**Final Examination**

 **Contracts, Fall 2017**

 Prof. Warner

 December 6, 2017

The exam is 3 hours long.

The exam is open book; you may use material on your computers, as well as commercial or personal printed materials. You may not access the Internet.

Steve Solwe owns and operates the energy company, Solar Sowle, whose motto is “Convert with Sowle.” On March 21, 2017, he is negotiating with Mickie Piatt, who owns a real estate development company, for the purchase of solar panels for her high rise development, The Apollo. Sowle says, “It looks like two of our products will meet your needs, the Regular Pallet putting out 8000 watts per pallet at a price of $7900, or the Superior Sowler Pallet putting out 9000 watts per pallet at $9000 a pallet.” Piatt says. “Send me your standard purchase order for three Superior Sowler Pallets.” Sowle agrees to do so. Piatt then says “I will also need an expert to install the panels. Can you do that?” Sowle says, “I should be able to arrange that. We don’t normally handle installation, but I can get some subcontractors. Let me get back to you tomorrow.” Sowle contacts Spirit Delivery to handle the delivery of the Superior Sowler Pallets, and E. M. Body Co. for installation. Spirit Delivery and E. M. Body submit their bids that day. The amount in Spirit’s delivery bid is lower by $2000 than Sowle expected, and he decides he can offer free delivery and installation to Piatt. The next day, he calls Piatt, and says, “If you agree to buy at least three Superior Sowlers, I will provide the installation for free. Installation will begin on the day of delivery.” Piatt says, “That’s a deal!”

Sowle sends Piatt a signed written agreement—the panel agreement—that describes all pertinent details of the solar panel deal between Sowle and Piatt. It also contains these clause:

*Entire agreement clause*: This agreement represents the complete and final statement of the parties’ obligations. Neither party is relying on any oral or written representations not contained in this agreement.

Delivery date: June 13, 2017.

The agreement does not mention anything about installing the panels. Sowle includes a note that says

Here is the signed purchase order for your consideration and acceptance. Sign and we have a deal.

Put some soul in your solar. Convert with Sowle!

Sowlerly Yours,

Steve

Piatt returns the form without her signature, and a note that says, “I propose a somewhat different deal. It is just like your deal except that it is for *four* Superior Sowlers for a total price of $33,000. I have made the changes in the form. Initial the changes, send the form back to me, and I will look it over one more time, and mostly likely accept it. Two more things—first, only the Superior Sowlers are acceptable. Nothing else will meet my needs; second, it is essential that delivery be on June 13. I am on a strict construction schedule, and delays could cost me in the hundreds of thousands.” Sowle does initial the changes and return the purchase order to Piatt with a note that says, “Here we go again—up to you now.” When she receives it, Piatt calls asks about the entire agreement clause. She says, “What is this thing? I mean the clause that says ‘This agreement represents the complete and final statement of the parties’ obligations. Neither party is relying on any oral or written representations not contained in this agreement.’ Does that mean our installation agreement is canceled? There is no mention of it in the written pallet agreement.” Sowle says, “I never paid any attention to that clause. The lawyer put it in. We can just ignore. We know what we are doing, right? Purchase *and* installation.” Piatt replies, “Right! Purchase *and* installation. I have never understood lawyer talk much either. But we know what we are doing.” After the conversation, Piatt signs the purchase order and inserts an additional page that says, “Warranty of Merchantablity: Solar Sowle warrants that the panels are fit for the purpose for which such panels are ordinarily used.” Piatt includes a note that says, “I have accepted your offer. Glad our deal is done.” Sowle and Piatt have no further conversations about the pallet agreement. The Warranty of Merchantability was neither asserted nor disclaimed in the written agreement Sowle sent Piatt.

Sowle is so pleased to be supplying solar panels to Piatt’s high rise development, The Apollo, that he decides to build a new marketing campaign around his role in the development. He contacts Delphic Marketing. He is negotiating with its president, Diana Pythia. Pythia sends Solwe a copy of the standard agreement she uses for marketing services on social media on the Internet. Sowle reads it and says that it all looks fine. “Just one thing,” he says. “I am worried about people using ad blockers to prevent the display of the ads. Do you do anything about that?” Pythia responds, “The sites we work with monitor the use of ad blockers. So far it has not been a problem for us. We are getting an excellent response rate to our ads. If you are worried, add a clause that says that Delphic Marketing will reimburse you 10% of the fee charged if the use of ad blockers causes a 10% drop in our ad display rate.” Sowle adds the suggested clause, signs the agreement, and returns it to Pythia.

Monocrystalline silicon is a key component in Sowle’s Superior Sowler Pallets. Sowle’s supplier of monocrystalline silicon is Crystal One. In April, Crystal One’s corporate network is hacked and several files are destroyed. The destroyed files include all records of Sowle’s order for monocrystalline silicon to be delivered on May 1, 2017. This was the supply that Sowle planned to use for Piatt’s solar panels. The hack was not a sophisticated attack. It was a result of a flaw in the software for Crystal One’s websites. The flaw was in a program called Apache Struts, created and distributed by Apache. Apache notified all uses of the flaw and provided them with the means to fix it on March 6, 2017. At the same time, Crystal One was also notified of the vulnerability and its seriousness by the Department of Homeland Security, which also provided instructions to fix the problem. The computer press widely discussed the problem, calling it “critical,” and the press noted that many hackers were exploiting the vulnerability to gain unauthorized access to websites. Crystal One had not fixed the problem in April at the time of the hack.

 Crystal One was under contract with Sowle to deliver monocrystalline silicon to Sowle on May 1. Because all of the records concerning Sowle’s order no longer exist, Crystal One fails to deliver. Sowle immediately contacts Crystal One, and they explain their hack problem, and promise to get the monocrystalline silicon to him in two weeks. That is faster than Sowle can get monocrystalline silicon from any other supplier, so he agrees to wait for the delivery. However, he is unable to have the Four Superior Sowler Pallets ready for the June 13 delivery to Piatt. On June 13, he delivers four Regular Pallets saying, “You can have these for half price.” Piatt nonetheless refuses to accept the software even with the price reduction, and Solwe seasonably announces his intention to cure. Piatt says, “I don’t think you have any right to cure, but I really need to panels, so I am willing to wait a while before I rescind the contract.” On June 30, Sowle delivers four Superior Sowler Pallets. Piatt accepts the delivery and pays the full contract price for it, but by that time, she has lost $100,000 from delays in construction.

**Questions (1) – (6)**

(1) On March 22, Spirit delivery contacts Solwe to inform him that they make a mistake in calculating their bid. They were adding by hand because their computers were down, and they added incorrectly. They say they are revoking their offer. Is their offer revocable? Assume that Sowle and Spirit do not have an option contract.

(2) Does the agreement between Sowle and Piatt contain a warranty of merchantability?

**You may assume that if there is an expression of acceptance, it is definite and seasonable.**

(3) Does the parol evidence rule make the oral agreement concerning free installation unenforceable?

**NOTE: USE THE PAROL EVIDENCE RULE AS STATED IN CLASS, AND USE ONLY THE NORMAL INCLUSION TEST FOR SCOPE.** You may assume the oral agreement satisfies the requirements of offer, acceptance, and consideration, and you may that the written agreement between Sowle and Piatt is a legally enforceable agreement. If you decide the written agreement is not a complete integration, be sure to discuss what happens if you assume it is.

(4) Do Sowle and Pythia meet the requirements of offer and acceptance?

(5) Does impracticability doctrine excuse Crystal One from its failure to deliver monocrystalline silicon on May 1? You may assume that the hack was unforeseen at the time of contracting.

**Use impracticability doctrine as formulated in class.**

(6) When Sowle delivered the four Regular Pallets, did he have a right to cure after seasonably announcing his intention to cure?

(7) Does Sowle owe Piatt $100,000 in consequential damages? Treat Piatt’s acceptance of the late delivery as the equivalent of a cover purchase.

**Some possibly relevant UCC Sections (you may need more than these sections for some questions)**

§ 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.

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

(1) Where any tender or delivery by the seller is rejected because nonconforming 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 nonconforming 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.

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

(1) Incidental damages resulting from the [seller's](http://www.law.cornell.edu/ucc/2/article2.htm#Seller) breach include expenses reasonably incurred in inspection, [receipt](http://www.law.cornell.edu/ucc/2/article2.htm#Receipt), transportation and care and custody of [goods](http://www.law.cornell.edu/ucc/2/article2.htm#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](http://www.law.cornell.edu/ucc/2/article2.htm#Seller) breach include

(a) any loss resulting from general or particular requirements and needs of which the [seller](http://www.law.cornell.edu/ucc/2/article2.htm#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.