Fall 1978

QUESTION NO. 12

Expo, a promoter of musical performances, contracted -with Rock, a little-known music group, to play a concert at College Center for a fee of S5,000. Subsequently, Rock released a record which was a commercial success and has resulted in a high demand for the group. Rock thereafter indicated to Expo that it would abide by the contract, and advance sales have been heavy.

Two weeks before the scheduled concert. Rock notified Expo by letter that it would not perform the scheduled concert. In explanation it enclosed a copy of a letter from Magnus urging Rock to break its contract with Expo and to perform for Magnus on the scheduled date in nearby City for a fee of $50,000. Magnus is now advertising the Rock performance in City.

Expo cannot now obtain another act which can successfully compete for an audience with the City concert. Expo is also faced with the necessity of refunding money received from advance ticket sales, loss of S3,500 spent in preparation for the Rock performance, loss of an estimated $15.000 net profit based on an anticipated capacity
audience, and loss of goodwill which could destroy its business.

Magnus will net $75,000 from the City concert.

To what relief, if any, is Expo entitled:

(1) Against Rock? Discuss.

(2) Against Magnus? Discuss.

Answer A to Question 12

(1.) The Rock Contract

Expo and Rock seem to clearly have a binding, executory bilateral contract. The terms are clear and each party has promised valuable consideration (Expo $5,000, Rock its performance). Even after circumstances might have called for renegotiation (Expo's windfall in having a famous group play so cheaply), Rock assured Expo it would perform.

Rock has now materially breached the contract by unequivocal advance repudiation, by informing Expo it will not play. Expo has an immediate cause of action for damages and for enforcement of the contract.

Damages. To be recoverable damages must be actual, foreseeable (under Hadley v. Baxendale), unavoidable and certain. Expo claims four separate elements of damage.

Ticket Refunds. The necessity of ticket refunds clearly stems from the breach of contract. It is also foreseeable - certainly Rock would have been on notice, or reasonably foreseen, that Expo would make every effort to sell tickets for the show. It does not seem possible to mitigate these damages (although Expo will try to cover by securing another group, Rock fans will probably have the right to a refund, since they contracted to see Rock) and they can be certainly calculated. Rock is liable for the refunds.

The $3,500 preparation costs were made in reliance on the contract that now has been breached. The question of foreseeability centers on facts: were the expenses reasonable and necessary; of the type Rock would expect Expo to expend; did the contract mention advertising, etc. Probably these reliance damages were foreseeable. (Courts are more generous now than they were in the day of the old Pavillion case). Reliance damages - especially ones that are unique (advertising, etc.) can seldom be mitigated. They are certain. (See below for double/ recovery discussion.)

The $15,000 profit. The reason for contract damages is to put the innocent victim in as good a place as he would have been had the contract been performed. Clearly profit **loss** is a foreseeable and anticipated result of a material breach. There are sometimes problems with certainty.

The problem here is to analyze what Expo is getting. Expo has had to return the pre-sale ticket money to fans. It does not suffer a net loss on this (except for incidental expenses) - it is just back at zero. If Rock pays Expo this amount of money, Expo then has the money it would have used to cover its reliances expenses and from which it would take its profits. It is now excused from paying Rock and putting on the concert, but of course it loses any further ticket sales. Expo can get the ticket money, or reliance and profits. They are the
same thing, and Expo can't recover twice.

The problem with loss of goodwill is measuring it with certainty. It is an ephemeral concept; some courts will take evidence on it and others won't. If Expo is a going business and can show a net loss of customers from earlier times it may be able to recover. If it is a new business, there is little chance of recovery.

Rock may be said to be unjustly enriched by its breach, since the breach enabled it to contract with Magnus. However, this enrichment did not come from Expo, and it is not entitled to restitution.

Specific Performance

Modern courts are often willing to grant specific performance where a contract is definite and certain, legal remedies are inadequate, enforcement is feasible, remedies mutual, and there are no defenses.

Here there is a definite contract. Legal damages are not adequate - Expo probably will not cover loss of goodwill, and the service contracted for is unique. Mutuality is no problem (if Rock played, the court would order that they be paid) and Rock appears to have no defenses.

The problem here is with the feasibility of the court ordering and supervising the performance. Courts are unwilling to enforce personal service contracts. There is simply no guarantee that the court could make Rock show up, play, or play well. It is too tenuous and subjective a type of performance for the court to put Rock into danger of contempt if it does not perform adequately. It would be a type of servitude.

However, the court will imply into the contract a negative covenant for Rock not to compete. Here there is no feasibility problem - the court will simply imply from the unique personal nature of the service that the contract contained a covenant not to play nearby on the same day. The court will enjoin Rock from performing at the Magnus concert.

(2.) Remedies Against Magnus

There is no contract between Expo and Magnus. However, Expo has an action in tort against Magnus for tortious interference with contract.

It is clear that Magnus intentionally and purposely induced Rock to break the contract with Expo, which Magnus knew about. This makes a prima facie case against Magnus for intentional tortious interference with contract.

At one time courts limited recovery under this tort to the actual contract damages. However, modern courts now allow all actual damages which are unavoidable and foreseeable under the more lenient tort test of proximate cause. Thus Expo could recover not only the contract damages determined to be recoverable (above), but also any other damages proximately caused by the breach. This might allow recovery for the loss of goodwill (which Magnus could foresee and might even have intended to create), since courts are more lenient about allowing juries to set the amount of tort damages.

The fact that Magnus' act was intentional also leaves it open to a recovery of punitive damages, for the purpose of deterring such wrongful conduct. (The punitives may have to have a rational relationship, with the actual damages).

The court will also be willing to enjoin the wrongful conduct.

Legal remedies may be characterized as inadequate, because of the unique nature of the contract interfered with, and the fact that Magnus' putting on the Rock concert when Expo cannot, will irreparably injure Expo's reputation. Some courts still require that a property right be involved for an injunction to issue. Most courts have either expanded the property concept to cover situations such as this, or have dropped it entirely. There is no problem of enforceability, since as above, the court will simply enter a negative order to stop Magnus from interfering with the Rock/Expo contract. (This would entail cancelling the same d[a]y concert). Courts seldom balance hardships where the tort is intention

It is unlikely that Magnus has any defenses. They may claim a free speech right to put on a concert, but they had no right to have the concert the same day as Rock was supposed to play for Expo.

Alternatively, the court might let the concert go on but impose a constructive trust

on the- profits of Magnus. The court could say that Magnus took wrongful title to the money only by injuring Expo. This recovery would probably be limited to the extent of Expo's own lost/expected profits.

Answer B to Question 12

Expo v. Rock

Rock's letter to Expo amounted to an anticipatory repudiation of the contract because it unequivocally communicated to Expo Rock's intention to refuse to perform. An anticipatory repudiation accelerates Rock's duty to perform and thus such failure to perform constitutes a breach of the contract.

There are two alternative avenues of remedies that Expo might pursue. First, Expo might attempt to recover damages, and secondly, Expo may try to get equitable relief in the form of an injunction.

To recover damages for breach of contract, such damages must be certain, foreseeable, causal, and unavoidable. There are four specific items of recovery that are in issue. First, there's an issue involving the return of the advance ticket sales receipts. However, since such return will not involve any loss because Expo is only returning an item which to date is unearned, there are no damages. However, the cost involved in administering this return of tickets would be recoverable since it is foreseeable to both parties that any breach by Rock would cause a return of the advance ticket receipts. Thus such costs would be recoverable.

The second item of recovery involves the loss of $3500 spent in preparation for the Rock performance. Clearly this loss is causal and certain However, an issue arises as to the foreseeability of such losses. In the case of Hadley v. Baxendale, the rule was established that any damages for breach of contract to be recovered by the injured party must have been foreseeable to the parties at the time the contract was entered into. This normally means that either the breaching party must have been put on express notice of the expediture to be made for the breaching party would foresee such an expenditure due to the very nature of the contract. Was the expenditure of $3500 for preparation foreseeable to Rock when the contract was made? Yes. Although it appears from the facts that Rock did not have express notice of the preparation expenditures, it is reasonable to conclude that Rock would foresee that some preparation would be necessary. Any time a concert is given the promoter will incur preparatory expenses. Since the expenses here don't seem unreasonable in amount, Rock will be liable for such expenses. As long as Rock could foresee preparation expenses it is not necessary that he foresee the exact amount of such expenses. Therefore Rock will be liable for the $3500 in preparation costs for his breach of contract.

The third item of recovery involves the $15,000 loss of profits. Loss of profit is a normal incident of a breach of contract. They are foreseeable under the Hadley v. Baxendale rule (see above). However, one problem here involves the certainty of such profits. The amount of $15,000 is based upon the anticipated capacity of the audience. Therefore, this figure is basically an estimate of anticipated losses. Will such an estimate satisfy the certainty requirement? Yes. Since the advance sales are high and Rock recently become a popular group it is not unreasonable to be able to anticipate what the size of the audience will be. Therefore the estimate is reasonable and the certainty requirement is met. A further issue involves the avoidability of these damages. Although the facts state that Expo cannot get another act which can successfully compete with City's concert, nevertheless any other concert or act put on by Expo on that date will make some money. The injured party under a contract is required to mitigate his damages if possible. Here it appears as though the $15,000 loss in profits could be mitigated to some extent by putting on an alternative performance. Therefore, to recover loss of profits, Expo will be required to put on another show at the College Center on the specified night and any profits made will be used to reduce the prospective loss of $15,000 in profits.

The fourth measure of recovery is the loss of goodwill which could destroy Expo's business. This would not be recoverable. First, the Hadley v. Baxendale requirement is not met since it is not foreseeable to Rock that breach of this contract would destroy the business of Expo. Secondly, the loss of goodwill is very uncertain and difficult to transform into a monetary recovery. Therefore, Rock will not be liable for such loss of

goodwill.

As an alternative to damages, Expo may attempt to seek injunctive relief. One type of injunctive relief may be a negative injunction ordering Rock to perform for Expo. However, since this injunction would force a party to perform activities against his will, the 13th Amendment's prohibition on involuntary servitude prohibits such an injunction.

A more likely approach would be to order a prohibitory injunction preventing Rock from performing for anyone, including Magnus, on the night that is set for the Concert at College Center. Although Rock may argue that such an injunction would prevent him from earning a livelihood, this argument will fail since Rock can perform at Expo's concert (although at a lower fee). Such an injunction is proper here because of the unique character of Rock's services thereby making the legal remedy of damages inadequate. The inadequacy of the legal remedy is emphasized by the fact that Expo will be damaged in his goodwill but will be un
able to recover for such damages.

Furthermore, the older common law requirement that a property right be involved for granting an injunction is no longer needed. Also this injunction would be feasible to enforce and no great hardship is placed on Rock by denying
him to give a concert at anywhere but the College Center. Although Rock may argue that the loss of the big fee for doing the concert for Magnus is a great hardship, such argument will not work since Rock is the intentional breaching party. Since there **are** no defenses against Expo the court would be permitted to
issue such a prohibiting injunction here.

In addition to damages or an injunction, Expo may argue that allowing Rock to breach and then get a $50,000 fee for Magnus's concert amounts to unjust enrichment and Rock should be able to get as another alternative remedy $45,000 which is restitution of the $50,000 minus the $5,000 fee which would have been paid. However, such restitution is not usually applied in the breach of a personal service contract and thereby there is no restitutionary recovery possible.

Expo v. Magnus

Magnus intentionally interfered with the contract between Expo and Rock and thereby induced the breach of contract. Such action constitutes a tort and allows Expo to recover. Again, Expo could recover all damages proximately caused by such inducement of breach of contract which would involve the cost of returning the advance ticket sales, the preparation cost losses and the mitigated loss of profits. (See above.) (It should be noted that Expo will not get a double recovery for these items but one recovery from both Rock and Magnus.)

Furthermore, an injunction prohibiting the Magnus concert would be appropriate since the unique nature of Rock's services makes the legal remedy inadequate. (See above for further discussion of propriety of injunction).

Also, this presents a more adequate situation to give Expo a recovery in restitution for the unjust enrichment Magnus would receive if the concert were to go on and no injunction was ordered. Magnus would be receiving a benefit by wrongfully injuring Expo and thus the restitutionary measure of recovery would be appropriate here.

July 1984

QUESTION 4

Fred is the owner of Fieldacre, a farm and residence located in State F valued at $200,000. Sam, Fred's son, is owner of Snowacre, undeveloped pasture land in State S valued at $25,000.

Fred asked Sam if Snowacre had access to water. Sam replied that he believed there was an underground water source which could be developed. Fred said that, in such event, he could use Snowacre to pasture cattle and that he wanted Sam to have

Fieldacre so Sam could raise Fred's grandchildren on a farm.

On May 1, 1984, Fred offered in writing to deliver to Sam a deed to Fieldacre in exchange for Sam's delivery to Fred of a deed to Snowacre. The offer concluded with the statement: "This offer will remain open until June 1, 1984," and was signed by Fred.

On May 10, 1984, Sam refused an offer from Rob to purchase Snowacre for $35,000. On May 25, 1984, Fred withdrew the offer he had made to Sam, stating that he had discovered there was no water source accessible to Snowacre. On May 28, 1984, Sam delivered to Fred a written acceptance of Fred's offer, together with a deed conveying Snowacre to Fred.

Sam brought suit in State S alleging a contract for the exchange of Snowacre for Fieldacre and his timely delivery to Fred of a deed to Snowacre. He seeks specific performance of Fred's promise to deliver a deed to Fieldacre. Fred made a general appearance in the State S action.

1. Does the State S court have jurisdiction to grant the relief requested? Discuss.

2. What other issues should Fred raise in defending the action and how should the court rule on each of them? Discuss.

ANSWER A TO QUESTION 4

1. Jurisdiction

The State S court must have both personal and subject matter jurisdiction in order to hear this case.

State courts have general subject matter jurisdiction, and can hear almost any kind of case unless there is exclusively federal jurisdiction. A contract action regarding the sale or exchange of land located within the jurisdiction of the court is certainly a proper matter.

Personal jurisdiction must be based, first, on the existence of an appropriate statute (not referred to in the question) , and it must also meet federal due process requirements. The first, statutory requirement, is probably met by in rem jurisdiction as far as Sam's (S's) property in State S is concerned, as the court has in rem jurisdiction to determine the rights against all the world in property located within its jurisdiction. Although the court probably has no direct jurisdiction over the land in State F, if a long-arm or other state jurisdictional statute gives jurisdiction and the statute complies with federal due process, the court may be able to gain control of title to that land by enforcing its judgment of specific performance and contempt against a non-complying Fred (F).

Again, assuming F is subject to State S's jurisdiction under State S's statutory law, due process requires that F have minimum contacts with State S and notice. Minimum contacts is determined by looking at the quantity and quality of the acts F has performed in or affecting State S (here contracting to acquire State S land from a State S citizen) , the relationship between those acts and the action (here the action is for a breach of the contract regarding State S land and a State S citizen) , whether F has voluntarily sought or availed himself of the protection and benefits of State S (probably not on these facts), and how foreseeable it was that F would be sued in State S (it was probably foreseeable based on the fact that F may have breached a contract to acquire State S land from a State S citizen) . Given these facts, it is likely that the court will find sufficient minimum contacts by F with State S to support personal jurisdiction. In addition, F must have sufficient notice to warn him of the suit against him. Although the facts do not state whether he was appropriately served, personal service would probably be both necessary and sufficient to meet this requirement. Thus, the State S court should have personal jurisdiction over F.

Note: even if the State S court finds that the above analysis does not confer personal jurisdiction on F, F has waived his right to object to lack of personal jurisdiction by making a general appearance in a State S court to defend the action. This is an objection that must be made as soon as possible or it is waived. On this basis, the court definitely has personal jurisdiction over F.

There is also a question whether the court has the power to order specific performance of a contract to convey land in State F. This is discussed below in connection with F's defenses to specific performance.

2. F's Defenses

F has a number of possible defenses to this action. First, he may assert that he revoked his offer before it was accepted. S will assert that the offer was to remain open until June 1, and that F has no power to revoke it before that time.

The general rule is that offers are revocable by the offeror unless they fit within a certain exception (e.g., firm offers for the sale of goods by merchants, option contracts for

which consideration is paid, etc.) . Since there was no consideration paid and F was not a merchant, and since most of the other possible bases of making the offer irrevocable are similarly inapplicable, F will win on this issue unless S can show that there was a consideration substitute to make the promise an irrevocable option contract. Here, there was such a consideration substitute: S reasonably and foreseeably relied and changed his position in reliance on F's offer when he rejected Rob's offer to purchase Snowacre for 10,000 dollars more than it-, apparent value. Thus, the court probably will and should rule that F's offer to keep the offer open was an option contract supported by a consideration substitute that could not be revoked until June 1. F's attempted revocation on May 25 would therefore be held ineffective.

However, F may also raise the defense of frustration of purpose, which may discharge his duty to perform. The requirements are that both the parties must have known what the purpose of the contract was (here they did both know that F wanted the land to pasture cattle) , and that an unforeseen and unforeseeable event or condition destroyed the value to one party of the performance required by the contract (here the lack of water clearly destroyed the value of Snowacre to F) . The only question is whether it was foreseen (the facts indicate that it was not) or foreseeable. The facts indicate that S merely said that he "believed" that there was an underground water source on Snowacre; under these circumstances it might be foreseeable that there was no such water source, and it may have been unreasonable for F to rely on that statement without having the land checked by a water expert. This is a close question, but since F also had another purpose for making the contract (to ensure that his grandchildren grew up on a farm) , the court should probably rifle that there was not a sufficient frustration of the value of performance to F, even if the water problem is held to be foreseeable, to meet the stringent requirements for frustration of purpose as a defense to enforcing contract duties.

F might also defend on the basis that the contract was unconscionable, given the great disparity in the value of the two parcels being exchanged. However, given the fact that there was no disparity in bargaining power (in spite of the confidential relationship between father and son) , and the fact that the exchange and offer were F's ideas, and there is nothing in the facts to indicate that S tried to deliberately coerce or take advantage of F, the court should rule that the contract is not unconscionable.

F might also raise fraud as a defense, for which he would have to prove a misrepresentation of a material fact (or an omission where, as here, there was a duty to disclose given the close confidential relationship between the parties) , reasonable, actual reliance by F on the misrepresentation, causation (actual reliance) , an intent by S to create such reliance, and scienter. The last requirement will probably eliminate this defense, since there is nothing in the facts to indicate that S was lying or being reckless when he made the statement that he believed there was an underground water source on Snowacre .

Finally, F can raise defenses to specific performance. Specific performance is appropriate only when legal remedies are inadequate (they are always considered inadequate when a contract to buy or sell land is concerned) , when the contract is definite and certain enough that the court can determine what to order (true here--order an exchange of two identified parcels of property) , when there is mutuality of remedies (the modern approach is merely mutuality of performance, and since the court clearly has the power to order S to convey Snowacre, land within its jurisdiction, this requirement is met) , there are no defenses such as laches or unclean hands (there do not appear to be any suggested by the facts) , and when such a remedy is

feasible to enforce. This is the major problem here (and it relates to the "jurisdiction" question answered in part above) . Since the land that the court would have to order conveyed is out of the jurisdiction of the court (Fieldacre) , the court would not ordinarily be able to order it conveyed. However, where, as here, the court has personal jurisdiction over the owner of the out-of-state land, it is feasible to enforce the order by using the contempt power against the party who refuses to convey the out-of-state land. Therefore, the court should rule against F's allegation that specific performance should not be allowed.

ANSWER B TO QUESTION 4

State S Jurisdiction

The court in State S must have subject matter jurisdiction, personal jurisdiction and the ability to give the relief requested or they will not hear the case.

As to the subject matter, the issue is whether Sam's request for equitable relief (specific performance) is proper. In order to properly obtain equity jurisdiction, there must be an inadequate remedy at law. It is presumed that where land is involved, damages will never be adequate as land is unique and no amount of damages can adequately compensate a party for the loss of a unique piece of land.

In this case, Sam is seeking to make Fred perform his promise to deliver a deed to a piece of land (Fieldacre) , so it is unique and there is no adequate remedy at law. Sam is proper in seeking equitable relief.

The issue of personal jurisdiction is no problem because the facts state that Fred made a general appearance--meaning he did not dispute the court's jurisdiction over him.

The most important hurdle for Sam is whether the State S court can grant the relief requested. It is said that equity acts in personam, or on the person not the property. The property in this case is located in State F, so state S could not act directly on the property outside State S. However, equity could act against Fred. The equity court in State S has the power to make Fred transfer the property in State F.

As State S has personal jurisdiction over Fred, they have jurisdiction to make a binding order against him, under penalty of contempt if he fails to comply. Using their power to hold him in contempt, they may throw him in jail until he complies. This is civil contempt and the keys to the jail are in his pocket as he can get out when he complies.

Because equity jurisdiction is applied against persons and because it can be backed up by contempt (civil or criminal) , the court in State S would have jurisdiction to grant specific performance in this action.

Fred's defenses to the action for specific performance

As Fred is in equity court, all of the equitable defenses would be applicable. The defenses of unclean hands and laches probably wouldn't serve Fred here because Sam didn't wait too long to bring the action and Sam's hands are basically clean. Although Sam did say that he thought there was underground water source--which may prevent his success in this action if he knew there wasn't and intentionally misrepresented that there was to Fred--nothing in the facts says he was intentional or even negligent in his representation, so he would probably not be barred by the equitable defenses.

Fred also may apply any of the basic contract defenses to this action by Sam. The first issue he may raise is whether his discovery that there was no water is sufficient to show frustration of purpose. If both parties are aware of the purpose of the contract and that purpose may no longer be served due to no fault of either party, the contract may be rescinded. As Fred asked first thing if there was water and stated up front that he wanted to use the land to graze cattle, clearly both parties were aware of the purpose for which he made the deal. If this was the sole purpose for the deal, the contract would be rescinded for a frustration of that purpose.

However, Fred stated another purpose; that is, that he wanted his grandchildren to be raised on a farm. This purpose is not frustrated by the lack of water on the other land and if a major purpose of Fred's, may be enough for Sam to show that there was no frustration of purpose.

Fred would also attack the very contract itself as Fred's promise to hold it open was given for no consideration by Sam. A promise to keep an offer open is revocable, despite its language that is not, unless there is consideration given for it, or it can be considered a firm offer under the U C C. As neither party is merchant here and the contract is not for the sale of goods, the U C C firm offer wouldn't apply.

Fred made the offer in writing on May Ist, saying he would keep it open until June 1st. However, Sam paid no consideration for the promise by Fred to keep it open. As such, the offer is revocable until it is accepted by Sam.

Fred revoked the offer on May 25, before any acceptance by Sam. The revocation is effective when Sam became aware of it, or at least received it. The facts imply that Sam received notice on the same day, May 25. At the time Fred revoked, he took the power of acceptance away from Sam. Thus, Sam's acceptance on May 28 was ineffective and no binding contract was created between them at that time.

Since the parties are in equity, the court would be more prone to examine the situation and determine what is fair in spite of the contract rules which provide Sam with no contract relief on the May Ist offer to keep open. In this case, Sam would show that he reasonably, foreseeably and detrimentally relied on the promise to keep the offer open. Sam relied by turning down an offer for $10,000 above the value of his property, depending upon his ability to accept and enforce his contract with Fred.

The equity court may hold the offer open based on an estoppel type theory due to Sam's justified reliance on Fred's promise to hold the offer open. The court will probably rule that the offer was revocable, it was properly revoked before acceptance and thus, there was no binding contract, despite Sam's reliance. In order to use the estoppel theory, the court would be balancing the equities and as Fred wouldn't be getting what he bargained for (pasture land with a water source), they probably wouldn't enforce the promise just due to the reliance of Sam in turning down one slightly profitable offer from another.

The last defense Fred would claim would be unconscionability. . If the deal is, from the beginning, an unfair inequitable one, the court may not uphold it, regardless of its enforceability otherwise. In this case, Fred was trading a farm and residence worth $200,000 for undeveloped pasture land worth $20,000. While a court will not ordinarily look at the consideration to see if it is adequate, as long as it isn't illusory, before they specifically enforce, they may take not of the unfair character of the contract.

The court here would also look at the relationship and purposes before finding the contract unconscionable. Here, it was a father offering a great deal to his son, partially for the benefit of his grandchildren. As such, the court would probably be reluctant to find it unfair, figuring that giving to his son and grandchildren was part of his purpose. Also, the fact that Fred is the one that made the offer would probably deter the court from finding that the deal offered by him was unconscionable with regard to him.

Despite Fred's lack of equitable defenses and the fact that the unconscionable aspects of the contract probably wouldn't help him, the court will probably not specifically enforce the contract due to the frustration of one major purpose and that under contract law the offer was revocable and properly revoked by him before acceptance.

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February 1986
QUESTION 4

Buyer, a builder of industrial plants, requested Seller, one of his regular suppliers, to submit a proposal for supplying a turbine for a plant Buyer was building for Carlson. Several days later, Seller phoned Buyer and offered to produce and install a turbine, pursuant to the specifications Buyer had supplied, at a price to be agreed upon at later time when all of Seller's costs were know. During this telephone conversation, Buyer accepted this offer, "so long as the price does not exceed $400,000," and emphasized that delivery by February 15th was essential, since the turbine was vital to Buyer's completion of the plant. Seller assented to Buyer's response.

The next day, Buyer sent Seller a written confirmation that referred to the specifications Buyer had given Seller, stated the price as "not to exceed $400,000," required delivery by February 15th, provided for damages of $1,000 per day for any delay in delivery, specified "the usual warranties," and stated that "any changes in the terms of this agreement must be in writing." Shortly after receiving this confirmation, Seller began producing the turbine.

On January 15th, Buyer received a letter from Seller requesting a one-month delay in the delivery date. Buyer phoned Seller and, after hearing Seller's reasons for the request, said that a one-month delay in delivery would be acceptable.

On February 20th, Buyer learned from a reliable source that Seller had completed the turbine and was about to sell and deliver it to Ted, another builder, for $430,000.

What are Buyer's rights, and to what relief and remedies, if any, is he entitled? Discuss.

ANSWER A TO QUESTION 4

This is a transaction subject to the UCC as a sale of goods between merchants. Buyer and Seller appear to deal in this type of goods on a regular basis, as evidenced by the "regular suppliers" description. Thus they are merchants with respect to the turbine, even though Buyer is described as a builder. (There is an issue as to whether the agreement is for goods and services, since it includes installation, but the primary element is the turbine itself, and installation is incidental to the sale of the turbine. This answer will treat the transaction as a sale of goods.)

An oral contract was formed during the first phone conversation described. The terms of the contract include the essential elements of time of performance (Feb. 15), subject matter (turbine built to specifications previously supplied by Buyer) and parties (Buyer and Seller). Price is generally an essential term for contract formation, but the UCC permits merchants to form a contract without specifying a price, so long as the parties intend to contract and there is some reasonable way to establish the

price at a later date. Hence, the parties agreed to set the price later, when all of Seller's costs were know, and an upper limit of $400,000 was set. The parties have an obligation under the UCC and evolving law to exercise good faith (honesty in fact in the conduct of the transaction), and Seller in particular would be required to provide the "costs" honestly and in good faith to set the price at a later date. Since the parties have dealt regularly, their course of dealing would be pertinent to interpretation of the cost/price term and the rest of the agreement.

The UCC Statute of Frauds requires a writing, signed by the party to be charged, where the sale of goods is over $500. (Another provision for other types of contracts applies when the transaction exceeds $5,000.) Buyer's written confirmation is probably

sufficient to satisfy the statute as to Buyer. Incorporation by reference is permissible, and there may be more than one writing. Although it is not stated whether Buyer's signature appears on the writing, it would be sufficient if the confirmation appeared on his stationery, or with his initials, or in some other manner reasonably identifying Buyer.

The UCC Statute of Frauds further provides that a written confirmation sent from one merchant to another is sufficient to satisfy the statute as to the recipient (seller in this case) if no objection is received by the sender within ten days. Seller did not object, but instead started to produce the turbine, and the statute is satisfied by the failure to object.

The confirmation purports to modify the agreement by adding a liquidated damages clause and specifying the "usual warranties." The effect of these additions depends on whether they are considered material. They are material if they substantially alter the risk of obligation of either party. "The usual warranties," e.g. merchantability or fitness for particular purpose, and any others established by course of dealing and usage of trade, may not be material if they would be implied contract terms based on the parties' prior history. (In any case, they are not relevant unless Seller actually provides the turbine, which would have to conform to the warranties.)

Liquidated damage clauses are upheld only where actual damages are difficult to predict and the stated figure is a fair and reasonable forecast of damages. If either condition is not met, the clause is void as a penalty and the remaining terms are in force. Unless such clauses are an established part of the course of dealing, the liquidated damage clause substantially alters Seller's risk and is material.

The general rule is that material alterations do not become part of the contract unless the recipient of the modification assents to them. Seller's beginning of production may be viewed as an assent to the new terms, since (a) he is presumed to have received notice of the confirmation, and (b) the new proposal could reasonably be interpreted as calling for an act of performance or a reply. However, such an interpretation would place the burden of reply as to material alterations on the receiver, while the policy of the UCC appears opposite when the alterations are material. Thus the liquidated damage clause is probably not part of the contract.

The UCC permits modification of contracts, in good faith for commercial necessity, without consideration or gross hardship. The request for a one-month delay would have been the basis for modification, except that it is oral and therefore excluded by the Statute of Frauds. The date for performance remains February 15, although Buyer may have waived that provision by allowing the date to pass without acting to assert his rights. In that case, the new date for performance is March 15.

Upon learning of Seller's plan to sell the turbine to Ted, Buyer has the right to demand assurances of performance, at minimum. If such assurances are not provided by Seller within a reasonable time (usually up to 30 days, but less here because of Buyer's urgent need known to Seller, and because of the March 15 performance date), Buyer could sue for breach and begin to attempt cover.

Because we are told that the source is "reliable," it may be assumed that Seller's plan constitutes a voluntary disablement, which accelerates all contract duties and gives Buyer a present right to sue for breach. Buyer's options include a suit for damages and a demand for specific performance, which may be pleaded in the alternative.

The right to injunctive relief in the form of specific performance depends on inadequacy of the remedy at law (damages) and feasibility of enforcement. "Uniqueness" of chattel is often considered a basis for finding the remedy of damages inadequate. The evidence here could show Buyer's specifications as unique, although the saleability of the turbine to Ted argues contra, since it shows the turbine is at least somewhat fungible. Feasibility of enforcement would not be a problem. The court could either affirmatively order Seller to convey the turbine to Buyer, and enforce by contempt power, or negatively order that Seller can't sell it to anyone else, with the practical effect of requiring sale to Buyer.

Buyer should move ex parte for a temporary restraining order to maintain status quo and prevent sale to Ted, followed by a preliminary injunction until the merits can be determined.

If specific performance is unavailable, Buyer has an obligation to mitigate by replacing Seller's turbine in the most rapid and reasonable manner. Damages are measured by the cost of cover minus contract price. Seller could prove the costs that would have affected the price term, in order to prove this type of damage.

Seller also had specific knowledge of Buyer's deadline for Carlson. Buyer's damages resulting from lost profits or a suit by Carlson are foreseeable to Seller having such knowledge, and therefore recoverable by Buyer.

If applicable, the liquidated damage clause would replace monetary damages but would not preclude specific performance, since liquidated damage clauses are generally held to be an incentive to performance and not a substitute for equitable relief.

ANSWER B TO QUESTION 4

This contract is governed by the UCC since it involves the sale of moveable goods and the parties are merchants (regular supplier/Seller).

Is there a valid contract?

Offer - An offer is valid if it is communicated to an identified offeree with material terms present and the offeror has a present intention to contract.

The facts indicate that Seller offered to produce and install a turbine pursuant to Buyer's specification (definite terms) with price to be agreed upon at a later date. Under the UCC no price need be stated in the contract. A reasonable price will be implied if no agreement is made. An identified offeree (Buyer) and Seller's phone call indicates a present intent to contract ("Seller phoned Buyer and offered"). There is a valid offer.

Acceptance - Under the common law an acceptance must mirror the offer. Under the UCC an acceptance does not have to mirror the offer unless the acceptance is made expressly conditioned to the offeror's assent to offeree's terms (Buyer). If acceptance is not made, expressly conditioned to the new term, then UCC 2-207 governs. Under 2-207 an acceptance that does not mirror the offer becomes part of the contract (between merchants) unless the offeror expressly rejects the new terms, the offeror says his terms cannot be varied in his offer or the new terms materially alter the contract.

Under these facts Buyer accepted the offer "so long as the price doesn't exceed $400,000" and emphasized time is of the essence. These facts indicate that acceptance was made expressly conditioned on Seller's assent to new terms. Therefore, Buyer's new terms become a counteroffer and Seller's assent to Buyer's response becomes an acceptance.

Consideration - Consideration requires legal detriment for both parties. Buyer's promise to pay and Seller's promise to deliver is legal detriment for both parties. Therefore, there is valid consideration. Since there is a valid offer (mutual assent), acceptance and consideration, an oral contract is formed.

Does the Statute of Frauds make the contract voidable?

Under the Statute of Frauds a contract for the sale of goods over $500 must be in writing. An exception to this requirement is if the supplier is supplying a unique good and

has commenced part performance on supplying the unique good.

Under these facts the sale of the turbine is worth over $400,000. Therefore, under the Statute of Frauds the contract must be in writing (to prevent fraud).

Under the UCC the Statute of Frauds requirement is met if there is a merchant's confirmatory memoranda. Under this rule if a merchant (Buyer) sends a writing to the other merchant (Seller) and it is signed by one of the

parties, both parties are bound unless the receiver of the memo rejects within 10 days.

Under these facts Buyer did send Seller a written confirmation of the order. Assuming Buyer signed the memo, Seller will be bound unless he rejects within 10 days. Since Seller did not reject, the Statute of Frauds requirement is met.

What effect does the new terms in the merchant's confirmatory memoranda have on the contract?

Under the UCC a party is bound by the terms of the merchant's confirmatory memoranda unless he rejects within 10 days.

Buyer will argue that the new terms do not materially alter the contract since Seller is aware of the need for timely delivery of the turbine. Furthermore, Buyer may argue that the new terms were a valid modification of the oral agreement which Seller accepted by commencing production of the turbine after receiving the memorandum.

Seller will argue that the liquidated damage provision does materially alter the contract since it provides for a grossly distorted penalty fee. I will discuss the liquidated damage provision in more detail infra.

Does the January 15 phone call from Buyer to Seller provide a valid oral modification of the contract?

Under the UCC an oral modification of a contract is valid if it is made in good faith, no consideration is necessary (under common law consideration is necessary), and the terms of the contract don't prohibit an oral modification (equal dignity clause) or if the modification results in a transfer within the Statute of Frauds.

Under these facts an oral modification was attempted by Seller despite the presence of the equal dignity clause. Therefore, an oral modification is invalid unless Seller has an appropriate defense.

Are there defenses to an oral modification attempted under a contract with an equal dignity clause?

The UCC recognizes two defenses to the equal dignity rule: waiver and estoppel. Under the waiver approach, Buyer waives the equal dignity rule if Seller has performed under the terms of the modified agreement and Buyer waives his right to invoke the equal dignity rule by accepting Seller's performance. (Buyer did not sue Seller on February 15; therefore, waiver can be found.) Under the estoppel approach Buyer is estopped from asserting the equal dignity rule if Buyer agrees to an oral modification before Seller's

performance is due and Seller reasonably and justifiably and detrimentally relies on Buyer's assent.

Under these facts, Buyer indicated that a one-month delay in delivery is acceptable before Seller's duty to perform arose; on January 15 Buyer agreed

to a delay from February 15 to March 15. Therefore, Buyer would be estopped from denying the modification.

Did Buyer's knowledge e on February 20 that Seller was going to sell the <u>turbine</u> <u>to</u> <u>e</u> <u>amount</u> <u>to</u> <u>an</u> <u>anticipatory</u> <u>reach</u> <u>or</u> <u>voluntary</u> <u>disablement?</u>

Under the rule of anticipatory repudiation, there must be an express repudiation by Seller. If there is no express repudiation, Buyer can seek an adequate assurance of performance if Buyer has reasonable grounds to believe Seller will not perform. If adequate assurance of performance is sought from Buyer, Seller must respond within a reasonable time, no later than 30 days.

Under these facts there is no express repudiation by Seller so there is no anticipatory repudiation met. Buyer should seek adequate assurance of performance.

Under voluntary disablement there is an implied repudiation by conduct; i.e., the sought-after good is now in the hands of another buyer. Under these facts, Ted does not yet have possession of the good so there is <u>no</u> <u>voluntary</u> <u>disablement.</u> (Can seek adequate assurance of performance.)

Relief: If Seller breaches and valid modified contract.

<u>Damages</u> - Buyer is entitled to the difference between the contract price and the fair market value of the turbine. If $430,000 is fair market value, then Buyer gets $30,000 plus consequential damages. Consequential damages are those damages that are suffered by Buyer that was foreseeable to both parties when the contract was made <u>(Hadley)</u> or foreseeable (as for Seller) to the average reasonable person. Buyer can recover incidental damages (costs looking to find another turbine).

Buyer can use the liquidated damage clause if the court determines that damages are too difficult to ascertain and the liquidated damage provision is a reasonable approximation of what damages might be. Since damages are probably ascertainable, the court will probably disallow the liquidated clause to be enforced.

Buyer can sue for specific performance if it (turbine) is determined to be a unique good. The remedy at law must be inadequate (Buyer needs turbine quickly for its new plant), the contract must be definite (discussed supra), there must be mutuality of performance (both sides must be able to perform and bound to perform, the old mutuality of remedy is not necessary), enforcement must be feasible [court can order Seller (mandatory) to deliver to Buyer or prevent (negative) Seller from selling to Ted], Seller has only defense of invalid contract; won't convince courts since there is a valid contract.

These remedies are not available to Buyer until Seller breaches (perform on March 15). If Seller sells to Ted then there is a present breach and Buyer can sue at the time of the breach.

February 2002

Question 2

Berelli Co., the largest single buyer of tomatoes in the area, manufactures several varieties of tomato-based pasta sauces. Berelli entered into a written contract with Grower to supply Berelli its requirements of the Tabor, the only type of tomato Berelli uses in its pasta sauces. The Tabor tomato is known for its distinctive flavor and color, and it is particularly desirable for making sauces. The parties agreed to a price of $100 per ton.

The contract, which was on Berelli's standard form, specified that Grower was to deliver to Berelli at the end of the growing season in August all Tabor tomatoes that Berelli might require. The contract also prohibited Grower from selling any excess Tabor tomatoes to a third party without Berelli's consent. At the time the contract was executed, Grower objected to that provision. A Berelli representative assured him that although the provision was standard in Berelli's contracts with its growers, Berelli had never attempted to enforce the provision. In fact, however, Berelli routinely sought to prevent growers from selling their surplus crop to third parties. The contract also stated that Berelli could reject Grower's tomatoes for any reason, even if they conformed to the contract.

On August 1, Berelli told Grower that it would need 40 tons of Tabor tomatoes at the end of August. Grower anticipated that he would harvest 65 tons of Tabor tomatoes commencing on August 30. Because of the generally poor growing season, Tabor tomatoes were in short supply. Another manufacturer, Tosca Co., offered Grower $250 per ton for his entire crop of Tabor tomatoes. On August 15, Grower accepted the Tosca offer and informed Berelli that he was repudiating the Berelli/Grower contract.

After Grower's repudiation, Berelli was able to contract for only 10 tons of Tabor tomatoes on the spot market at $200 per ton, but has been unable to procure any more. Other varieties of tomatoes are readily available at prices of $100 per ton or less on the open market, but Berelli is reluctant to switch to these other varieties. Berelli believes that Tabor tomatoes give its sauces a unique color, texture, and flavor. It is now August 20. Berelli demands that Grower fulfill their contract in all respects.

1. What remedies are available to Berelli to enforce the terms of its contract with Grower, what defenses might Grower reasonably assert, and what is the likely outcome on each remedy sought by Berelli? Discuss.

2. If Berelli elects to forgo enforcement of the contract and elects instead to sue for damages, what defenses might Grower reasonably assert, and what damages, if any, is Berelli likely to recover? Discuss.

ANSWER A TO ESSAY QUESTION 2

1. The contract between Berelli and Grower is a contract for the sale of goods, tomatoes. Accordingly, it is governed by Article 2 of the UCC. Because Berelli is a pasta sauce manufacturer and Grower is a commercial farmer, both parties are merchants and the UCC's special rules for merchants will apply. Additionally, because the contract calls for Grower to provide Berelli with all of the tomatoes it requires, the agreement is a requirements contract and the rules applicable to those particular types of agreements will also apply.

The parties appear to have made a valid contract, as it was in writing and reflected both the type of goods specified (Tabor tomatoes) and the price ($100/ton). Although the UCC ordinarily requires contracts to specify the quantity of goods to be provided, in a requirements contract it is sufficient that the buyer (Berelli) agrees to buy all its requirements from the Seller (Grower), to the limit of Seller's ability to provide goods of that type. That renders the contract sufficiently definite to be enforced under the UCC, as the Buyer's good faith in using Seller as its sole supplier, and its actual after-the-fact use of the goods contracted for, define the quantity of goods to be delivered. Here, Berelli's actual need for 40 tons of Tabor tomatoes supplies the requisite quantity under the contract.

While in this case Grower may have defenses to contract formation based on the doctrines of failure of consideration, unconscionability, misrepresentation and fraud, these will be discussed later.

If Berelli seeks to enforce the terms of the agreement with Grower, it may do so

under the doctrines of replevin and specific performance, or seek an injunction prohibiting Grower from selling the tomatoes to Tosca.

Anticipatory Repudiation. The time for performance under the contract has not yet arisen, and won't arise for 10 more days. A party can ordinarily not sue under a contract until the time for performance has arisen. Where, however, a party unambiguously states to the other, before the time for performance has arisen, that it will not perform, the other party is entitled to treat that as an anticipatory repudiation that gives rise to an immediate right to sue for total breach of the contract, including the right to seek to cover its losses by purchasing replacement goods. Because Grower informed Berelli that it was repudiating the contract, Berelli is entitled to sue immediately and seek replevin or specific performance, or damages.

Replevin

Replevin. Replevin provides a remedy for a plaintiff to recover its goods prior to determination of a dispute, upon a judicial hearing to determine whether the plaintiff has title to the goods, and upon plaintiffs posting of a bond to secure any damages that may be owed to the defendant if the replevin is wrongful. Under the common law, to obtain replevin a plaintiff must show that the defendant has possession of personal property that is owned by the plaintiff. Under the UCC, however, where goods have been "specifically identified" under a contract and the buyer is unable to cover by purchasing other goods, it has a right to replevy the goods in seller's possession, even though title to those goods has not yet passed. Here, the requirements for replevy are met. Because Berelli agreed to buy all of Grower's Tabor tomatoes, all the tomatoes actually grown by Grower have been specifically identified under the contract. And because Berelli has only been able to cover

10 of the 40 tons it needs, the second requirement is met. Accordingly, Berelli is entitled to replevy 30 tons of the Tabor tomatoes in Grower's possession, as well as recover damages for the excess price it paid for the 10 tons it was able to cover (as discussed in the next section).

While Grower does not have any defenses to Berelli's claim for replevin (because all elements of that claim are met), Grower will defend on grounds that the contract is invalid for failure of consideration and lack of mutuality, or voidable for fraud and unconscionability.

<u>Failure</u> <u>of</u> <u>Consideration/Mutuality:</u> A contract must be supported by consideration, which is a bargained for exchange of something of value. In addition, the promises must be mutual, with both parties required to perform a detriment in exchange for receiving a benefit. Here, Grower will contend that because Berelli had the right to reject conforming goods under the contract, it was not bound to purchase anything from Grower and, as a result, there is a failure of consideration under the contract.

Consideration is found in a requirements contract from the fact that the buyer is required to meet all its requirements from seller, despite the fact that, as stated above, the contract itself does not expressly require the buyer to buy any fixed quantity of goods. While a requirements contract will not fail for lack of consideration if the buyer in good faith has no requirement for the goods and therefore orders none on that basis, it will fail if the buyer has no real obligation to buy goods it needs, and can accept or reject without regard to its actual requirements for the goods. Here, that is precisely the case. As a result, there is no mutuality of obligation under the contract -- Berelli can buy if it pleases, whereas Grower

is required to sell all its Tabor tomatoes only to Berelli. Accordingly, the contract is void for failure of consideration and Grower should succeed in defending against all of Berelli's claims on this basis.

Fraud/Misrepresentation. Where a party is induced to enter into a contract based upon the fraud or misrepresentation of another party, the contract may be voidable in whole or in part at the election of the defrauded party. Here, Berelli's standard form provided that Grower could not sell Tabor tomatoes to third parties without Berelli's consent. When Grower objected, Berelli's representative falsely stated that Berelli never enforced this provision, when in fact it regularly did. In reliance thereon, Grower went forward and signed the agreement. While Grower might argue that this provided it grounds for voiding the entire contract, this argument will likely be rejected because the term was not material to the bargain (as evidenced by the fact that it was just a clause in Berelli's standard form), and because Berelli had made no attempt to enforce it. Rather (as we shall see in the discussion of Berelli's right to injunctive relief), the
remedy will be to void the term, rather than the entire contract. This is also the result under the doctrine of estoppel and under the UCC battle of the forms rules. Having induced Grower not to formally object to the term based on the representation that it will not be enforced, Berelli will be estopped to do so. Moreover, under the UCC battle of forms rules pertaining to contracts between merchants, additional terms do not become part of the bargain when the other party objects within 10 days of receipt of the form, as Grower did here. Hence, the contract is not void for fraud.

Unconscionability. Grower will also argue that the contract is unconscionable

because 0) Berelli is not bound to purchase anything, as explained above, while (ii) Berelli is prohibited from selling to third parties.

Changed Circumstances. Grower may also seek to challenge the validity of the contract under the doctrine of changed circumstances, contending that the poor growing season coupled with the unprecedented demand for scarce Tabor tomatoes was not foreseen by the parties such that performance should be excused on grounds of commercial impracticability. This defense will be rejected, however, because uncertain weather is always foreseeable at the time of contracting, and unanticipated market conditions will never support a challenge to the validity of a contract based upon commercial impracticability.

Specific Performance

Berelli will also seek to enforce the contract through a decree of specific performance. Specific performance is an equitable remedy that will be granted where: (1) the contract is valid, definite and certain; (2) mutuality is present; (3) the legal remedy is inadequate; and (4) the plaintiff has fully performed all of its obligations under the contract. A request for specific performance is subject to equitable defenses, including the defense of unclean hands.

Here, the contract is sufficiently definite and certain, as stated above, but could be found invalid for lack of consideration or mutuality, also as explained above. If these defenses are accepted, specific performance will not be granted. If the promises are found to be mutual and the consideration sufficient, however, then Berelli would be able to meet the elements required for specific performance. The legal remedy is inadequate because the subject matter of the contract is unique. Here, we are told that Tabor

tomatoes are in short supply, they have a distinctive flavor that is critical to the Berelli sauce recipe, and the use of other types of tomatoes is inadequate. Hence, this would provide sufficient uniqueness to support a request for specific performance. In addition, Berelli performed all of its current obligations under the contract when it placed the order with Grower for all of its requirements, and stands ready and willing to perform its remaining obligation to pay for the goods when received. Hence, assuming the mutuality/consideration issues could be overcome, the other requirements necessary for specific performance would be met.

However, Grower could defend against such a decree on the doctrine of unclean hands. Equity will deny relief to a party with unclean hands, that is, one that has engaged in wrongful conduct with respect to the case at hand. Here, Berelli's fraud in inducing Grower to sign the contract based on its false assertion that the prohibition on third party sales was never enforced by Berelli, coupled with its insistence on terms that allowed it to reject Grower's goods without reason, could support such a defense.

Injunction

Berelli could also seek the Court's immediate assistance through the issuance of a Temporary Restraining Order, followed by a preliminary injunction and a permanent injunction. This relief will likely be denied, however, unless Berelli can show a right to replevin.

A TRO may be granted ex parte based on a showing of immediate and substantial hardship. Here, the fact that Tabor tomatoes are scarce and Grower is about to sell them to Tosca would be sufficient to support entry of a TRO. Berelli would have to make a good

faith effort to provide Grower with notice of the hearing, but if it could not the TRO could be entered on an ex parte basis. The TRO would last for only 10 days, however, and then be automatically dissolved.

Berelli would thus have to seek a preliminary injunction before the 10 days expired. A preliminary injunction will be granted in order to preserve the status quo pending trial or otherwise avoid extreme hardship to a party, where the plaintiff can demonstrate the likelihood of success on the merits and the balance of hardships favors entry of injunctive relief. Here, Berelli can meet the hardship test but will have difficulty establishing the likelihood that it will succeed on the merits, due to the failure of consideration/mutuality argument described above. Additionally, the fact that the tomatoes are perishable goods will make it impossible for the Court to preserve the status quo -- the tomatoes simply cannot be preserved in any useable form pending the outcome of a trial on the merits. If Berelli can overcome the problems described above and establish its immediate right to replevy the goods, this hardship could be avoided because the tomatoes would be immediately sent to Berelli. Hence, a preliminary injunction could be entered. If it cannot do so, an injunction would be denied on grounds that Berelli has not demonstrated it is likely to succeed on the merits, or the balance of hardships (spoiled rotten worthless tomatoes) favors Grower, or both.

While a permanent injunction is theoretically possible, it would be of no practical use because the tomatoes would spoil long before the injunction would be entered. However, to obtain such an injunction, Berelli would have to show that its legal remedy is inadequate, it has a property interest to protect, the injunction would be feasible to

enforce, and the balance of hardships favors entry of the injunction. Here, the remedy is inadequate for the reasons explained above; Berelli has property interest in both the contract and, if specifically identified, the tomatoes; the injunction would be simple to enforce because it countenances just a single act, delivery of the goods; and (assuming, arguendo, the contract was enforceable) the balance of hardships would favor Berelli because it has an immediate need for and contractual right to the tomatoes, whereas the hardship to Grower -- a lower contract price -- was entirely of its own making.

2. If Berelli elects to sue for damages, it can seek to recover compensatory damages, nominal damages, and restitutionary damages. Punitive damages would not be allowed because this is a breach of contract action. The defenses to contract enforcement described above would pertain to these claims as well. However, Berelli might be able to recover these damages under a theory of promissory estoppel, which provides that a party is estopped to deny the existence of an agreement where their promise can reasonably be expected to induce reliance in the other party, and the other party so relies to their detriment. Here, Berelli elected not to enter into a contract with other growers of Tabor tomatoes in reliance on Grower's promise to meet all its requirements. Hence, if the contract is invalid, Berelli may be able to claim damages under this alternate theory of relief.

To be recoverable, contract damages must be foreseeable at the time the contract was entered into, they must have been caused by the other parties (sic) breach, and the amount must be provable with certainty.

Compensatory damages aim to give each party the benefit of their bargain. The

amount is the amount necessary to put them in the place they would have been in had the contract been performed. Here, Berelli can claim the right to recover the difference between the $200/ton it paid for the 10 tons of tomatoes it purchased on the open market, and the $100/ton contract price, or $1,000. Berelli will also be entitled to recover any incidental expenses it incurred in purchasing these goods, that it would not have incurred had the contract been performed. These damages were all foreseeable,
the amount is certain, and they were caused by the breach. Hence, Grower would have no defense (other than the defenses to contract validity described above).

With respect to the other 30 tons, Berelli could seek to recover the lost profits it would have realized on the pasta sauce made from these tomatoes, or may seek to recover restitutionary damages in the amount by which Grower was enriched by refusing to perform its contract with Berelli. Lost profits would be defended by Grower on grounds that they are speculative and uncertain. However, here, Berelli's past sales and manufacturing records could be adequate to demonstrate how much sauce could be made from 30 tons of tomatoes, how much would be sold, and what the anticipated profit would have been. On the restitutionary side, Berelli would simply argue that Grower has been unjustly enriched by being allowed to sell the tomatoes to Tosca for $250/ton, and therefore should be liable to return the excess $150/ton to Berelli.

Both claims would be subject to Berelli's duty to mitigate; and Grower could successfully argue that Berelli must try to make sauce with other tomatoes to mitigate its damages, and then be limited to recovering the amount by which its sales were lowered due to using worse types of tomatoes.

ANSWER B TO ESSAY QUESTION 2 I.

VALIDITY OF THE CONTRACT

This is a requirements contract for a sale of goods of over $500. The UCC applies, and the writing requirement appears to be satisfied.

CONSIDERATION: Grower will argue that there was no consideration for its promise to

supply Berelli's tomato requirements because Berelli could reject the tomatoes for any reason, even if they conformed to the contract. Thus, Grower would argue, Berelli's promise is illusory. This is probably not a good argument because Berelli still has an obligation to try in good faith to be satisfied with the shipment. Although the terms are harsh, there probably is consideration here.

II. CONTRACT TERMS

Grower would argue that the contract terms should reflect the oral "agreement" from the Berelli's representative that the prohibition on sales to third parties would not be enforced. Berelli would successfully raise the PAROLE EVIDENCE RULE which states
that where the parties have reduced their agreement to final written for form (sic), evidence of prior or contemporaneous agreements varying the contract are inadmissible. Here, the supposed promise by Berelli that a part of the contract would not be enforced clearly varies the agreement, so this evidence would not be admitted. The terms of the writing will be applied.

Grower might argue that the parole evidence rule does not ban evidence that the agreement was induced by FRAUD. Grower would argue that Berelli committed fraud by knowingly misrepresenting Berelli's practices regarding enforcement of the clause forbidding sales to 3rd parties.

III. GROWER'S BREACH

Anticipatory Breach: When Grower informed Berelli on August 15 that it would not perform, this was a breach of the contract. Berelli could either sue for damages immediately or choose to treat the contract as still in force.

Frustration of Purpose: Grower would argue (unsuccessfully) that its duty to perform was excused by frustration of purpose because of the unexpected rise in tomato prices. This is not a valid argument because a change in market price is generally a foreseeable risk

allocated by the parties under the terms of the contract.

1 BERELLI'S REMEDIES IF HE CHOOSES TO ENFORCE THE CONTRACT.

A. SPECIFIC PERFORMANCE: Specific performance is an equitable remedy which will be allowed only if money damages are inadequate (typically because the goods are unique), if the terms of the contract are clear and definite and if no equitable defenses apply.

Here, Berelli will argue that money damages are inadequate because the Tabor tomatoes are very distinctive and that using inferior tomatoes would cause irreparable harm to Berelli's high reputation. The facts also state that Berelli is unable to get Tabor tomatoes elsewhere, and this indicates that money damages would be inadequate because there is no opportunity to cover. The written terms of the contract terms are also clear and definite, so the court would likely grant specific performance if no defenses apply.

B. BERELLI WOULD ALSO SEEK A PRELIMINARY INJUNCTION TO STOP GROWER FROM SELLING THE CROP TO TOSCA.

The purpose of the preliminary injunction is to maintain the status quo between the parties pending outcome of the merits of the suit. Berelli must show irreparable harm, likelihood of success on the merits, and that a balancing of interests favors Berelli.

Here, Berelli appears to have a valid claim on the merits or the breach of contract. Moreover, Berelli would suffer irreparable harm if Grower were to sell the Tabor tomatoes elsewhere because these are the only tomatoes Berelli uses and they are not available elsewhere. The balancing of interests is a fairly close case here. A court of equity might be influenced by the very harsh terms of the contract and look to the hardship suffered by Grower in being unable to sell his tomatoes elsewhere. On the other hand the hardship to Berelli would be very great because there are no other tomatoes available and use of inferior tomatoes would damage Berelli's trade reputation. Moreover, if the court grants

specific performance, clearly the sale of the entire tomato crop to Tosca must be halted, or performance of the contract will no longer be possible.

C. GROWER'S DEFENSES

Specific Performance and Preliminary Injunction are both equitable remedies. Thus Grower would raise several equitable defenses.

UNCLEAN HANDS: Grower would assert that Berelli acted wrongfully in relation to the very contract which Berelli seeks to enforce because Berelli's representative made misrepresentation to Grower during contract negotiations. Also, the generally harsh terms of the contract indicate possible overreaching by Berelli. This argument probably will not prevail because there is nothing wrong with hard bargaining. There appears to be no outright wrongdoing here, hence, the defense of unclean hands does not apply.

ESTOPPEL: Grower will argue that he relied to his detriment on Berelli's oral promise that Grower would be allowed to sell his excess tomatoes elsewhere. The reliance was Grower's act of entering into the contract. This is probably a good argument, so Berelli would be estopped from preventing Grower from selling the excess tomatoes to Tosca. Thus, if this defense applies, Grower will still have to sell 40 tons to Berelli but may sell the excess 15,000 tons to another buyer.

UNCONSCIONABILITY: Grower would argue that the terms of the contract are unconscionable: the writing was Berelli's standard form contract. The terms themselves are oppressive (preventing Grower from selling elsewhere) and Berelli is the largest single buyer of tomatoes, so there may be a great difference in bargaining power. This is probably a convincing argument, given all these factors.

Under the UCC the court may refuse to enforce the contract or limit the effect of the unconscionable terms. Thus the prohibition on selling elsewhere probably would not be enforced.

2. Berelli's Legal Damages.

As the aggrieved buyer, Berelli may seek either the difference between the contract price and the market price at the time he learned of the breach, or he may make a reasonable "cover" of substitute goods and sue for the difference between the cover price and the contract price plus incidental and consequential damages.

Here, Berelli can partially cover on the spot market per ton. The difference in price is ten tons times 100, so $1,000. Berelli is entitled to damages for the remaining 30 tons which it is entitled to under the contract. The damages there would be the difference in market price and contract price at the time of the breach. Berelli will argue that the market price is 250, since that is what Tosca was willing to pay. Grower would argue that the cover price is only 200 per ton because that is the price on the "spot market."

Berelli would also seek incidental and consequential damages such as damage to its reputation and customer goodwill because of being forced to use inferior tomatoes. Any possible delay might also result in consequential damages to Berelli.

B. BERELLI'S DEFENSES

UNFORESEEABILITY: Contract Damages will only be awarded if they were foreseeable at the time the parties entered into the contract, <u>(Hadley v. Baxendale).</u> Here, the money damages are clearly foreseeable, but Grower would argue that damage to reputation was not foreseeable, and thus should not be awarded. However, damage to trade reputation is probably foreseeable here because both parties appear to be aware of the uniquely excellent qualities of the Tabor tomatoes.

FAILURE TO MITIGATE: Grower will also argue that Berelli cannot collect damage it failed to mitigate. Here, Berelli could have mitigated its damages by buying inferior tomatoes, and this would at least allow Berelli to continue production. This argument is probably not convincing because Berelli has no obligation to "cover" with inferior tomatoes.

Berelli probably can obtain money damages for Grower's breach.