CONTRACTS MID-TERM
PROFESSOR GEDID EVENING

Adelbert Athlete (A hereafter) is the owner and operator of a health spa located in Pittsburgh, Pennsylvania. A recently received the following communication in the mail from Superdynanautilus Corporation (S hereafter), a manufacturer of bodybuilding equipment:

PROPOSAL

"S has 10 Superdynanautilus machines available for sale to you. These new bodybuilding machines operate on the nautilus principle, but they have the newest lever and pulley attachments.

The price is $1,000.00 each, and we will deliver within 2 weeks.

Let us know if you choose to buy the machines on the attached form and we will ship the same day we receive it."

There was attached a form which recited:

PURCHASE ORDER

Addressee orders the items at the price set forth on the attached proposal. Addressee agrees to be bound by all of S's standard terms.

/s/_____

A telephoned S's local sales representative and said: "I assume that the high price is because you think you will have to extend credit to me. I want the machines, and I'll be able to pay cash; but I don't think I should be paying $1,000.00 each if I'm paying cash." S's representative did not reply. A then filled out one of his own forms entitled PURCHASE ORDER and mailed it to S. The form provided [after A filled out the blanks]:

PURCHASE ORDER

A agrees to purchase 10 Superdynanautilus machines for $9,000. A agrees to be bound only on the terms of this order.

/s/ Adelbert Athlete_____

When S received the purchase order, S shipped 5 of the machines to A. A took delivery of the five machines. Several weeks later, A became concerned because the other machines had not arrived. A knew that Superdynanautilus machines were difficult to purchase, so he immediately telephoned S and said, "All right. I'll take the 10 machines at $10,000." S replied "You're too late. I sent you five as an accomodation, but that's all you're getting."

A refused to pay for the machines which he had received, and offered to return the five machines to S. S refused. A then brought an action for breach of contract against S, and S counter claimed.

What are the rights, liabilities, and remedies of the parties?

(A+ ANSWER)

The first issue that must be addressed is whether or not a contract was formed between A and S. The most common way that parties demonstrate that they have the requisite intent/mutual assent to contract is through an offer and an acceptance.

An offer is an invitation to enter into a bargain so worded as to create in an offeree the understanding that if he assents to the bargain, a contract has been created. Although the writing from S to A is labeled "proposal," it has all the definiteness of an offer - it specifies the parties (A & S), the subject matter (Superdynanautilus machines), the price, and the quantity as well as the time of performance. As such, it would objectively create in the mind of a reasonable person the idea that to assent to it would cause contract formation. Recognizing that in general a seller solicits offers on his own forms, in this case it can be easily argued that S's proposal was in itself an offer.

The second issue is whether or not A accepted S's offer. Although an offeror is master of his offer and can limit the author of acceptance, S did not expressly limit A to his own purchase order form. When A submitted his own purchase order, this can be seen as an acceptance. While under the common law, an acceptance must be the mirror image of an offer, this is no longer the case under UCC 2-207. UCC 2-207 says that any expression is an acceptance unless it expressly limits acceptance to its own terms. The purchase order of A does specifically limit agreement to its own terms (e.g. "A agrees to be bound only on the terms of this offer.") Therefore, under UCC 2-207 paragraph I, it would seem that A has made a counteroffer.

With this in mind, it would then seem that when S began performance (shipped 5 machines) without any notification to A at the time that this was an accommodation, this

act signified acceptance and a contract was formed between A and S. Under UCC 2-207(3), when the exchange of writings between two parties does not lead to a contract, their subsequent conduct may. In such a case, the contract consists of the terms on which they agree plus other terms as provided as reasonable under UCC. (It should be noted that under the common law last shot doctrine, the terms of A's purchase order would be binding.

Assuming then that a contract was formed between A and S, we turn to the issue of the regrets, liabilities, and remedies under this contract. When A telephoned S to inquire about the remaining five machines and S refused to deliver them, S became the breaching party to a contract.

In terms of remedies in the suit for contract breach between A and S, the UCC states that the provided remedies should be broadly construed to put A in as good a position as he would have been had the contract been performed.

The preferred buyer's remedy under the code is that of cover. If a buyer can find a substitute to purchase, he may then receive as damages the difference between the contract price and cover price. In the instant case, it seems very unlikely that substitute goods are available to allow cover. The machines are of a new type and difficult to purchase, so cover does not seem to be a viable choice of remedy for A.

Similarly the Code provides for an aggrieved buyer to receive market damages usually computed as the difference between the contract price and the market value. Market damages also presumes an availability of the subject matter in question.

The code under these remedies also provides for consequential damages-in this case it might well be possible for A to sue for lost profits. Lost profits are permitted if they can be proved with reasonable certainty. The UCC does not demand mathematical precision to award lost profits. Considering that A has an established business and with the new machine is merely going to be offering customers an additional service, he may well be able to demonstrate through market surveys, etc., an estimate of lost profits of sufficient certainty to meet the requirements of the UCC. Additionally, lost profits as a result of not delivering the machines are easily foreseeable. That A will not be able to charge customers for services on a machine that has not been delivered flows naturally (under the first rule of Hadley v. Baxendale) so that no special notice would have had to be given. Additionally, A might well be able to demonstrate that he could easily book time on all 10 machines for every working hour each day and as such his prayer for lost profits would be like that of a lost volume seller.

With all of the above in mind, however, the best remedy open to A, the aggrieved buyer, is that of specific performance. Specific performance is a discretionary, equitable remedy traditionally available only when the remedies at law are inadequate-for example, when the goods in question are unique. The UCC is even more liberal in providing the remedy of specific performance and says that it may be available to an aggrieved buyer "in other appropriate circumstances." An inability to provide cover as well as a difficulty

in ascertaining harm are the typical examples of "other appropriate circumstances." In this case, it is made clear in the facts that the Superdynanautilus machines have new and unique lever and pulley attachments and that they are difficult to purchase imply that it is unlikely that A can cover. Therefore, A's situation would seem to put into the "other appropriate circumstances" under which the code would provide for specific performance.

In the same vein, it might even be possible for A to undertake replevin of the goods. Replevin is a remedy at law that permits a buyer to take action for possession for any goods assigned to the K. I think that it could be argued that the machines were assigned to the K and as such could be replevined by A.

The last inquiry is into the rights/remedies of S in his countersuit. Although it would seem that S's breach is willful (which would preclude recovery under the common law), more modern decisions do permit restitutionary damages for a breaching party. In the instant case, S has partially performed (has delivered 5 machines) and has been for none. Under restitution, he should be permitted to get back from A that by which A has benefitted-he should be permitted to either repossess the machines or be given their cost. Thus, S is commanded by a court of equity to specifically perform and deliver all 10 machines to A, it would seem likely that the same discretionary/equitable court would provide for A to pay S a reasonable price for the machines.

(B+ ANSWER)

Prior to addressing the issues here we must establish the governing law. This is a transaction in goods and therefore, the UCC applies.

The first issue is whether or not a contract was formed. The elements are all there. The "proposal" constitutes an offer because the parties are sufficiently identified as are the subject matter, the price and the time and place of performance. Although A is referred to as "addressee," the overall construction of the offer would lead a reasonable person to believe that S is willing to enter a contract.

The acceptance is also valid. Although A replied on his own purchase order, which was apparently not the authorized manner, and charged the terms, the changes are certainly small and so they are not material. The UCC says that where such amendments are made, a contract is formed unless S immediately and clearly rejects them. Even if considered as a counteroffer, S accepted by beginning performance which is also acceptable under the UCC. At common law, no contract would have been formed because the offer and acceptance do not exactly match (mirror image rule).

Having established the contract, the next issue is whether or not S's failure to complete performance constitutes a breach and if so, what rights and remedies does A have.

By not objecting to A's purchase order and starting performance, S agreed to contract with A and was under a duty to perform because he created in A the expectation that he would do so. A has a right to be compensated for S's failure to perform and a right to be made whole. By not completing the order, S has breached.

To collect damages under the expectation theory A must show he tried to cover and he must be able to show damages. Given the newness of the machines, cover may be difficult and we don't know how much business A may have lost by winding up five machines short. He should, therefore, plead reliance as an alternative because he could possibly collect the cost of the other five machines, or $4,500.

A might also consider a replevin action if S has not sold the machines and he could be successful on a specific performance theory if the machines are sufficiently unique.

On the counterclaim by S, S's best theory is that of substantial performance. Although S had a duty to communicate to A the fact the shipment was an accommodation, A did not reject the shipment, he accepted it. Under the UCC, S has a right to be paid for the part of the contract he did perform at the contract rate, which would total $4,500. In a unit contract such as this, the court will divide the contract into what could be called separate contracts for each unit. S may also be able to collect the market rate of interest on the balance owed for the period it was owing. The non-payment of the debt may also open a tort action for S.

If the action was brought in an equity court the chances are that the court would find a contract in the parties' conduct so far and say "A, you keep the five machines and pay S his $4,500. S, you are entitled to your money and no more." This would seem to be the fairest way to resolve the dispute.

(B ANSWER)

Since this situation involves a contract that is for the sale of some item, it must be understood that the applicable rules under the UCC would govern.

The communication appears to be a valid offer from S. The necessary items that make up an offer, that is, quantity, description of the goods, the price, and the terms and time of delivery are all in the offer. A did not sign the purchase order form sent by S, but instead proposed a counteroffer. He did this in two ways. First, he orally counter proposed with S's representative over the phone, but the representative did not reply. A then made a counteroffer to S by mailing him one of A's purchase orders with his new terms. S then accepted this counteroffer because he immediately shipped five of the machines to A. S did not show in any way that he was counteroffering A's proposal, he appeared to have accepted A's counteroffer. Being that A's form was the last to be sent, the "last shot" rule should apply.

A's action for breach of contract should be sustained. A should be able to claim

damages and should have the option of several remedies. If it is possible for him to purchase five of the machines out in the market, he should be able to claim the difference in the prices if the other five are more expensive. A might also seek specific performance from S since the machines seem to be somewhat unique and hard to purchase elsewhere. It is conceivable that A might even be able to claim lost profits if he can show that his profits have grown due to having five of the machines, and can prove that his business would have been even greater with ten machines. A would have to come up with some pretty concrete evidence though. A also could rescind the argument which he apparently tried to do, return the five machines, and forget about the contract. This wouldn't be a preferred option, however, since he has nothing to gain from this.

S would be in a tough situation. S could try to claim that since his representative was silent as to A's counteroffer, that this silence cannot be construed as acceptance. He might also try to claim that his actions of sending only five machines was in itself a counteroffer to A's proposal. This would be hard to claim since there was no communication to A that this was indeed a counteroffer. S naturally is entitled to the purchase price of the five machines that he sent if A should decide to keep them. The price of the machines would be an interesting point to argue. A's counteroffer stated he would pay $9,000. But after receiving five machines he telephoned and agreed to amend the contract and pay $10,000. S could argue that this last offer from A should stand and that $10,000 should be the contract price. A could argue, however, that the contract was formed when S performed by sending the five machines, therefore, $9,000 is the contract price.

(C+ ANSWER)

The first issue that must be resolved is whether or not there is a contract in this instance and what are the terms to which the parties are bound. The proposal that S originally sent to A constituted an offer which A could have accepted by completing the attached purchase order. Because of his dissatisfaction with the price, A completed his own purchase order including his own terms as to price and returned it to A. This amounted to a counteroffer because of the significant change in terms. The counteroffer did not directly specify mode of acceptance, but acceptance of the counteroffer can be shown by S's action of shipping a portion of the order to A upon receipt of the order. The two parties were bound by the terms of the counteroffer of 10 machines at $9,000.

S breached the contract when he refused to ship the remaining five machines under the terms of the UCC. A has a duty to try and limit damages which he does by 1) his offer to rescind/counteroffer to S to go with the terms of the original contract; 2) his offer to return the goods to S. He is entitled to cover in the market place but the specific machines are difficult to obtain and it therefore may be difficult to cover. He may have to show that the market situation made it impossible to cover. In this circumstance, A's best option for recovery will be in specific performance forcing S to complete the contract and send the remaining five machines. Specific performance will only be granted if it can be shown that other remedies at law will not be sufficient. A may be

able to recover for any expenditures he made based upon his reliance that the contract would be performed or possibly for any profits he can prove he lost due to S not supplying the other machines. Under the limited information given however it seems that the goods may be unique enough so that he can obtain specific performance.

S's counterclaim is probably based upon A's refusal to pay for the five machines shipped. In determining what he should be allowed to recover, however, the court will undoubtedly look at the opportunities he had to reduce damages by accepting A's last proposal. The fact that they would not take back the machines from A which they could then resell would also be counted against them. The only damages the court could award in their favor would be the contract price for the first five minus whatever the court could determine they could have reduced that amount by if they had mitigated.

(C ANSWER)

This case deals with one unaccepted offer and an accepted counter-offer. Superdynanautilus (S) sent Adelbert Athlete (A) an offer that A did not accept. He was unsure of the terms and called S's representative to clear up these questions. S's representative knew nothing, or at least said nothing. Rather than accept an unclear offer, A send to S a counteroffer with different terms. A's actions will be acknowledged as an acceptance. He sent these Superdynanautilus machines (only 5 of 10) to A and this is considered an acceptance. A called S and tried to have the other 5 machines shipped. S said, "No way!" A offered to comply with S's former offer of $10,000 for 10 machines rather than $9,000 for 10 machines. S refused. S blatantly and openly breached the K, which is definitely a K due to S's act of shipment. A sues and S counterclaims.

A has a strong case due to many factors. One factor is that he tried to be as reasonable as a man can be by agreeing to accept a former offer despite the fact that a different K was now in process. When this didn't go over too well with S, he tried to return the machines to S, but S refused to take them back. A acted as reasonably as a person can act under the circumstances. He was actually willing to pay more $ than the accepted K called for.

Thus, S should be able to sue for equitable relief and demand specific performance. In order to get specific performance, he must show that the goods are unique and that he can't cover by buying other machines. He could say that regular nautilus machines are readily available and most health spas have them; however, these Superdynanautilus machines are brand new and S is the only manufacturer of them. By having these machines in his health spa, A would have a spa with equipment that was new and not possessed by other spas. This could make his spa the best in the area.

Thus, in order to put A in as good a position as he would have been, had the K gone through as agreed to, money damages won't do. A needs those 10 machines to put him in as good a position.

According to these facts, Lost Profits will not be recoverable because even if new members would have joined A's spa due to the new machines, that would be hard to prove. However, if the facts indicated that A definitely had a new list of members who were joining solely due to these new machines being in A's spa, he might have a chance at recovering lost profits.

S really does not have a good case because he has no real issue to stand on. He can't sue for not signing his (S's) offer. He won't be able to sue A for not paying him because A agreed to pay him (a sum of $1,000 more than the K stated) and S refused. Thus, A will end up receiving the 10 machines, plus court costs, plus other damages (not punitive, no tort involved) and not compensatory. I can't think of the name, but they're the damages one must pay just due to his breaching contract. Oh! I remember, nominal damages just due to S's breach.

Verdict for A for specific performance in shipment of 10 Superdynanautilus machines, court costs, and nominal damages as a result of S's breach. S will get his $9,000 from A, as that was the K price he accepted.