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(1) Under the UCC, Processor has claims against farmer for breach of contract, breach of the implied warranty of merchantability, and possibly breach of the implied warranty of fitness for a particular purpose. Farmer's defenses are anticipatory repudiation and installment contract.

Processor has a claim that Farmer breached the initial contract by only delivering 4000 pounds of peppers by October 31 when the contract was for 5000 pounds. The UCC requires perfect tender of the goods under a contract, and Farmer did not deliver perfect tender. Farmer can defend that there was an anticipatory repudiation of the original contract when Processor said that he didn't know how long the delay would last, the delay was not customary for the industry, and Processor said to "do whatever she needed to get rid of the peppers." However, this was not an anticipatory repudiation, because Processor only told farmer there would be a *delay* in accepting deliveries, not that he would no longer accept deliveries. Furthermore, Processor told farmer that he was fixing his processing equipment and had already ordered the replacement part, implying performance would continue. Therefore, Processor did not anticipatorily repudiate the contract. Even if a court found that there was an anticipatory repudiation, the Farmer created a new contract on September 10 when it reassured Processor it would meet the contractual obligations, and then Processor has a claim for breach of the second contract to deliver the remaining 4000 pounds.

Farmer may also have an installment contract defense to breach of contract. The peppers were delivered in installments to Processor, and four of the five installments were timely. Thus, Farmer's one late delivery perhaps did not materially impact the contract. However, because all of the peppers delivered were unusable, this defense will likely fail. (Farmer may try assert the defense of substantial performance. However, under the UCC, there is no such defense.)

Next, Processor (P) has a claim for breach of the implied warranty of merchantability and possibly for breach of the implied warranty of fitness for a particular purpose. Under the UCC, Farmer (F) is a merchant who deals in goods such as peppers. Thus, in all F's sales, there is an implied warranty that the peppers are fit to be used as peppers ordinarily are used. Furthermore, F may have known that P would use the peppers for hot sauce. If so, there was also an implied warranty of fitness for the peppers to be used for that purpose. Here, the peppers were unfit for use in the hot sauce, as proven by the rejection of the hot sauce by the retailers. Thus, Farmer breached both warranties. Farmer has no defenses (but may assert claims against Supplier, as discussed below).

(2) I assume P has not yet paid F for the peppers. If so, P's damages, if P prevails, will be \$1000, the cost of covering for the loss of F's peppers, plus any incidental damages and foreseeable consequential damages.

P's contract with F was for 5000 peppers for \$0.25 a lb, or \$1250. 4000 of those peppers, of \$1000 worth, were unusable. P covered this loss by purchasing 4000 peppers for twice the cost, \$0.50 a lb, at a cost of \$2000. This is \$1000 more than P would have spent had F's peppers been usable. Thus, P will be able to recover this \$1000 of extra cost from F. Next, the fact that P sold the hot sauce for a higher price is not relevant. Next, P can recover any incidental damages--extra costs incurred from having to find the replacement peppers. Finally, if F knew that P was had those contracts and was relying on the peppers, P can recover foreseeable consequential damages, such as penalties under his contracts to sell the hot sauce to the retailers.

(3) F's has claims against Supplier (S) for breach the implied warranty of merchantability, and/or

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for breach of the implied warranty of fitness for a particular purpose. S is a merchant in the business of selling seeds, and so all sales of seeds come with an implied warranty of merchantability, unless properly disclaimed. S breached this warranty to F when the peppers were not unusable for an ordinary purpose, making hot sauce. If S knew that F was buying the seeds to make peppers for hot sauce, it also breached the implied warranty of fitness for a particular purpose when it advised F to buy the "Very Hot Pepper" seeds for the best hot sauce.

S will argue in its defense that it disclaimed the warranties on the invoice. However, this defense will fail. Although a seller may disclaim implied warranties, it must be done as part of the bargain. S will say that under the battle of the forms, F signed the invoice with the disclaimer, and F failed to object within 10 days and so the disclaimer was an additional term that became part of the contract. This argument will fail because it does not apply to terms that materially alter the terms of the contract, such as eliminating F's rights to sue for breach of warranty. (Furthermore, the disclaimer was in very small type on the back, so even if it were found to be part of the contract, it may not be enforced because it is unconscionably hidden.)

**END OF EXAM**

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### Question 3

#### Part 1 Processor's Claims Against Farmer

Under the UCC the sale of goods requires perfect tender. A contract for goods that is not an installment contract must be performed by delivery of perfect tender. Processor as a buyer is entitled to accept the conforming commercial units, reject the nonconforming units or accept all or reject all. Processor is also entitled to damages that are consequential to Farmer's imperfect delivery.

Here Processor contracted to buy 5,000 pounds of peppers from Farmer. The facts state that it was a written contract. This satisfies the SOF since the sale of goods over \$500 requires a writing. 5,000 pounds at 25 cents a pound is over \$500. The facts state that Farmer had to deliver the 5,000 pounds of peppers between August 1st and October 31st. Farmer had only delivered 1,000 pounds by September 1st. However this is not yet a breach by Farmer since he had until October 31st to deliver the remaining peppers.

Processors temporary hold on the deliveries is not an anticipatory repudiation of the contract. Processor did not unequivocally state that he was not going to accept any more deliveries. Furthermore 9 days later on September 10th Processor told Farmer to resume. An 8 day break in acceptance of delivery in this situation where Farmer still

had to deliver 4,000 pounds of peppers and still had over a month and a half left to perform would not relieve Farmer of his obligation to deliver. Processor also could not at this point reject any peppers from Farmer since Farmer still had time to perform.

Under the UCC modification of a contract does not require consideration if it is done in good faith and as a result of unanticipated events. Here, Processor's statement of the delay being standard in practice for this industry would not be material to be considered a breach or rejection of Farmer's further deliveries. If Processor's statement was made in good faith this modification of the contract of holding off on receiving any more deliveries would be valid. Furthermore the facts state that Processor told Farmer that she could do whatever she needed to do to get rid of the peppers because Processor did not know how long the delay would last could also be considered a good faith attempt to mitigate Farmer's potential loss. It however could not be considered an anticipatory repudiation because it is not an unequivocal statement that processor was terminating the contract and not planning to perform. Therefore Farmer still has an obligation to deliver the remaining 4,000 pounds of peppers.

## **Part 1 Farmer's Defenses**

Under the UCC a seller that is prevented from performance by the buyer has a defense of substantial and/or partial performance and is entitled to the fair market value of what he delivered according to the contract. Here, Farmer contracted with Processor to deliver 5,000 pounds of peppers. Farmer was prevented from continuing his deliveries by Processor because of no fault of his own. Processor prevented Farmer from making any further deliveries because Processor's equipment needed repair. Therefore, Farmer could argue that he was prevented from performing under the contract. This however would most likely fail because he did not pick any of the ripening peppers or proceed to harvest and prepare for delivery. This would suggest that Farmer was not ready to perform at the time that Processor halted delivery.

Under the UCC anticipatory repudiation allows a party to treat the anticipatory repudiation as a breach and immediately sue. Anticipatory repudiation has to be unequivocal and leaving no questions as to the alleged breaching party's intentions. Here Processor's claims of delays being standard in the industry could be taken by Farmer as a mere subterfuge because Farmer had 20 years of experience and had never heard or had experience of such a hold. Here if Farmer in good faith took Processor's

statement as anticipatory repudiation he no longer had a duty to perform. Furthermore Processor followed up his statement by telling Farmer to go ahead and do whatever he needed to to get rid of the peppers. This would support Farmer's belief and interpretation after having 20 years experience of growing peppers and selling peppers that this was Processor's way of unequivocal repudiation. This would explain Farmer's lack of picking any ripening peppers because there would be no need to pick peppers if Farmer truly believed he had been unequivocally repudiated.

Under the UCC a delivery of goods over a period of time that is not installment contract does not have to be delivered with an accommodation for nonconforming goods. Here when Farmer delivered the 3,000 pounds he did have to deliver with it a notice of accommodation because he was only delivering 3,000 pounds instead of the remaining 4,000. However this would not be in itself held to be a material breach because of the modifications and delay that processor himself caused. Furthermore, sellers have a reasonable time after date due of delivery to deliver the remaining portion if notice is given and reasonable expectancy of performance. Therefore Farmer could argue that his 3,000-pound delivery is not breach and even though after October 31st since time is not of the essence according to the contract (the contract did not state so)

Farmer would have a reasonable time to perform still.

Under the UCC mutual mistake and unilateral mistake are defenses if neither party acts in bad faith. Here the facts suggest that both parties were not clear and were ambiguous about the type of pepper that was required under the contract. Supplier told Farmer that he buy "Very Hot Pepper" seed variety. Supplier also told Farmer that these seeds make the spiciest hot sauce. However, the contract between Processor and Farmer did not stipulate what type of peppers and what type of peppers were required to make Processor's hot sauce. It would seem that Farmer's attempt to obtain very hot pepper seeds was a good faith effort to perform under his contract with Processor. This mistake or ambiguity in their contract would not allow Processor to void the contract because Farmer did not have a scienter mind and he did not try to defraud Processor by getting seeds that were nonconforming. In fact the facts suggest he tried in good faith to conform. Moreover, Farmer could argue that Processor's delay had an effect on the peppers. They were obviously too "spoiled and not spicy enough" for Processor's customers. Spoilage comes from time and delay a direct result from Processor's delay.

### **Part 2 Processor's Damages**

Under the UCC a contract for goods and a seller's breach requires the buyer to mitigate his losses and he is

entitled to damages in the amount of what he had to pay to offset the seller's breach versus what he would have paid if the seller would have performed under the contract. Here the contract states that Processor was going to buy 5,000 pounds at 25 cents a pound. Farmer had already delivered 1,000 pounds that Processor accepted. Farmer's nonconforming 3,000-pound delivery failed to conform to the contract. Processor had a right to mitigate his damages and fulfill his other contractual obligations by seeking relief and buying 4,000 pounds of acceptable conforming peppers. Unfortunately he had to pay 50 cents a pound. This resulted in Processor having to pay 850 more dollars to cover what he needed and contracted for with Farmer. Therefore Processor is entitled to \$850 plus any incidental and consequential damages that he has suffered. Contract law does not provide for punitive damages.

### **Part 3**

#### **Farmer's Claim Against Supplier**

Farmer could assert a claim against Supplier express warranty and implied warranty for a particular purpose. A sale of goods also automatically comes with an implied warranty of merchantability.

Under the UCC an implied warranty for a particular purpose is enforceable when a good is sold for a particular purpose and the seller knows of the buyer's particular

purpose for the good and the buyer relies on the seller's superior knowledge and experience with the particular good. Here Supplier made express statements that could be argued to go beyond mere puffing. Farmer told Supplier that he needed to buy chile pepper seeds. Chile pepper seeds by their own character are considered spicy. Supplier knew that Farmer had to buy enough seeds to grow 5,000 pounds of peppers. It could be argued that Supplier's statement and suggestion to buy the very hot pepper seeds and even more supporting that with the statement that his peppers make the spiciest hot sauce would be argued to entice and induce Farmer to buy this variety of seeds. Since spiciness would be considered a good character for chile peppers this would be akin to saying buy this medicine because it's the best medicine for your particular need. Although Farmer has been in the business for 20 years of growing peppers it could be argued he was not growing chile peppers and had inferior experience with spicy chile peppers. This being the reason he specifically told Supplier that he needed enough seeds to grow chile peppers. Therefore supplier has breached the implied warranty for a particular purpose. Supplier knew the particular need, Farmer relied on Supplier's experience, Supplier made statements to induce purchase.

Under the UCC an implied warranty of merchantability

is available when a merchant sells a good. The good should be merchantable of that type of good and conform within industry standards and work as what the good is. Here Supplier is a merchant. Supplier sold chile pepper seeds. Chile pepper seeds to be merchantable would have to give fruit to spicy chile peppers. The peppers that came from Supplier's chile pepper seeds were not spicy. Therefore, Supplier's chile peppers were not merchantable and he has breached the implied warranty of merchantability.

Under the UCC express statements of fact and not mere opinions or puffing in salesmanship are considered express warranties. Here Supplier made express statements as to the character and quality of his pepper seeds. The character of spiciness is an inherent character for chile pepper seeds. Although the adjectives of very and spiciest could be argued to be puffing these circumstances suggest that these statements were made as an assertion of fact as to the quality of the chile peppers by a merchant in the know. Therefore Supplier has breached an express warranty that he made.

Under the UCC disclaimers of warranties need to be given at the point or prior to the completion of a sale. They also need to be conspicuous for the consumer to be able to have knowledge of and protest any disclaiming. Here Supplier sent an invoice after Farmer bought the

seeds. The disclaimer was inadequate because it was in very small print and on the back of the invoice. Therefore, Supplier's defense of warranty disclaimers would be invalid.

Under the UCC implied warranty of merchantability can only be disclaimed by special magic words of "merchantability" and being conspicuous. Supplier has failed to use the UCC delineated magic words of disclaimer for merchantability. Furthermore it was in very small type and on the back side of an invoice hence inconspicuous. Therefore the waiver is invalid and cannot be used as a defense.

Under the UCC parole evidence may be used to prove express warranties. Here if Farmer could be allowed to prove Supplier's statements Supplier could not use a denial of his express warranties. Therefore he would not have a defense against his express warranties.

Farmer would prevail on his causes of action for implied warranty of merchantability, implied warranty of fit for a particular purpose and express warranties.

END OF ANSWER

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1. P has a claim for breach of contract against F. Under the written contract between P and F, F was obligated to delivery 5000 peppers by October 31, but only delivered 4000. F might have a anticipatory repudiation defense against P. P told F to not deliver the peppers and to get rid of them. An anticipatory repudiation occurs when a contracting party states that she cannot or will not perform. Here, the statement made by P to F on Sept. 1 appears to be a repudiation of the contract, that F should get rid of the pepers based on the impliation of the statement.

If the original contract was repudiated, then on Sept. 10, when P told F to resume pepper deliveries P could argue that a new agreement was formed for delivery of the remaining pepers and if F tries to deny the existence of such an agreement, promissory estoppel would prevent F from denying liability. Based F's promise to deliver the rest of the peppers, P justifiably relied on F for the peppers at the contract price. Not enforcing the contract would be unjust for P based on this justifiable reliance.

P also likely has a cliam for the implied warranty of merchantability. The implied warranty of merchantability requires a merchant selling a product to warrant that he product will do what it is typically meant to do or serve its intended purpose. Here, its implied that the peppers would not be spoiled which is apparently what they were from the facts. Accordingly, F breached the implied warranty of merchantability.

2. If P prevails on any claims against F, his damages would be the difference in the market price and contract price for the peppers not properly delivered ( not delivered at all or delivered and spoiled). This amount is equal to 4000 times the difference in the market price and the contract price(.25). Accordingly, P would be entitled to \$1000 in damages if he prevails on a claim against F.

3. Famer (F) does not have a claim for breach of implied warranty or breach of express warranty.

F could assert a claim for breach of express warranty against Supplier (S) because of S's statement that these peppers make the spiciest hot sauce which in fact was not true as demonstrated by the rejection of P's shipment to the retailers. While a merchant is typically obligated to perform on express warranties made prior to a sale, statements that are mere puffery do not bind a merchant to the warranty. Here, the statement that the pepers were the spiciest was subjective and unlikley to be sufficient to be an express warranty.

On the otherhand, there may be a potential cliam for breach of implied warranty of merchantability or implied warranty of fit for a particular purpose. The implied warranty of merchantability requires a merchant selling a product to warrant that he product will do what it is typically meant to do or serve its intended purpose. The implied warrant of fit for a particular purpose is impliked when a person selling goods who knows that the buyer is using the good for a particular purposer, the buyer is not sophisticated with knowledge of the good, the seller makes a represenation about the good knowing the buyer will rely on that representation. It is unlikley that there was an implied warranty of fit for a particular purpose because as a farmer, F likely had knowledge about the seeds and nothing shows S knew of a lack of knowledge. There may be an implied warranty of merchantability claim based on the facts that the seeds did not do what they were supposed to because they were spolieed, but the facts aren't strong enough to demonstrate that. It is likely that the farmer's growth of the peppers caused the spoiling of the peppers.

Assuming that a warranty was created and breached, S's disclaimer was not sufficient to avoid liability. A disclaimer of implied warranties must be conspicuous, meaning must be clear and noticable( ie with large or bold font). Here, the invoice was in small font on the back of an

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invoice, thus not conspicuous. Furthermore, the disclaimer was on an invoice sent after the parties agreed to the contract, because such a disclaimer is said to materially alter the agreement, it would not be part of the contract.

**END OF EXAM**

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