**Final Examination**

**Contracts, Fall 2009**

Prof. Warner

December 16, 2009

The exam is 3½ hours long.

The exam is open book; you may use material on your computers, as well as commercial or personal printed materials.

Steve Sowle, a Korean Chef with a passion for soul food, owns and operates Seoul Soul, a restaurant specializing in a Korean interpretation of soul food. On May 10, Sowle is negotiating with Brill’s Broccoli and More, a food importer, for the delivery of soybeans and collard greens. That day, Brill sends an unsigned purchase order agreement to Sowle and includes the following note: “Read this over, make whatever changes you want, and send the signed original back to me for my consideration.” When he receives the purchase order agreement, Sowle telephones Brill. Sowle says, “What about selling me 50 pounds of chitterlings and 100 pounds of hog maws? To be delivered along with the collard greens and soybeans. Payment to be at the market price prevailing today.” Brill agrees. Chitterlings are pig intestines, and hog maws are pig stomachs, but Brill, unfamiliar with soul food terms, thinks that chitterlings are pig stomachs, and hog maws are pig intestines. After the phone conversation, Sowle signs and returns the purchase order agreement with the following note attached: “Your form had no place for a delivery date; delivery shall be on August 28.Also, I include the following warranty of merchantability: The seller warrants that the goods sold under this contract are fit for the purpose for which such goods are ordinarily sold. I have signed the purchase order agreement, and include it and this note.” Sowle had noted that the purchase agreement from Brill was silent in regard to the warranty of merchantability, neither asserting it nor disclaiming it, and did not mention a delivery date. When Brill receives the signed purchase order agreement from Sowle, he immediately signs and returns it by special messenger that day with the following note attached: “The warranty of merchantability is hereby disclaimed.” The purchase order agreement specifies all relevant details of the deal including price and quantity, and it contains the following clause: “Entire Agreement Clause: This agreement is a complete and exclusive statement of the parties’ obligations.” When Brill received the agreement, he called Sowle before signing it and said, “Our chitterlings/hog maws deal is still on, right?” Sowle answered that that was right. Brill replied, “So what about this entire agreement clause?” Sowle said, “It’s your agreement. Don’t you know what it means?” Brill replied, “Lawyer talk. I pay the lawyer but I don’t understand the lawyer. Anyway, we know what we are doing, right?” Sowle responds that that is right. When Sowle receives the purchase order agreement back from Brill, he calls him to say, “Great. Glad our deal is done.” They have no further discussions about the purchase order.

In June, a virus is discovered in several different shipments of hog maws to various restaurants, and the world’s main hog maw supplier closes its plant to investigate. The price of hog maws increases ten times as a result. Neither Brill nor Sowle expected or even contemplated the virus attack. Brill does, however, subscribe to the “Hog Maw Supplier Alert,” a service which sends suppliers of hog maws alerts about events that may affect the hog maw market. An alert was sent on May 1 about a virus that was likely to spread to hog maws worldwide, but Brill was away from his office; his e-mail is forwarded to his Blackberry, and he saw the e-mail but did not open it because he misread the subject line and did not realize it was from the Hog Maw Supplier Alert.

When Sowle learns of the virus attack, he sends the following letter to Brill:

The virus attack has made me concerned about your ability to deliver the hog maws. I saw a report from the Association of Hog Maw Suppliers which predicted that 90% of suppliers would not be able to fulfill their current contracts without sustaining unacceptable business loses. They predicted that the majority of suppliers would fail to deliver. Please confirm in writing that you will be able to perform.

Brill immediately replied:

Fortunately, I have been absolutely assured by Hog Maws R Us that they have in stock sufficient supplies of virus-free hog maws to deliver the necessary amount at the pre-virus market price in time for me to deliver them to you.

Hog Maws R Us is a very well-known and reputable company. As Sowle knew, its promises of delivery could be relied on with complete confidence; however, despite Brill’s reply, Sowle remained concerned that Brill would be unable to perform. The repeated warnings in the press of a hog maw shortage convinced him Brill would not perform; consequently, failed to pay Brill a partial payment due under the contract on June 20. Sowle assured Brill that if he did deliver the hog maws, Sowle would pay in full on the day of delivery. Brill replied, “You should make the partial payment, but, rest assured, I am delivering on August 28 even though by doing so I am waiving no right to damages under the contract.”

Brill delivers the collard greens and soybeans on August 28, and Sowle pays in full. Brill also delivers 100 pounds of pig intestines (chitterlings) and 50 pounds of pig stomachs (hog maws) instead of 50 pounds of pig intestines (chitterlings) and 100 pounds of pig stomachs (hog maws). The current market price for hog maws is still tens times what it was the day Sowle and Brill made the chitterlings/hog maws deal. Sowle accepts the delivery, but when Brill receives the check in the mail from Sowle for payment, he returns the check, and claims that they have no enforceable contract for the chitterlings and hog maws, and sues in restitution for the reasonable value of the benefit conferred.

**Questions**

(1) What is the contractual delivery date for the collard greens and soybeans? Does the contract contain a warranty of merchantability?

**Assume the Sowle and Brill are both merchants.**

(2) Does the parol evidence rule render the oral agreement about the hog maws and chitterlings unenforceable?

**You may use the parol evidence rule as formulated in class. Assume the written agreement about collard greens and soybeans says nothing at all about chitterlings and hog maws. Use the normal inclusion test for scope.**

(3) Did the occurrence of the hog maw virus mean that Sowle was not obligated to pay Brill on June 20? Assume that there is otherwise a legally enforceable obligation to pay.

(4) Brill claims: (a) under Restatement 201, there is no contract for the delivery of the hog maws and chitterlings; (b) under mistake doctrine, there is no contract for the delivery of the hog maws and chitterlings; (c) because of (a) or (b) or both, he is entitled to recover in restitution for the reasonable value of the benefit conferred by delivering the chitterlings and hog maws. Are Brill’s claims (a) and (b) true?

**Assume Restatement 201 applies in this case, and apply the common law mistake doctrine, not any similar UCC doctrine.**

(5) No matter how you answer question (4), assume that the court finds there was no contract between Sowle and Brill for the delivery of the hog maws and chitterlings. What will Brill likely recover in restitution?

**Use common law principles, not the UCC, in discussing restitution.**

UCC Sections

**Caution: Not all sections are relevant.**

§ 2-202. Final Written Expression: Parol or Extrinsic Evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement .

§ 2-207. Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

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

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

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

§ 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§ 2-508. Cure by Seller of Improper Tender or Delivery; Replacement.

(1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

§ 2-609. Right to Adequate Assurance of Performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

§ 2-715. Buyer's Incidental and Consequential Damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.