

**1) Please type the answer to Question 1 below. (Essay)**

MEMORANDUM REGARDING TRANSACTION BETWEEN BADBOY ("B") AND CYBERPUNK ("C")

Issues

There are two main fields containing issues to be analyzed in this memorandum ("memo"). The first area concerns those arising out of the agreement from the website, while the second relates to the various questions which arise from the dealings between B and C while users of the site. Since this situation is primarily dealing with the sale of a good, albeit "virtual," it will be presumed that the UCC applies as the governing rule system; however, the Restatement may be referenced for clarification. Further, it may be argued that B is a merchant. Conversely, however, one must consider the common law, as it may well be argued that the "good" is in fact land, which has particular characteristics and is governed by rules different than those impacting goods. The UCC will govern the sale of the shop and the goods inside, while common law will govern the sale of the land beneath it. This is a mixed-use case, and under both the gravamen and primary purpose tests, there are separate pieces to be considered. For that reason both common law and the UCC will be examined.

1. The site.

There is an issue, first of all, as to whether or not the users of the site are actually bound by the terms and agreements. There are 3 main types of agreements related to computer/software products. The first is referred to as shrink wrap. This involves the user

accepting the terms & agreements by virtue of the fact that he/she opens the packaging, which contains a notice of the terms & agreements and by using the product contained within. If the user does not agree to the terms, she may return the product to the store. The second form is click wrap, which essentially means that a user, while operating software or on a website, is forced by the program to read an agreement and cannot move forward within the program without clicking some form of "accept" button. The final, which appears to apply here and which has been held to have limited enforceability, is browse wrap. This generally holds the agreement on some other link within the site or program, where the user may access it, but is not required to do so before proceeding to her use of the program. Terms on these types of agreements are generally not binding because the user is not required, in contrast with the other two main forms, to affirmatively accept the terms and agreements. (Specht).

Accordingly, because the terms on the SL site were presented in browse wrap form, it is not likely that users will be bound by them.

## 2. Negotiations between B and C

There are many issues related to the dealings between B and C and the analysis thereof will accordingly be separated into several subsections: offer, acceptance, revocation, mutual assent, enforceability, and damages.

### a. Offer

There appear to have been several offers within the course of dealings between B&C. C's first invitation to B may be viewed as an offer or as an invitation to negotiate. If it was an offer, B's response should be considered a rejection of that offer and a resulting counteroffer. Even if C's correspondence to B was viewed as an invitation to negotiate, B's response still contained an offer. C then attempted to accept B's offer for C to buy the store for 25k; however, it may

be argued that C's inclusion of extra, different terms was in effect a rejection and counteroffer. (Ardente). B's final response to C, accepting of transferring the property may be considered in effect an offer requesting only performance in exchange, in the form of a transfer of \$25k. However, it may be argued here, too, that B in fact rejected C's latest offer by again changing certain terms. B may argue that this change was not sufficient or material and therefore did not nullify the original offer (Restatement 61). There were no material terms left open and the absence of a time of transfer is not sufficient to nullify the agreement. (Restatement 33, UCC 2-207). It is clear that there were several offers; however, it will have to be analyzed by the court to determine which was the final offer. C will argue his was last, with B rejecting it via counter offer. This is probably the strongest argument

b. Acceptance

If B's final correspondence to C served as an acceptance of C's offer, then C would be bound by the terms. B's transfer could also be considered an acceptance by performance, given that he transferred the land. However, if B's final correspondence served as a unilateral contract, having nullified C's offer with his change of terms, B was inviting C's acceptance by performance (Carbolic). If this is the case, the performance requested was the bank transfer, which C didn't even begin. Further, according to Restatement 45, if B's transfer were considered the acceptance, he is not required to notify C of his having accepted. However, if his transfer signaled the creation of a unilateral contract requiring acceptance by performance, of course C must be notified, as he cannot be forced into a contract for which he did not bargain. It will likely be argued that B did not consider his final act of transferring the land as a unilateral contract, but rather simply an acceptance of C's final offer with clarifying terms. C will argue of course that those terms were sufficiently material as to nullify his offer at B's changing of them. (Ardente, White).

### c. Revocation

C will argue that B's final correspondence, leaving out the contracts with the workers, effectively stood to nullify C's offer as a change in material terms. (Ardente). B will argue the opposite, that it was simply a clarification. Further, B will argue that his performance of transferring the land was acceptance of C's offer and therefore C cannot revoke his offer after B's performance. C may then try to argue that B made, by his transfer, a unilateral contract, requiring only C's performance to complete. This would mean that C, having never performed by transferring the money, simply never accepted the offer and revocation is irrelevant in that case. The likely finding is that, although B intended to maintain C's final offer in B's last letter to C, his change of the terms rejected that offer and created a new one. Having had no response from C, and having performed regardless, B will have several important arguments to make in order to be able to recover anything from C.

### d. Mutual Assent

There are several tests utilized to determine whether there existed mutual assent between the parties. First, the subjective test looks at whether the parties each intended to enter into the contract for the same thing. Here, while both parties intended to enter into the contract, they each understood a different item for sale. Therefore, under the subjective test, there was no mutual assent. Under the objective test, it is arguable that there was mutual assent, as the parties manifested a willingness to enter into a contract. The problem arises from the fact that there were important ambiguous terms (the store itself.) (Raffles), in addition to the issue of the change in terms regarding the contracts with employees. The objective test seeks manifest intent to enter into a contract. Intent was manifest by the fact that each negotiated and that B eventually transferred the property. However, it may be argued that C did not manifest intent

after seeing B's final correspondence. The CISG test, which may not apply here, as I am assuming the parties are both from the same country, would look at the parties' subjective intent and then objective manifestations. (MCC Marble). There would not be a contract under the CISG. Finally, the Embry test would analyze the parties' objective manifestations of their subjective intent. C understood the offer to mean Toyz, while B understood it to mean Toys. Because B was in a better position to clarify, he should have done so. C, likely being considered the offeree, understood the offer for Toyz and viewed B's objective manifestations of intent as meaning the same, as no clarification was provided and C had no knowledge of B's other property. A reasonable person could have found accordingly that there was sufficient mutual assent to create a contract, but for Toyz, so B would be in breach. (Embry)

However, if the final correspondence from B was simply his acceptance of C's offer and he thereby transferred the property, the idea of mutual assent may "flip." If B understood the offer to be to purchase Toys, because of the price, etc., even under the Embry test, that may have been found to be sufficient for mutual assent. This seems to be unlikely, though.

It is likely, however, that a court would find lack of mutual assent due to the obvious confusion over very material terms. (Raffles). This would nullify the contract altogether and would bring into question the idea of damages.

#### e. Damages

C has very little claim for damages as he has arguably not agreed to be bound. However, if the court finds B's final letter an acceptance of C's offer and the transfer of the property his performance accordingly, C might be liable. B could pursue damages for two parts, the property and the damage done by C's looting. Under the expectancy, B would get his 25k for

the sale. C damaged the property himself, so B can't be liable for that. However, given that this is a mixed-use case and arguably has a large part containing land, B may argue the land presumption, which holds that land is presumed unique and he would therefore seek specific performance (Loveless). Since the shop is now damaged, he will probably seek this, as well. B will likely not seek reliance or restitution, as his damages under these 2 theories are significantly less than under the expectancy or specific performance. In all likelihood, C will be liable to B for damages caused by looting but nothing more. B may attempt to recover under quasi contract, but it is unlikely that he will be able to do so due to public policy concerns.

### 3. Conclusion

It is likely that, on the issues of offer and acceptance C may prevail; moreover, C has a strong argument that B's last letter rejected C's offer and C then never agreed to another one.

(Ardente) Additionally, C will argue that he cannot be held to a contract for which he didn't bargain and given that the 2 parties have no previous dealings with each other, C's silence cannot be presumed acceptance. Even in the absence of a contract, C may be liable to B for the damage he caused in looting, but if a contract is not found otherwise, he will not be held liable for the land or the 25k.

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Question #1 Final Character Count = 10724

Question #1 Final Character Count (No Spaces, No Returns) = 8766

**2) Please type the answer to Question 2 below. (Essay)**

Professor: "P"

Student: "S"

Uncle: "U"

Frank: "F"

Aunt: "A"

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The first issue is whether or not a valid offer was made. P made an offer requiring performance as acceptance (Carbolic). Really, two similar offers were made: one related to the midterm and one related to the final. Both had performance as acceptance and, if performance were tendered would constitute unilateral contracts. S will argue that her beginning of performance created an option contract not allowing P to revoke offer. (Restatement 45). P will argue it did not (UCC 2-206). Even though the offers were made to the contracts class, they are still valid offers: a performance was promised in return for something requested. (Lefkowitz). Further, even though S was not in class on the day of the offer, she was a member of the class to whom the offer was directed and therefore could perform accordingly. P may argue that S was not a valid recipient of the offer, and that she intended the offer to those who were present in class on the date it was made; however this argument is fairly weak. By the terms of the offer it is understood that P probably intended it to be open for her entire class, present at the moment or not.

The Second Issue is a combination of whether acceptance of the offer(s) was valid and whether P's revocation of same was valid. S began performance in reliance of the offers. Further, she purchased materials and hired tutors, etc., in reliance of same. S's performance related to the contract concerning the midterm exam was complete before P even discovered

she didn't have enough money. Therefore, in relation to the midterm offer, S's acceptance of getting the highest grade completed it and made it a binding contract. Under the restatement, above, P could not revoke the midterm portion of the contract once S began to study for completion of performance. Moreover, since studying for the midterm is arguably also of benefit for the final, it may be argued by S that once S began to perform at all P could not revoke either part. However, P will likely argue that she could still revoke the portion related to the final exam after the midterm.

S's scoring the highest grade on the midterm completed her acceptance by performance. Therefore P will have difficulty arguing she is not liable at least for the 25k associated with that award. Further, S will argue that she had begun performance towards the offer related to the final, which held that offer open as an option (Restatement 45), thereby preventing P from revoking it. P will argue no such option was created and that performance meant complete performance, meaning the highest grade on the final. It is probable here that, because these offers and contracts are not for the sale of goods, the Restatement or common law will be weighed more heavily than the UCC and S is likely to prevail, at least regarding the midterm portion.

P's revocation of the offer related to the midterm is almost certainly invalid, as the offer was valid and S completed acceptance accordingly. Further, S did not have to notify P of her acceptance, as the professor would have obviously seen that S received the highest grade. Related to the portion concerning the final exam, S will argue her having begun the performance made the offer irrevocable under the restatement (45); however, P will argue that complete performance was required to make the contract binding. Further, P will argue that "tender" means completion (Petterson) and that no consideration was offered in order to hold the option open. P will accordingly claim that her offer was appropriately revoked and that S cannot recover, even if S gets the highest grade. Additionally, given that F informed S of the



revocation, the fact that S continued to perform cannot be attributed to P (Luten Bridge). Moreover, even though S did not receive the message until she returned, the revocation was valid as it was noted generally and would not have to be directly and individually provided to each student (Carbolic). Additionally, S's continued performance even after the revocation does not make P liable to S for additional damages, as S could have avoided those final damages. (Luten Bridge). Therefore, S will likely prevail on the issue of acceptance/revocation of the offer as it pertains to the midterm but will likely not as it pertains to the final.

The final issue is of damages. S may claim, pursuant to the discussion above, the reward for the highest midterm grade, or 25k. She may be able to claim, under the reliance theory, some of her additional damages for study aids, etc., providing that they are reasonably foreseeable (Hadley). However, regarding the trip to the island, this is arguably not reasonably foreseeable under the circumstances. Accordingly, should she have expected P to cover those costs, she would have had to inform P of their existence (Hadley). P may argue that not only are they unreasonable and she was not informed of them, even had she been informed, under the tacit agreement rule, P would have had to accept them, and she did not. S's demand of 125k is disproportionate to the reward she is really due. She knew of P's revocation of the second portion of the offer prior to the completion of her performance. Although she will argue that the option was created by her beginning performance, on the portion related to the final, P will likely prevail in stating that performance meant completion (Carbolic) and that P's revocation was timely and she therefore is not liable to S, at least for the final exam reward. The court should probably award S the 25k for the midterm and reasonable damages in reliance thereof; however, unreasonable damages and those in relation to the final should probably not be awarded. At most she may claim the cost of reasonable damages until revocation of the final

exam portion was made, which would probably include study aids and perhaps some of the tutoring. Certainly 125k should not.

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Question #2 Final Character Count = 6039

Question #2 Final Character Count (No Spaces, No Returns) = 4950

**3) Please type the answer to Question 3 below. (Essay)**

1. The single most challenging question regarding the SL community is, perhaps, whether or not traditional contract law is capable of governing cases regarding e-commerce and "cyber life." Further, how much of what occurs in SL is transferable to "real life" and even for that which remains online, which law should govern is, at first glance, a difficult question; however, it seems to lend itself to reasonably simple interpretation. Arguably the transactions in SL should be governed by the rules that would govern the corresponding type of transaction in real life. A transaction for goods should follow the reasoning under the UCC. Contracts for services and land should be governed by common law, as in reality. With international transactions, the CISG should be followed. Although the nature of cyber transactions is different in terms of material, literally, the concept behind them is the same as in real life.

2. Related to #1, although this is related to e-commerce topics, I do believe contract law is generally equipped to deal with the challenge. In SL, as in real life, the UCC governs the sale

of goods, which may happen frequently in SL. Common law governs services and land, which are also a part of SL and if the parties are both within the US, the gravamen or predominant factor tests may be used to determine which rule of law should apply in mixed cases. Further, if the parties are in 2 different countries, the CISG should apply and be sufficient. The general principles of contract law may still be comfortably applied to these areas, even though "virtual." One small difficulty will be if the sale of virtual land counts as land or as a general "good." However, given some flexibility for this new forum, the courts will be able to apply general contract law principles.

3. Hawkins, for example, would likely be decided in the same way online as it was in "real life." Damages for a breach of contract could still be calculated in the same manner and the same policy behind Hawkins would encourage the same behavior in SL. If a participant were offered a perfect online boat and received an online boat with a hole in it, he could still recover the difference between the perfect boat and what he received, as Hawkins could recover for his damages between the perfect hand and what he got. Additionally, Neri would arguably have a substantially similar result in the cyber world, as SL is full of contracts between various parties as in real life. If someone in SL ordered an object and then repudiated the contract, the seller could get his lost volume according to the lost volume rule, just as in "real life." Finally, as there are also services traded in SL, a case such as Britton would apply as well, and likely have the same result as it did in reality. If a party in SL contracted for someone else to design his car, receives it, although slightly different although not related to personalization, the recipient should pay the reasonable value of the product he receives. Although one could argue that principles of contract law do not apply in the same manner in cyberspace, I believe this argument is difficult to truly pursue. It seems reasonably clear that, although slight modifications may come about through new experiences, the general principles held will still be

a sufficient guide for online transactions.

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Question #3 Final Character Count = 3387

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**END OF EXAM**