ESSAY QUESTION NO. 1

Answer this question in booklet No. 1

The Alaska Manufacturing Corporation ("Tenant") leased a television manufacturing plant (the "Plant") from Alaska Commercial Properties ("Landlord") for a term of five (5) years. The lease agreement contained all of the necessary and material terms, including that Tenant would pay Landlord rent in the amount of 25% of Tenant's net profits from the sale of televisions produced at the Plant. The lease provided further that Tenant had inspected the Plant and was leasing the Plant "AS IS" without warranty of any kind. The lease contained an integration clause that stated: "No representations, warranties, or agreements, oral or written, have been made by either party with respect to this lease except as expressly provided in this lease."

Tenant operated the Plant during Year 1 of the lease. At the beginning of Year 2, a fire destroyed all of the manufacturing equipment at the Plant. The lease provided that the lease would terminate in the event of such a casualty unless the parties agreed otherwise.

Landlord offered to replace the destroyed equipment and repair the Plant if Tenant was willing to continue leasing the Plant under the existing lease when such repairs were completed. Tenant responded that it would continue leasing the Plant under the existing lease if Landlord installed new, cutting-edge equipment and if the Plant was ready to operate by September 30 of Year 2. Tenant believed that it could increase its production and profits with such equipment. Understanding that increased profits would lead to increased rent, Landlord replied that it would install new, cutting-edge equipment. Landlord instructed that Tenant should work with Landlord's equipment contractor, Television Manufacturing Equipment, Inc. ("TME"), to identify the equipment that Tenant wanted installed and that while Landlord hoped the Plant would be ready to operate by September 30, the date would depend on TME's scheduling.

Tenant worked with TME to identify the best television manufacturing equipment available and Landlord contracted with TME for the installation of that equipment. Based on the equipment identified by Tenant, TME and Landlord agreed that installation would be completed by January 1 of Year 3 at a cost to Landlord of two million dollars. TME warranted that the equipment would perform in accordance with industry standards.

The Plant was ready for operation on January 1 of Year 3. Upon commencing operations, Tenant reported that there were many problems with the new equipment. TME returned to the Plant several times over the first few months of Year 3 to fix the reported problems. Tenant continued to claim that the equipment was not operating properly, however. On April 1 of Year 3, Tenant

represented that it was going out of business because it had lost so much money as a result of the production delays caused by the equipment problems.

Tenant sued TME asserting that TME caused Tenant financial loss by failing properly to provide and install the new equipment. Tenant asserted that TME had breached its contract and the warranties it made. Tenant sued Landlord asserting that Landlord breached the lease and the related subsequent agreement between Landlord and Tenant by failing to deliver the rebuilt Plant by September 30 of Year 2 and with equipment that operated properly.

1. Does Tenant have any viable causes of action against TME based in contract? Discuss.

2. Does Tenant have any viable causes of action against Landlord for breach of express contract? Discuss.

GRADER'S GUIDE

***** QUESTION NO. 1 *****

SUBJECT: CONTRACTS

1. Does Tenant have any Viable Causes of Action against TME Based in Contract? (50 points)

Tenant sued TME asserting that the new equipment installed in the Plant was defective and that TME breached its contract and the warranties it made. The call of the question limits examinees to consideration of contract-based claims.

TME entered into a contract only with Landlord. TME did not enter into any contract with Tenant and TME did not make any representations or warranties directly to Tenant. Consequently, Tenant does not have any claim for breach of contract or breach of warranty against TME based upon any contract between Tenant and TME. Instead, Tenant's cause of action is founded upon the theory that Tenant was a third party beneficiary of the contract between Landlord and TME.

Whether a party may claim to be a third party beneficiary of a contract between two other parties is largely a question of intent. Howell v. Ketchikan Pulp Co., 943 P.2d 1205, 1207 (Alaska 1997). It need not be shown that the sole purpose of the underlying contract was for the benefit of the third party: it is sufficient that the parties "either intended or contemplated that one purpose of the [contract] would be to benefit a third party." Century Ins. Agency, Inc. v. City Commerce Corp., 396 P.2d 80, 82 (Alaska 1986). However, it is not sufficient if the benefit to the third party is only incidental. Id. The motives of the parties, including those of the promissee, are determinative. Howell, 943 P.2d at 1207 (citation omitted).

Tenant's claim that it was an intended beneficiary of the contract between Landlord and TME would be supported by the following facts:

- that the equipment that TME agreed to install was contemplated by Landlord, as evidenced by the lease agreement, to be for the use of Tenant;
- that Landlord agreed to install the new equipment on the condition that Tenant would continue leasing the Plant under the existing lease agreement;
- that Tenant was authorized by Landlord to work with TME to identify the equipment that Tenant believed was most appropriate for its purposes; and

- that Tenant, in fact, took possession of the repaired Plant and attempted to use the equipment.

Finally, Tenant may argue that Landlord was seeking to perform its obligations under the lease, and the agreement to continue leasing the Plant to Tenant, by contracting with TME to install the necessary equipment. This is evidenced by Landlord's and Tenant's agreement regarding installation of equipment in accordance with Tenant's specifications. Where a promissee under a contract seeks to discharge its obligations to a third party by the promissor's performance under the contract, there is no question but that the third party is an intended third party beneficiary. Kennedy Associates, Inc. v. Fischer, 667 P.2d 174, 178, n.2 (Alaska 1983).

TME would argue that there is no evidence of an intent to benefit Tenant directly because the contract was between Landlord and TME alone. The facts do not indicate that Tenant was named in the contract in any way. A further argument supporting TME's position would be that Tenant's rights in connection with the Plant were defined and limited by its contract with Landlord (the lease), which expressly disclaimed any warranty. The specific warranty limitations of the lease indicate a lack of intent by Landlord to benefit Tenant with any warranty arising from the Landlord/TME contract. TME further would argue that the lack of an intent to benefit Tenant directly is shown by the fact that Landlord invested several million dollars to repair the Plant but had only three (3) years left on the lease with Tenant by the time the repairs were completed. These facts indicate that the investment was made by Landlord primarily for its long-term benefit and that the immediate benefit to Tenant was incidental. Kodiak Elec. Assoc. v. DeLaval Turbine, 694 P.2d 150, 154 (Alaska 1985), in which the Court held that a buyer of certain equipment was not an intended beneficiary of a contract between the seller and another firm for the repair of the equipment prior to sale, would support TME's position.

In summary, whether Tenant was an intended beneficiary of the Landlord/TME contract is a question of fact that cannot be resolved definitively. However, the weight of the facts indicates that Tenant has a fair opportunity of prevailing on its claim. Examinees should be given credit for discussing the potential causes of action that Tenant would have if found to be a third-party beneficiary, such as breach of express warranty, breach of implied warranties such as fitness for a particular purpose, etc.

2. Does Tenant have any Viable Causes of Action against Landlord for Breach of Express Contract? (50 points)

Tenant claims that Landlord breached the lease by failing to deliver the rebuilt Plant, with equipment that operated properly, by September 30 of Year 2. Tenant's claims present two questions:

a. Whether Landlord agreed to deliver the repaired Plant by September 30 of Year 2;
b. Whether Landlord is liable for breach of contract due to the alleged defects in the new equipment installed in the Plant.

A. Whether Landlord Agreed to Deliver the Repaired Plant by September 30 of Year 2.

The facts state that after the fire the lease terminated unless the Landlord and Tenant agreed otherwise. The Landlord and Tenant did not allow the lease to terminate. Instead, they entered into negotiations regarding the continuation of the lease.

Formation of an express contract requires an offer encompassing its essential terms, an unequivocal acceptance of the terms of the offeree, consideration, and an intent to be bound. Young v. Hobbs, 916 P.2d 485, 488 (Alaska 1996).

Facing termination of the lease, Landlord made an offer. Landlord offered to replace the destroyed equipment and repair the Plant if Tenant was willing to continue leasing the Plant under the terms of the existing lease. Tenant replied that it would agree to continue leasing the Plant under the terms of the existing lease but clearly added additional conditions—that Landlord install new, cutting-edge equipment and that the Plant be ready to operate by September 30 of Year 2. Thus, Tenant made a counter-offer. Southwest Marine, Inc. v. State, Dept. of Transp. and Public Facilities, Div. of Alaska Marine Highway Systems, 941 P.2d 166, 173 (Alaska 1997) (citing Restatement (Second) of Contracts § 59 (1979) (a reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer). Landlord's response is more equivocal. While Landlord clearly accepted Tenant's term that Landlord install new, cutting-edge equipment, Landlord did not unequivocally accept the date for completion specified by Tenant.

The Alaska Supreme Court has emphasized the importance of mutual assent for the formation of a contract: "In order for a contract to have been formed, it was essential that acceptance of [the] offer be unequivocal and in exact compliance with the requirements of the offer that [the offeror] had made." Walton v. Ramos Aasand & Co., 963 P.2d 1042, 1046 (Alaska 1998). A contract must be reasonably definite and certain as to its terms to be enforceable. Kodiak Island Bor. v. Large, 622 P.2d 440, 447 (Alaska 1981).

Given these principles, a fact finder most likely would conclude, based on the communications between the parties, that the date term was material and, therefore, was a term that had to be unequivocally accepted by Landlord. Consequently, Landlord's response is most reasonably construed as a counter-offer.

Finally, the facts do not state that Tenant affirmatively accepted Landlord's counter-offer by any written or oral manifestation of assent.

Acceptance requires a reasonable manifestation of assent to the terms of the offer. Valdez Fisheries Development Ass'n, Inc. v. Alyeska Pipeline Service Co., 45 P.3d 657, 666 (Alaska 2002). Except in unusual circumstances, manifestation of acceptance by promise requires a reasonable attempt to communicate this promise to the offeror. Id. Silence generally cannot constitute acceptance. Id.

While the facts do not indicate that Tenant expressly accepted Landlord's counter-offer, Landlord's counter-offer indicated that acceptance could be by performance (Landlord instructed Tenant to work with Landlord's contractor which Tenant did) and, in any event, a fact finder likely would deem Tenant's performance as a manifestation of assent to Landlord's counter-offer. See Restatement (Second) of Contracts, §30 (unless otherwise indicated by offeror, an offer invites acceptance by any medium reasonable in the circumstances)) and §50 (an act of performance may operate as an acceptance); see also Jones v. Central Peninsula General Hosp., 779 P.2d 783, 787 (Alaska 1989) (employer's notification to an employee of a policy manual constitutes an "offer," which is accepted by the employee's continued performance).

Consequently, Landlord did not agree to deliver the repaired Plant by September 30 of Year 2.

B. Whether Landlord is Liable for Breach of Contract Due to the Alleged Defects in the New Equipment Installed in the Plant.

This issue requires examinees to consider the operation of the disclaimer clause in the lease agreement. Clearly, at the time of commencement of the lease, Tenant agreed that it had inspected the Plant and agreed to lease the Plant in its existing condition. Thus, the parties placed upon the Tenant the burden to confirm that the Plant and its equipment met the Tenant's requirements.

After destruction of that equipment, however, the question is whether Landlord had an obligation to replace the equipment with equipment in any specific condition. The lease contained an integration clause that made clear that the lease contained all of the representations, warranties and agreements of the parties. Thus, Landlord would argue that because it did not subsequently

make any express warranty as to the condition of the new equipment, the disclaimer was operative and binding upon the Tenant.

Leases are contracts interpreted according to contract principles. Rockstad v. Global Finance & Inv. Co., Inc., 41 P.3d 583, 586 (Alaska 2002). Courts give effect to the reasonable expectations of the parties when interpreting a contract. Krossa v. All Alaskan Seafoods, Inc., 37 P.3d 411, 418 (Alaska 2001). In order to give legal effect to the parties' reasonable expectations, the court examines the written agreement itself and also extrinsic evidence regarding the parties' intent at the time the contract was made. Hayes v. Xerox Corp., 718 P.2d 929, 937 (Alaska 1986); Municipality of Anchorage v. Gentile, 922 P.2d 248, 259 (Alaska 1996) (parties' conduct after entering into a contract is probative of the intent behind the agreement).

Tenant would argue that the reasonable expectations of the parties when they made the agreement to repair the Plant is not consistent with application of the lease disclaimer to the new equipment because: the original equipment had been destroyed and Tenant did not have the opportunity to inspect the new equipment prior to its agreement to continue leasing the Plant under the existing lease. Tenant would assert that the Court should look only to the subsequent agreement, not the original lease, to determine whether Landlord had a duty to deliver to Tenant a Plant that had working equipment. The discussions between Landlord and Tenant at that time were that Tenant would continue leasing the Plant if the Landlord installed cutting-edge equipment. Inherent in that agreement is a reasonable expectation that such equipment would work properly.

Tenant would assert that the integration clause in the lease did not prevent the parties from making an additional enforceable agreement concerning the leased property. The integration clause is no impediment to enforcement of the agreement as to the repair and redelivery of the Plant because the agreement was a subsequent agreement. An integration clause typically operates to bar parol evidence to vary or contradict the contract by prior negotiations or agreements. Alaska Diversified Contractors, Inc. v. Lower Kuskokwim School Dist., 778 P.2d 581, 583 (Alaska 1989), cert. den., 493 U.S. 1022 (1990) ("The parol evidence rule is a rule of substantive law which holds that an integrated contract may not be varied or contradicted by prior negotiations or agreements").

The lease is silent as to subsequent agreements and amendments of the lease. Thus, the parties did not expressly agree that any subsequent agreement or amendment of the lease needed to be in writing. Consequently, the lease agreement itself does not provide a bar to enforcement of the subsequent agreement.

Nonetheless, Tenant was aware of the disclaimer in the lease agreement at the time Tenant made the subsequent agreement and could have negotiated an express warranty or a right of inspection as a condition to continuation of its obligations under the lease. Tenant did not.

Finally, examinees may consider whether the subsequent agreement is unenforceable pursuant to the statute of frauds. Pursuant to AS 09.25.010(a)(6), an agreement for leasing for a period longer than one year is unenforceable unless it or some note or memorandum of it is in writing and subscribed by the party charged. The agreement concerning the repair of the Plant relates to the lease executed by the Landlord and Tenant, which lease was automatically terminated unless otherwise agreed by the parties. The subsequent agreement is not in writing, however. Thus, Landlord could assert that, all other things aside, any agreement to deliver the Plant in a certain condition would be unenforceable.

This argument likely would fail. The writing required by the Statute of Frauds need not be formal and a "writing may be sufficient even though it is cryptic, abbreviated, and incomplete." Fleckenstein v. Faccio, 619 P.2d 1016, 1020, 1021, n.18 (Alaska 1980) (citation omitted). "(W)e should always be satisfied with "some note or memorandum" that is adequate, when considered with the admitted facts, the surrounding circumstances, and all explanatory and corroborative and rebutting evidence, to convince the court that there is no serious possibility of consummating a fraud by enforcement." Id. at 1020 (quoting 2A. Corbin §498, at 681)).

Landlord and Tenant had executed a lease agreement. The agreements concerning the repair of the Plant were subsequent to the lease and addressed only the terms under which the parties agreed to continue under the lease. Thus, there was a writing that contained the essential terms of the lease arrangement and, given the surrounding circumstances, including the fact that each of the parties performed, there is little possibility of consummating a fraud by enforcement.

In summary, it is difficult to conclude whether a factfinder would hold that Landlord breached the lease by failing to deliver the Plant with properly operating equipment.

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Question **No. 1** *Only*

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Tenants potential claim on contract against TME

As well as in contract, Tenant may bring an action against TME in Quasi Contract, Tenant reasonably relied on the representations of TME and relied to this detriment and has as a result thereof suffered loss. The court can award damages for this loss in the amount of tenants reasonable reliance and can also order consequential damages (these result from consequence of closure) and incidental damages (these result in the normal procedures of going out of business expectation: Lost profits.

Tenant will make a contract claim against landlord but should also claim

2/9

against TME asserting that the contract was modified and TME became a party

Mixed Contract

Both service and goods, but goods are controlling as service is a lesser part of agreement

Tenant is not a merchant, but TME is and deals in goods of this kind and makes certain warranty as to fitness for a particular purpose and merchantability these fail as to the description "cutting edge" equipment and the equipment does not perform in accordance w/ industry standards

3/5

(2) Tenants claim against landlord under breach of express contract.

This is an express contract for a commercial lease, must be evidenced by a writing signed by the party against whom enforcement is sought under the Statute of frauds. Unclear that this has ocured.

Parol Evidence may be considering by the court in determining intent of parties, any conversations or other representations made that would establish intent & terms.

4/5

Modification

this contract was modified or a new contract was made when Landlord failed to perform in accordance and parties agreed to new terms. –

Tenant can also claim against land lord in Quasi. K – Quantum Meruit.

– No consideration necessary in a straight lease agreement.

5/5

~~Harder to find an exp~~

No express Contract

after fire - & NO writing -

to evidence (over 1 year) SOF -

Illusory Contract apparent

"If [illegible] [illegible] to indemnify —

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(1.) IF tenant and TME have a contract, it is governed by the UCC because TME provided goods, in the form of television equipment. The contract is governed by the UCC because TME is a merchant.

IF there is a contract, there needs to be some agreement as to the ~~pace~~ quantity and what will be expected (goods). There seems to be that agreement here between TME and Tenant. According to the facts, TME provided the equipment that Tenant chose. The equipment was determined by tenant when he worked with TME to identify "the best television manufacturing equipment available." While at common law, consideration is necessary for a contract to pass muster, that is not the case when the contract is governed by the UCC - at least not in an express form. Courts generally

will forgive any lack of reference as to consideration – or price – if it is left out of the contract.

As between TME and tenant, however, there is no agreement as to time for delivery, etc. Infact, the facts specifically say that TME and Landlord agreed on an installation time. That suggests that the contract was enforable between TME and Landlord. Additionally, there was no third party beneficiary agreement allowing tenant the right to sue. In other words, Tenant and TME do not have a contract.

However, as part of TME's services, the company warranted that the television equipment it provided would perform in accordance with industry standards. Implied also in UCC contracts is an implied warranty of merchantability

3/9

and arguably TME's warranty gave the user a ~~war~~ warranty for a particular purpose, especially since TME and tenant worked so closely together in determiniging which products would best serve tenant's needs. Regardless, the contract between TME and Tenant does not likely satisfy the statute of frauds because the goods are likely over $500 and the contract is not in writing. Tenant can sue, then, on the warranties. There are several options. Tenant will have to prove that the equipment provided by TME did not conform to industry standards. If tenant can prove that TME breached the warranty, tenant may be able to collect consequential damages. It is unclear from the facts to whom TME made the warra[nty]. These damages will include "lost profits." ~~and~~ However, lost profits will have to be proven with particularity and be relatively certain. In Tenant's case, that may prove impossible because he has not been working in the business while the plant was shut down due to fire, etc.

4/9

It is problematic, however, that tenant is not in a contract with TME. This may very well bar him from collecting any damages or bringing a warranty claim. Additionally, the contract will not satisfy the Statute of Frauds which requires that there be some written form of contracts for more than $500 in goods.

Regardless, Tenant may be able to sue TME in equity. Tenant could file promissory estoppel, or equitable estoppel claims against TME. Specifically, Tenant could argue that TME breached its warranty promise, that tenant relied on that promise to his detriment and that TME should pay restitution in the amount of Tenant's lost profits. However, based on the facts it is not clear that Tenant will have much of a claim.

5/9

(2) Tenant and Landlord's contract will be governed by common law in Alaska. The contract is for a commercial lease so the laws regarding residential relationships between landlords and tenants are inapplicable.

The original contract, according to the facts, contained all the material terms and was written. The Statute of frauds applies to leases that are ~~in~~ agreed on for terms longer than one year. The contract conforms to the statute of frauds.

The contract also contained an integration clause, in essence saying that the express contract signed at the beginnings of the lease was the final agreement. ~~since Tenant is not arguing that Landlord breached that agreem~~ In that ~~express~~ lease, according to the facts, Landlord and tenant agreed that

6/9

the lease would terminate in the event of a fire - or some other casualty - unless the parties agreed otherwise. That is exactly what happened. ~~[illegible] Tenant~~

Landlord offered to replace the equipment and repair the plant if Tenant would consider leasing the plant for the remainder of the lease term. Tenant responded with a counter-offer that gave landlord the option of a ~~accepting his~~ continuing the lease if Landlord installed new equipment and if the plant would be ready for opening on Sept. 30. Landlord accept tenant's offer in part. Landlord said it would install new, cutting edge equipment. There was not ~~accep~~ express acceptance of Tenant's offer that landlord have the equipment in the plant by Sept. 30. ~~The~~ However, landlord did say he would try to have the equipment in the plant by that time.

7/9

It was not necessary that this new agreement be in written form. According to the Statute of Frauds, a contract must be in writing if it is for a term longer than 1 year ~~and~~ or for real estate. While the consideration in this case was that Tenant would continue leasing, it was not the crux of the new contract. The crux was the equipment and time and those were to be accomplished within one year.

There is an issue, however, regarding what terms the new contract encompassed. Under common law, the parties must have an offer, an acceptance, consideration and an intent to be bound. This ~~contract~~ is arguably an express contract.

~~Here, the issue~~ As previously mentioned, Landlord and Tenant entered into a ~~agreement~~ contract but were ~~not~~ ~~fully~~ apparently not in agreement regarding the September 30th date.

The September 30th date was a condition

8/9

precedent, as was the new equipment. A condition precedent means that until those things occur, there is no obligation to perform. The question, then, is what the contracting parties agreed to and if Tenant can sue because Landlord failed to satisfy the September 30 date.

For this, the courts will apply the Parol Evidence rule to determine the terms of the contract. When parties have varying understandings of what the agreement entails, the court will ~~inquire as to ex~~ consider extrinsic evidence to explain the terms. If the court determines there is a final agreement, any prior understandings will be barred.

There was no integration clause in this second agreement. The ~~parties wer~~ court will likely determine that the September 30 condition precedent was not part of the final agreement because the parties did not both expressly understand it as

9/9

part of the contract. Additionally, Tenant apparently worked with TME to get the new equipment. There is nothing in the facts that suggests Tenant protested after September 30 that the contract was invalid because Landlord ~~breached~~ failed to meet the condition precedent. Tenant will be barred from asserting a claim based on his September 30th condition preceden

Tenant likely does not have a claim ~~in~~ ~~the express contract~~ regarding the contract formed after the fire. ~~Although, Alaska does~~ Alaska courts ~~do~~ read an implied good faith and fair dealing covenant into each contract ~~in~~ entered into. Landlord arguably satisfied this too.

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Question **No. 1** *Only*

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I. Does Tenant (T) have contract claim against TME?

Contract Beneficiaries: There are 2 types of contract beneficiaries, intended beneficiaries and incidental beneficiaries. An intended beneficiary is a party who is there at the time of contract formation. An incidental beneficiary is someone who comes after formation. Here, T is an intended beneficiary of the contract between Landlord (LL) + TME. Thus he is an intended beneficiary.

Can Intended Beneficiaries bring suit? There are two types of intended beneficiaries, gratuitous beneficiaries, who are merely deriving a benefit and can only sue the promisee (Landlord) and creditor beneficiaries, who have money or services owed to them and who may bring suit for a breach against both the promisee (LL) and promisor (TME) if there is a breach of contract. Here,

When do an intended beneficiaries rights vest? Beneficiaries rights can vest in 3 different situations. ① Where there assent is required for the contract ② where there is detrimental reliance and ③ where a lawsuit is brought. Here, T may have a claim in all of these instances, as will be discussed below.

How was the contract formed? Here, a secondary contract between LL and TME, with ~~landlord~~ LL as the promisee and TME as the promisor to preform ~~services~~ work on a contract for specially manufactured goods was formed. LL agreed to pay TME

2/7

for TME to furnish T with specialty equipment for the manufacturing plant. This made T the beneficiary of a contract between LL and TME. The contract appeared to be valid. There appeared to be offer, acceptance + consideration as well as mutual assent evidenced by a meeting of the minds. As such, there was a valid contract formed, and T as the intended beneficiary has some rights under the contract. The key issue is whether T will qualify as a creditor beneficiary in order to sue TME. ~~The rules for creditor~~

Creditor Beneficiary: The rules for creditor beneficiaries were set out previously. Because a gratitous beneficiary can only sue a promisee, even if rights have vested, T must prove he was ~~a~~ creditor beneficiary to sue TME. There is a good argument T was more that just a gratitous beneficiary. LL owed him a new facility with functioning machinery under the new deal. As such, LL was in debt to T to provide the services. Thus it appears T was more than a mere ~~benefici~~ gratitous beneficiary + can bring suit for TME's breach.

Have T's rights vested? See rules above. Here, T's assent was required for the contract, most likely. However there is language that LL "instructed" T to work with TME. If LL did not directly acquire T's assent, this may not prevail. Hower, T did likely detrimentally rely

3/7

on the contract + the fact he would have new equipment. This reliance in fact, that the manufacturing plant would be up and working by a certain date led to extreme hardship + the closure of the plant. Further, if T sues, there will also be ~~[illegible]~~ vested right.

Did TME Breach the Contract?

The uniform commercial code applies to all contracts not for services, including contracts for goods and equipment. Here, the ~~[illegible]~~ manufacturing equipment was a contract for the sale of equipment. There are two main issues here, did TME breach warranties under the UCC, including the implied warranty of merchantability, the express warranty and possibly the warranty for fitness for particular purpose, and did TME breach by not performing the contract by a specified time.

Implied warranty ~~for particular purpose~~ of merchantability: This applies when the merchant is a dealer of the goods of the kind. The warranty extends to the normal use of the product as to be expected from purchase from such a merchant. Here, this was likely breached by TME because the equipment repeatedly failed + did not perform as a normal person would expect + thus the product was not likely merchantible. T may sue on this.

4/7

Express warranty: An express warranty is one that is made by a merchant + relates directly to the performance of the goods. If the goods fail to perform to these specifications, the purchaser (or beneficiary) may sue for the difference between the value of goods as warranted + as given. Here, TMG warranted that the equipment would perform in accordance with industry standards. Clearly, the failure of the equipment to perform was a breach, and T can sue of these grounds.

Fitness for particular purpose: This warranty occurs when the merchant has special knowledge the purchaser asks for products based on the merchant's knowledge, + relies on the merchant's recommendations. The merchant must ~~have an~~ know what the intended use of the product is. Here, in their discussions TMG + T likely understood what one's needs + the other's expertise where. T likely relied on TMG. Thus, there could be a claim for breach of warranty for particular purpose.

Failure to perform on time: A material breach occurs when there is a substantial problem with performance. Here, the contract between TMG + LL stated the manufacturing plant + equipment be up + running by Jan 1 of yr. 3.

5/7

However, even though the plant was ready, there were so many problems with the equipment, and despite TIME'S efforts to fix them, they did not appear to be resolved even ~~one year~~ four months later. This is likely a material breach of the contract, as time was of the essence, because T could not operate the plant ~~time~~ without the equipment.

II T's claim's against Landlord

Contract: A valid contract needs offer, acceptance, an consideration. Where there is an existing contract, and there has been a material breach or a condition has been met that terminates the contract, a new contract may be formed. Here, there was a clause in the contract specifying that upon the happening of a specified event, the lease would terminate unless the parties agreed otherwise. ~~They~~ Here, the event was a fire. Upon happening of the fire LL & T agreed to not terminate their contract based upon the condition subsequent. Instead, they appeared to make a modification of the agreement

Modification: In order to be valid, a modification for a contract for services might be in

6/7

writing to satisfy the statute of frauds. Also, the modification must be given consideration. Valid consideration is not necessarily monetary, it is a legal right.

Here, LL offered to repair + replace the equipment. This was not really any new consideration, since LL already had a pre-existing legal duty to so. However, T agreed if LL put in cutting edge equipment. This is likely valid consideration, since this is different than LL's preexisting duty. Further, T is giving up the right to "manufacture" during the time LL is completing the work. However, none of this appears to be in writing. But, if it the contract can be performed in less than a year, it will still be valid. This is unclear from the facts.

Mutual assent on date: Part of T's terms were that the contract needed to be completed by Sept 30. LL instructed that to complete by Jan 1. This is almost a three month differerence. If T can prove time was of the essense there may be a breach.

Time: Time of the essense occurs when a party makes it clear that the time frame for performance is an essential part of the contract. Failure to adhere to that deadline can be a breach.

7/7

However, ~~upon~~ even if time was not of the essence, being out of the manufacturing business for over 1 year (yr 2 - fire — Jan yr 3 open) is not likely substantial performance on the contract, and T could sue LL for breaching when LL knew T needed to manufacturer in order to pay the rent. Rent was based on 20% of the profit.

Even if there was no valid contract formed, T could rely on equitable damages for reliance costs based on Promissory Estoppel. This occurs (1) when there is a promise to induce reliance (2) there is justifiable reliance on the promise made (3) damages result in the reliance (4) the principles of equity require some enforcement.

Here, T relied on LL that LL would fix the plant so T could continue manufacturing. LL took was to long, T relied on this, and because of this went out of business. Thus, T could recover for the reliance, but not for consequential and incidental damages.

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This Book is for your answer to

Question* No. 1 *Only

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Question I

1. Tenant v. TME

Breach of Contract

Third Party Benefeciary

The common law applies to contracts for services between persons. However, UCC applies to contracts between goods. Here, there is a combination of services being provided by TME as well as goods ("cutting edge" equipment) being provided. Here, Tenant will aruge that he was a Third Party Beneficiary for a contract between Landlord and TME. A third party beneficiary is a person whom the contracting parties intend to benefit at the time the contract was made. The intent of hte promisee is the best evidence to prove this. This is easily proven because both the Landlord and TME knew that the contract was being made in order to provide "cutting edge" equipment to TME for purposes of hte lease.

A beneficiary can either be intended or incidential. Here, Tenant was an intended beneficiary because both parties intended for him to benefit from their contract by receiving "cutting edge" goods to replace the losses in the fire. An intended beneficiary can step into the shoes of the original contracting parties (here, Landlord) in order to sue on the contract if their rights have vested. Rights can vest by the beneficiary having notice of the contract and either suing on the contract or detrimentally relying on the contract. Here, Tenant can argue that his rights have

vested because he is bringing suit against TME as an intended beneficiary. Furthermore, Tenant can argue that he detrimentally relied on the contract between the two parties by continuing to lease the TV manufacturing plant. TME can argue that the reliance was not reasonable because Tenant knew that TME was not going to be able to perform by the date listed in the contract. Nonetheless, Tenant continued to accept TME's services, therefore, his loss of profits from the production delays was not a result of reasonable detrimental reliance.

Breach

Timing

The court will likely find that Tenant is a donee beneficiary of the contract between Landlord and TME and will allow him to step into the shoes of Landlord in the contract. Tenant will argue that TME materially breached the lease when he failed to deliver timely performance on September 30 Year 2. Tenant will aruge that time was of the essence in this contract because express language was used that the contract would be made only if performance could be completed by September 30 Year 2.

TME will argue that the doctrine of substantial performance will protect him from a material breach. TME will argue that Tenant knew that TME would not be able to perform by the time stated in the contract yet Tenant continued to procure TME's services on the contract. Therefore, when Landlord told Tenant that he "hoped the plant would be ready" by September 30 but the date would depend on TME's scheduling, Tenant accepted these new terms by accepting TME's performance. Furthermore, TME will arugue that the plant was finished a mere few months later on January 1. In addition, TEanant had a duty to mitigate his damages when

he knew that the plant may not be complete by September 30.

TEnant will argue that when Landlord said he "hoped" that the work would be done on time was not an anticipatory repudiation because it was not an unequivocal notice that the work would not be done on time. Furthermore, anticipatory repudiation does not apply to cases involving time of the essence.

TME will aruge that tenant had a duty to mitigate damages once he knew that the work was not going to be performed in a timely manner and did not treat it as an anticipatory repudiation and sue.

Warranty

Tenant will also aruge that TME breached two warranties that apply in contracts that deal with the sale of goods. First, the implied warranty of merchantibility states that goods should be able to perform to reasonable industry standards, in that, they should perform as one would expect in the industry. Here, TME made this warranty express by stating that the equipment would perform in accordance with "industry standards". Tenant will argue that this warranty, both express and implied, failed when there were repeated problems during Year 3. Furthermore, TME failed to properly fix the equipment after several attempts. Finally, on April 1, Tenant had to shut down their business because of lost profits.

The second implied warranty is an implied warranty of fitness for a particular purpose. This applies if the TME knew that Tenant was going to use the equipment for a specific purpose and warranted that the equipment woudl perform to Tenants specifications. While the facts are not clear, this may apply because Landlord had TME work with Tenant in order for tenant to specify

their needs in the manufacturing plant. However, TME will aruge that their express warranty that the goods will work to industry standards worked above the implied warranty of fitness for a particular purpose.

Finally, TME will aruge that TEnant had a duty to mitigate damages caused by TME. There is no evidence that Tenant did not call for repairs when the products were not working, nor is there evidence they acted in bad faith.

Implied Warranty of Good Faith and Fair Dealing

Both parties must abide by the implied warranty of good faith and fair dealing. Here, there is no evidence that either person acted in bad faith or witheld material information regarding performance on either sido of the contract.

1. Tenant v. Landlord

Breach of Lease

Tenant will argue that a proper contract was formed because it contained all the necessary and material terms. However, a lease for a term of 5 years falls within the Statue of Frauds because it encumbers property for more than one year. Therefore, this lease needs to be in writing including all the material terms. However, the STatute of Frauds seems to be satisfied, whether written or not, because Tenant took possession of the land and paid rent for it, thereby

recognizing the existence of the contract/lease.

Terms of the Lease

The issue in this case is what the terms of the lease are. Tenant will argue that the subsequent agreement became terms of the lease according to the parole evidence rule. The parole evidence rule bars extrinsic evidence of a contract if the contract was fully integrated. However, evidence of additional, not contradictory terms can be included.

The first issue with respect to terms is whether the lease was terminated due to the fire because the lease said it would absent an agreement otherwise. Here, Tenant will aruge that there was an agreement otherwise for the Landlord to timely perform by placing new cutting edge equipment in the area by September 30. Landlord will argue that the subsequent agreement consisted of conflicting terms to the express term that the lease will terminate upon a condition such as a fire. These additional terms will likely not be added because they materially alter the terms of hte agreement by directly contradicting them and changing the performance of the parties.

Therefore the terms of the lease state that the plant was leased "AS IS", without warranty and it would be terminated by the occurrance of a condition such as a fire.

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Tenant will also argue that a new contract was formed between TEnant and Landlord. A contract consists of an offer including all material terms, identical acceptance (under the common law), consideration (legal detriment) and an intent to be bound. Tenant will argue that

Landlord offered to replace the destroyed equipment and repair the plant in consideration for Tenant continuing to lease the plant under the existing lease. However, Tenants acceptance was not the mirror image (which Alaska tends to disfavor), of the offer because the Tenant added the terms of that the equipment be cutting edge and that the plant was to be ready by Setpember 30. These terms materially alter the terms of the existing lease and therefore serve as a counteroffer rather than an acceptance under the common law. Landlord accepted this counteroffer when he replied that he would install "new cutting edge equipment".

There is no information whether this contract was in writing. If it was to assume the terms of the lease and extend for 5 years, it comes within the Statute of Frauds and needs to be in writing including all material terms. However, if one party accepts full peformacne of a services K, the statute of frauds is satisfied. furthermore, if a party takes possession of property and pays rent, the statute of frauds is satisfied.

Breach

If the court finds that an new contract was formed based on the terms of the delivery date and the properly working equipment. Many of the same arguments above will apply.

Time of the ESsence

The same time of the essence argument will apply from above

Equipment

The same implied duty of good faith and fair dealing will apply. However, the implied warranties will not apply because this is not a UCC contract. There is no evidence of bad faith on the part

of the Landlord to the court will likely not find a breach.

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①

Tenant has a few different causes of action against TME because Tenant is a third party beneficiary to the contract between Landlord and TME, and TME probably breached an express warranty, a warranty of merchantability, and a warranty of fitness for a particular purpose.

Tenant has a cause of action against TME because it was harmed from TME's breach of its contract with Landlord, and Tenant was a third party beneficiary to that contract. In general, only parties to a contract may bring suit based on a breach of contract. However, when a contract is formed with the intent to benefit a third party, that party may also bring suit based on breach, if its rights have vested. The rights of a third party beneficiary vest when the third party takes action in reliance on the contract,

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or upon bringing suit.

The contract ~~for~~ between Landlord and JME was made for Tenant's benefit because it provided that JME would work with Tenant in ~~picking~~ identifying which equipment would be used, and was for Tenant's use in the plant. JME may argue that ~~as~~ the contract was for Landlord's benefit, because Landlord ~~it~~ only made money if Tenant made money. However, the fact that Landlord also benefits does not preclude ~~the contract~~ Tenant from being a third party beneficiary, especially given the extensive nature of Tenant working with JME.

Tenant has a viable cause of action against JME on a theory of express warranty. JME ~~stated~~ "warranted that the equipment would ~~conform to~~ perform in accordance

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with industry standards." It appears that the equipment does not work sufficiently. If this warranty is somehow found not sufficient, Tenant has a viable claim on a theory of warranty of merchantability, if Tenant can show that the equipment is so defective it is not fit to be used for the purposes one would generally use the equipment for. However, this ~~argument~~ claim could be ~~defeated~~ defeated if Tenant were using the equipment in a ~~highly~~ highly specialized way. Tenant also has a viable claim on a theory of warranty of fitness for a particular purpose because JME knew of the purposes for which Tenant was going to use the equipment. When a seller is aware of the precise purposes for which a seller intends to use goods or equipment, and represents that the equipment or goods are sufficient, ~~that~~ there is a warranty of

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fitness for a particular purpose. Here, Tenant and JME worked together on choosing the appropriate equipment so warranty of fitness for a particular purpose probably applies.

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Tenant probably does not have any viable causes of action on breach of express contract because the modifications were not written down, and Landlord appears to have made good faith efforts to save the contract. Contracts dealing with interests in land for more than one year, as this one does, ~~not~~ fall within the statute of frauds, and must therefore have some writing which contains the essential terms, and is signed by the party against whom the contract

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is seeking to be enforced. The original contract is clearly written down. However, the arrangements after the fire ~~are~~ ~~and~~ appear to be not written down, except for the broad reference that the parties could agree not to terminate the contract in the event of a casualty. ~~Because~~ As such ~~the~~ these ~~[illegible]~~ new arrangements may fall inside ~~outside~~ the statute of frauds, given the extensive nature of the new arrangements.

Tenant may argue that oral modifications after contract formation generally do not need to be written down. However, the installation of new cutting-edge equipment is a pretty significant modification. Also, Tenant may argue that a contract may be enforced, in spite of a Statute of Frauds problem, when one or both parties have substantially performed. This is a persuasive argument here because Landlord installed

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the equipment and Tenant ran the plant for several months, so contract may survive.

If contract survives the Statute of Frauds, Tenant probably cannot prove breach because Landlord made a good faith effort to save the contract. Landlord let Tenant install whatever equipment Tenant wanted, so any problems with the equipment are probably not the fault of Landlord. Tenant may argue that Landlord breached by not installing the equipment by September 30, as this was a vital condition for Tenant to continue under the lease because "time was of the essence." However, a court is likely to find that the date was a promise, not a condition, because courts prefer promises over conditions when the

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language is not absolutely clear. Also, it does not appear that Landlord ever agreed to this condition, as it then made a contract with JME for January 1. At any rate, Tenant waived any ~~stipulation~~ promises or conditions to the later date by continuing to work with JME to get the equipment, and starting up on January 1.

Moreover, it is not clear that Tenant adequately represented that failure to have plant ready would constitute breach. Generally, brief delays do not constitute breach unless one party clearly indicates that "time is of the essence". Tenant probably did not convey this ~~easy~~ enough. Next question, is whether delay was brief. Three months would generally not be considered brief in tenancies, but in projects involving installation of large equipment, it may be considered brief.

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Court would likely look to industry standards.

Even if three months not brief, Tenant probably waived any objections to the timing by ~~[illegible]~~ proceeding with plans, as discussed above.