at the prices listed in the catalog. This letter also stated the delivery and payment terms. The letter requested customers to place their orders "by using the convenient order form attached at the end of the catalog."

Fiona Fiori, a florist who had on a number of occasions purchased plants from Brooklyn Bridge, received a copy of Brooklyn Bridge's catalog in early February. On March 1, Fiori sent Brooklyn Bridge a large order for delivery by May 5, in advance of Mother's Day. Instead of using the order form in Brooklyn Bridge's catalog, however, Fiori used her own order form, on which she listed the varieties of plants she wished to order, the quantities, and the prices as specified in Brooklyn Bridge's catalog. On the face of Fiori's order form the following statement appears: "This order is expressly conditioned on Seller's assent to the additional or different terms and conditions printed on the reverse side." Among the terms and conditions printed on the reverse side was the following:

> Paragraph 6. Upon delivery all plants must be in bloom unless otherwise specified on the face of this order.

No reference to the matter of bloom was made on the face of the form.

Upon receipt of Fiori's order on March 3, Bromeliad proceeded to copy the details onto one of her own catalog forms. On the face of this form the following statement appears:

> This order is expressly conditioned on Buyer's assent to the additional or different terms on the reverse hereof.

One of the terms included on the reverse of the form was the following:

> Seller will make every effort to deliver plants in bloom if the Buyer so requests, but Seller makes no warranty in this regard.

Bromeliad sent a copy of this form to Fiori with a letter, thanking Fiori for her order and stating that "the plants as

listed on the enclosed form will be delivered to you on or before May 5."

In due course, Brooklyn Bridge shipped the plants, and Fiori received them on May 4. Upon inspection, Fiori discovered that about 1/2 of the plants were not in bloom and that most of those probably would not come into bloom until after Mother's Day. Although she would like to accept and pay for the plants in bloom and reject the rest, she decided she should consult her lawyer before taking this action. She therefore called Latifah Llewellyn, her lawyer, and sent her copies of the various documents and sought her advice.

Latifah Llewellyn is your boss. She has turned over the matter to you, saying: "I believe that Fiori can accept the plants in bloom and reject the rest if there was a contract and paragraph 6 was part of it. As part of your analysis, you should discuss the legal effect of each of the communications that passed between the parties, as well as the legal effect of the shipment of the plants."

Please write the memorandum requested by Llewellyn.

END OF QUESTION TWO

Question Three

15 Minutes

BEGIN THIS ANSWER IN A NEW BLUEBOOK. INCLUDE YOUR ANSWERS TO QUESTIONS THREE AND FOUR IN THE SAME BLUEBOOK.

Schumpeter is an economics professor who is preparing to retire. He is also a bit absent-minded, and Byer knows of one instance of this ten years before. Also, Byer knows that Schumpeter has a collection of rare books that he keeps at home. On Tuesday, 5 May, Schumpeter spoke with Byer. Schumpeter said to her, "I'll sell you my academic library in my office for $20,000, journals and all." Byer, after looking over the shelves, said: "It's a deal." At the time that Schumpeter made the above statement, he had forgotten that his favorite copy of Adam Smith's <u>The Wealth of Nations</u> -- a rare, valuable first edition -- was in his office rather than at his home. Schumpeter had had no intention of selling this book. Byer, however, insists that the deal includes this book. Is Byer correct? Explain.

END OF QUESTION THREE

Question Four

INCLUDE THIS ANSWER IN THE BLUEBOOK THAT CONTAINS YOUR ANSWER TO QUESTION TWO

40 Minutes

Carborundum Company manufactures FerroCarbon, an abrasive powder used in the process of manufacturing steel. To serve its customers in the upper Midwest, in 1979 Carborundum entered into a three year contract with Lakeriver Corporation by which Lakeriver agreed to provide distribution services for FerroCarbon from its warehouse in Illinois. Lakeriver agreed, for a fee, to receive FerroCarbon in bulk from Carborundum Company, bag it, and ship the bagged product to Carborundum's customers at Carborundum's request.

As part of this contract Lakeriver agreed to install a new bagging system to handle its responsibilities under the Carborundum contract. The new system cost $89,000. Lakeriver expected to recover this cost during the term of the contract and in addition expected to earn a profit equal to 20 percent of the value of the FerroCarbon it handled. This goal was effectuated by the insertion of a minimum quantity guarantee in the written contract:

> In consideration of the installation of the bagging system to be acquired and furnished by Lakeriver for handling the product, Carborundum shall, during the initial three year term of this Agreement, ship to Lakeriver for bagging a minimum of 22,500 tons of the product. If, at the end of the three year term, the minimum quantity shall not have been shipped, Lakeriver shall invoice Carborundum at the contract rate for the difference between the quantity bagged and the minimum guaranteed, and Carborundum shall promptly pay the amount so stated in the invoice.

Market conditions changed dramatically shortly after the contract was signed. Two foreign producers of abrasive powders introduced powders that competed directly with FerroCarbon at attractive prices. Also the decline in American steel production accelerated because of foreign competition and depressed economic activity. As a result, when the contract expired in 1982 Carborundum had stripped only 1,000 tons of FerroCarbon, for which it had paid Lakeriver $24,400 for bagging and delivery. In 1982, Lakeriver invoiced Carborundum for the 21,500 tons difference between the guaranteed amount and the amount actually shipped. At the contract rate, Carborundum owed an additional $524,600 for the amount not shipped. Carborundum refused to pay this or any other amount and Lakeriver sues for breach of contract.

QUESTION FOUR CONTINUES NEXT PAGE

Question Four, Continued

A. What defenses might Carborundum interpose against Lakeriver's claim, and what are the chances that those defenses will succeed?

B. If Lakeriver may not recover $524,600, what amount, if any, may it recover?

END OF QUESTION FOUR

END OF EXAMINATION

M E M O R A N D U M

TO: Contracts Students, Section Three

FROM: Thomas D. Russell

DATE: 7 August 1992

SUBJECT: Final Grades

The distribution of raw scores and grades in the course was as follows:

Raw Score	Grade	Number
>210	A+	2
176-210	A	10
168.5-175.5	A-	12
160-168	B+	14
149.5-159.5	B	20
140-149	B-	15
129-139.5	C+	9
105.5-128.5	C	10
61.5-105	D	4
≤ 61	F	1

Final grades are based on the sum of the midterm and final exam raw scores. The point totals for the four final exam questions appear on the front of the bluebook. The final raw score for the course equals the sum of the the final exam question scores plus the midterm raw score.

Raw scores on the final examination questions ranged as follows:

Question	Low	High
1	21	68
2	7	63
3	2	31
4	9	50

Total scores on the final ranged from 66 to 172, with a mean of 124.1 and a median of 125.

Attached are student answers to each of the four final exam questions. Each student answer was high-scoring, though not always the highest scoring answer in the class.

Thank you and good luck.

STUDENT ANSWER
QUESTION ONE

[This answer received 68 points.]

The predominant thing bargained for between Carp and Plummer was the installation of plumbing. Application of the Bonebrake balancing test depicts this deal as an arrangement for services while the goods--here pipe--is secondary to the need for professional installation. Principles derived from the common law as presented in the Restatements apply, however, a court may also choose to apply the principles set forth in the UCC.

Under the common law statute of frauds, this contract may be performed within a year which is sufficient to satisfy a liberal statute. There is evidence of writing which would also satisfy the UCC statute of frauds, 2-201.

(1) The bid that Plummer submitted on Nov. 20 presented terms sufficient to constitute an offer that limited Plummer's capability of being bound to it only by a formal acceptance. R, §30(2) allows Plummer (P) to choose the form of acceptance of his offer and under a traditional common law approach P is the master of his offer and may revoke at any time before acceptance. At one time, P may have been able to revoke his offer without further liability based on a concept of lack of consideration on behalf of Carp (C) and hence, no mutuality.

The principles of contract law have changed, however, and adapted themselves more readily to such real world situations. R, §87(2) affects this type of deal, and construction bids in particular, by creating an option K where the offeror should reasonably expect action or forebearance on the part of the offeree and which actually does, limited as justice requires. The customary practice of collecting bids from sub-contractors before a general contractor bids on the proposal has converted the traditional master-of-the-offer' rule into a type of firm offer that may be accepted within a reasonable time, but without obligation to do so.

Carp is hindered somewhat because he must show that he actually relied on the P bid. C may show that through the course of dealing between the two, P should reasonably expect that C likes P's work and thinks the price is right. Because C has dealt with P numerous previous times P may suspect that C is likely to award the job to P or maybe even that P's silence,through the course of dealing, may be an acceptance, §69. C did forego the opportunity to solicit other bids once he received P's bid which may, in certain circumstances, lead to reliance under §87(2) regardless of the offer's express requirement of formal acceptance.

C, however, never mentioned, apparently, anything to P, nor did give P the opportunity to do the work as offered. C may have to protest, as in U.S. for Crane, then continue with his obligations because his secret intentions to correct the situation later may be too late. UCC 1-207 requires good faith in such dealings.

C's ongoing and continuing relationship w/P may be more important than a damage remedy, but C may first seek expectation which would award C the additional cost of the second subcontractor ($135,000-$126,700) to put him in the position if a breach had not occurred. 87(2) requires limits as justice requires, and if C were awarded a remedy, although unlikely, he may receive reliance damages which would be very nearly equivalent to the damages just mentioned.

(2) As before in (1), P is the master of his offer and may revoke before acceptance, however, reliance on an offer under 87(2) may limit that ability. Carp must still show reliance on the offer to recover, however, several conditions present some difficulty.

First, P may argue that it was not foreseeable that C would suffer such a large profit loss merely because P pulled their bid before the deadline. P may have suspected that C solicited and received other bids some of which could have been lower than P's. P was not assured of receiving the job. However, the course of dealing between the two may have created a type of partnership in which P should expect acceptance from C whenever P's bid is fair. C certainly thought that way since he did not seek other bids for the plumbing work. Still, P may not have foreseen the losses.

Second, C will not have a decent claim of duress since C put themself in the position of having only one plumbing bid, but C may have a remote chance of claiming bad faith on behalf of P. The previous deals between the two, in a very weak sense may have created a type of implied requirements contract in which C gave all his plumbing work to P and P must use best efforts and good faith to fulfill C's needs, 2-306. However, such a claim is very weak and the argument might not cut both ways, i.e., P's claim of breach of best efforts if C had awarded the plumbing contract to someone else.

Finally, as meager as it may be, C's best claim might lie in a §90 reliance argument. Here, as in Hoffman v. RedOwl an agreement was never reached, but a breach of good faith may justify an award of reliance damages to C. C's biggest problem, however, is that he did not propose a bid on the school project and did not subject himself to any liability or losses. §90 is very reluctant in allowing expectation damages and C cannot show any substantial out-of-pocket expenses in reliance on P's bid.

(3)(a) UCC 2-209 allows a liberal modification of contracts and C may have several claims of varying plausibility:

First, C may argue that P had a pre-existing duty to complete the work at $126,700. Such a claim had substantial merit in days when pirates extorted extra pay from the ships's captain, however, the modern trend accepted by both the UCC and Rsts is to allow renegotiation of deals and KS. The element of duress is hardly as existent between respectable business persons and liberal modification is allowed, §89. This argument may be unpersuasive.

Second, the offer proposed a merger clause of the deal. The parol evidence rule would bar some prior negotiations, however, subsequent modifications are permitted regardless of whether the agreement is partially or completely integrated.

Third, P made a clerical error which may be corrected if done promptly, Elsinore. However, there is little difficulty in fulfilling the higher standard of showing it was an honest or harmless error because the contract was modified regardless.

Fourth, C could have performed under protest, but did not. The agreement to an additional $1000 should stand. The previous writing, as noted before, satisfies the statute of frauds.

(3)(b) Here, P may show that the mistake was an honest clerical error and may be entitled to correct it if done promptly, Elsinore. If, however, Carp can show that the original price, should stand and that P breached by not performing he will be entitled to some expectation damages. These damages will be limited, however, if Carp cannot show that the $131K was a reasonable price for 'cover.' Obviously, P was willing to do the job for $127,700 and will claim that they shouldn't have to pay the difference. Carp must show a reasonable mitigation of the damages to recover the additional cost from P only after C has shown breach as stated above.

(4) Carp must pass two hurdles to recover any money. Carp must show that he didn't orally relieve P of his time obligation and C may also show the liquidated damages were punitive.

First, the offer contained a merger clause. If the agreement is found to be completely integrated it will bar any dealings within its scope, if partially integrated it bar any inconsistent terms (UCC 2-202 provides escape to common law under 1-103: mistake, duress, . . .)

P will focus on the oral extention as a collateral agreement--something that would not be in the writing which is an unlikely event. Time might normally be in the agreement.

The modification was made before the k, presenting great difficulty. Evidence of fraud is always permitted regardless of the strictness of the PER (determined by jurisdiction and may be strict-williston for liberal (anything allowed) Corbin approach. P will claim fraud as an exception to the PER to admit evidence of the oral arrangement.

Second, liquidated damages clauses are unenforceable if thought to be punitive and if no actual damages are shown (eg racetrack unfinished but hasn't gotten operating license so no real damages--12, 2, §356) they may be excused. C could try to recover money from state, UCC 2-718(3).

STUDENT ANSWER
QUESTION TWO

[This answer received 63 points.]

This K is within the UCC plants are goods. This K is NOT void by statute of Fraud because there is written forms (maybe NOT O.K. though).

First Form analyzed letter in catalog:

The rules of offer and accept make clear that an ad is NOT an offer. There are exceptions (for ex. 200 daiseys for $1 ea) BUT the Bremeliad ad does NOT meet such exception and ... is NOT the offer.

F's Mar 1 order:

F's order is likely to be found to be an offer. It is a "manifestation of willingness to enter into a bargain." (§24) The offer is complete in that it gives price, quantity, date of delivery. A real problem with F's form, and this is where our Battle of the Forms" begins, is that it requires B's acceptance to be "expressly conditional on F's assent to [all terms on back, etc]." This includes ¶6. Such a statement requires F to agree to all additions and differing terms within B's acceptance. If there is no such assent given, NO K will result and the only possibility of an enforceable K is performance (2-207(3)) by the parties, and as we will see, this is not clearly done either.

B's Mar 3 form:

B transferred all the "relevant" data to her own form upon receipt of F's offer. F added her own clause which also required F's acceptance to comply with B's assent. B also included a clause on the back about "bloom" on a warranty disclaimer [covered below]. She then sent this "acceptance" to F.

B's performance:

B performed by sending the plants BUT F has not yet accepted.

Was ¶6 part of the K?

¶6 was not agreed to by B. In fact, it appears that B did NOT even read ¶6. But since F's form required B's acceptance of all F's terms unless assented to by F, it would appear that not only was ¶6 not part of the K, BUT that no K even was formed.

At CL, the last form would rule, and ¶6 would NOT be part of K. BUT since our jurisdiction uses the UCC and my boss is probably related to the UCC's writer, we turn to §2-207 for guidance. UCC rejects the "mirror image rule" and instead looks at each form. Any of B's terms which were additional or different from those contained in F's offer would be seen as proposals under normal circumstances. BUT in our situation, F clearly reserved right to assent to such "different or additional" terms and clearly she has NOT at this point. UCC lets "first form" rule in that it is the basis of the K, and the proposals of 2nd form are either incorporated or thrown out according to 2-207(2) and Comm. 4. The Offer limited acceptance to the offer's terms and 2-207(2)(a) would suggest that none of B's "proposals" are part of the K.

Did a K exist?

Since the acceptance by B would fail under §2-207(2) we have 2 options: 1 F could assent to B's terms, BUT as her attorney I would suggest she NOT do such since we may collect damages later or 2 we could see if 2-207(3) turns out forms into a K due to performance. B clearly performed by shipping the plants BUT F has not accepted them NOR paid for them yet. While the plants were shipped, full performance would require F's acceptance and this has NOT been given. 2-207(3) requires "conduct by both parties which recognzies the existence of a K."

F's rights at this point:

F could just reject and be free of any obligation since no K exists BUT since Mother's Day is almost here, I would tell F to go ahead and accept the part of the plants that are in bloom and reject the rest. 2-601 gives F the right to reject the nonconforming plants (vestage of Perfect Tender Rule) and accept the ones that do conform. B could cure under 2-508. If B can't cure, and this may be a problem since Mother's Day is close at hand, B could resort to remedies under 2-711. F should probably choose to cover and get: cover price - K price & incidentals & consequences = expenses saved.

Warranty disclaimed

Since my analysis suggests that a K did NOT exist, this disclaimer does NOT need attention, BUT in case my boss determines a K does exist, analysis here may be later necessary.

Warranties are disclaimed under 3-316. The warranty disclaimed is most likely an "express warrant" since the catalog gave a description. It may also disclaim implied Warrant of Merchant. This disclaimer is likely to be found inoperative since:

Express Warrant we don't want merchants to later disclaim "truths" earlier told. Parol Evidence Rule may not solve our problems, BUT a court is likely to go with our first argument "illogical" to disclaim truths told.

1 WM disclaimer was NOT conspicuous and did NOT mention "merchantability."

B's Defenses

B may argue that ¶6 was on the back of F's form and she did NOT see it. She may also argue that her performance was complete performance and 2-207(3) makes form a valid K.

STUDENT ANSWER
QUESTION THREE

[This answer received 20 points.]

Buyer may be incorrect. S has five arguments that the K should not be binding. Intent: Statute of Fraud, and unilateral mistake. Note that this is UCC §2-105--movable goods.

Intent. A lot depends, again (§1-103, mistake, intent allowed in) on the outlook of the court. Willisham/Holmes outlook would find a K because of the objective manifestations of assent between B & S. S clearly said what any objective person interpret as an offer to sell his entire academic library, and B accepted. A Corbin-like court might allow S's intent as to determine what he truly meant. In this argument §20(2)(b) comes into play. In this case, S may attach a different meaning to "academic library" than B is asserting--then "academic library" doesn't include the Smith book. Also B had reason to know this since he knews that S has a valuable collection of books, and here reason to know S wouldn't sell them. This question comes down to how the jury decides. -- note that S may cause sympathy. Interpretation issues--about the same as intent.

Statute of Frauds. Under §2-201(1) an agreement for greater than $500.00 is not enforceable unless a signed writing listing at least the quantity exists. There is no writing here, only an oral K. S could get out of the K unless he admits the existence of the contract in court by pleading or otherwise 2-201(3)(b).

This may be where morality and law diverge --S may have to deny the whole K on basis of SoF to get his Smith book. B may be able to plead reliance if there is any, but it only applies to specially manufactured goods §2-201(3)(a). B may try a CL escape hatch §1-103 to allow the "essential reliance" rule in, but he would have to 1 prove such reliance--none is given in the facts--and 2 get the court to buy it in the face of the [illegible] §2-201. S has a good chance of success on §2-201 if he pleads SoF.

Finally, S can plead mistake--that he was mistaken and that enforcement would be unconscionable. Under §1-103, CL mistake rules supplement the UCC. S could argue §153, that he made a mistake as to the nature of the "academic library" and that enforcing it would be uncconscionable. Again S might cause sympathy with the jury on the "unconscionable" idea. A lot may depend on whether the court requires strict unconscionability or a lower "[illegible]" standard as in Elsinore. Alternatively, S could plead §161(d)--that the relationship between B & S created a duty upon B to inform him of the Smith book (Feist) B may also argue §161(b)--duty to

disclose about a basic assumption, the assumption being that the academic library only contains office books, not books from home.

B would have a hard time enforcing the promise at all, and if he could enforce it generally, what interpretation would probably allow exclusion of the Smith book. Finally, note the strategic choice: to plead intent and mistake, S would have to forego his SoF clause, because he would be admitting the existence of the K and vice versa.

STUDENT ANSWER
QUESTION FOUR

[This answer received 50 points.]

A

This case involves a service and not a good. Therefore, UCC doesn't apply, but if it did 2-306 would impose a best efforts requirement on each party in an exclusive dealings K. Defendant may not assert Statute of Frauds since there is a writing, and there appears to be no defenses to formation under offer and acceptance as under consideration.

Defendant may assert many defenses, with varying degrees of anticipated success. First, defendant may assert that orders were down and that he is not required to perform if due to circumstances outside his control and unrelated to the K. This is in line with Posner's good faith analysis of requirements K's in Empire Gas. Plaintiff will assert that the written K allocated the risk of that loss to defendant, regardless of its cause as source. Defendant will also argue that plaintiff wants merely to avoid paying its obligations and is acting in bad faith. The court will probably give great weight to the writing in this point and find against defendant.

Defendant may argue that the K provision services as a penalty clause. Defendant will argue that the liquidation damages were not a reasonable estimate of the damages that have resulted and that the damages could have been subject to calculation (limited primarily to reliance damages). Defendant will counter that the liquidated damage amount was a good estimate of value at the time the K was made and that the assurance of minimum payments is what induced defendant to enter the K. Thus the liquidation damages clause was reasonable. Defendant may have more success with this defense if he can convince the court that the estimate was unreasonable, especially given its large amount after the breach. (Defendant may try to get the court to do UCC analysis (2-718) of reasonableness at time of K as with respect to actual damages).

Defendant may also assert a defense of impossibility. He may argue, as outlined in Transatlantic, that an unforeseen contingency (foreign competition) occurred, that the risk had not been allocated by agreement and custom, and that the contingency made performance commercially unreasonable. Plaintiff will have strong counter arguments. Plaintiff will argue that defendant is in the business and should have foreseen foreign competition. Further, defendant got the risk of loss in the written K, and, while performance may be commercially unreasonable, the standard to judge is insolvency. Defendant will likely fail on this claim in the face of plaintiff's arguments.

Defendant may argue that he used best efforts to comply but could not. Plaintiff will argue that Feld requires that mere financial difficulty is insufficient to establish breach and that defendant must go to the brink of insolvency. Defendant may counter that enforcement would be unconscionable (using UCC 2-302 as reference) because the amount is so large and he could be financially ruined. Depending on how the court views the size of defendant, the relationship between plaintiff and defendant, and the importance of maximizing efficiency, the court may go with defendant on this argument.

Overall, however, defendant's defenses are weak.

B

Defendant - The absence of K enforcement, plaintiff may argue for

1 expectation damages

The cost of the bag machine and the 20% of anticipated volume profit they expected plus any profits from other jobs they couldn't perform (if foreseeable and in contemplation of parties at time of K--Hadly)

2

Reliance damages -- $89,000 and I they spent in reliance on the K.

3

Plaintiff probably can't get restitution since no value seemed to pass to defendant.

4

Plaintiff can't get specific performance because of court difficulty in enforcement and adequacy of legal remedies.