

Problem 3, Group 5

[deleted: students' names indicating who is point person]

Assuming that "Seller agrees to work with Buyer to achieve ongoing compliance with best practices in organic production at member dairy farms" (see outline 1.a.i) is a term of the agreement between Happy Cows (HC) and Yo-Go, the issue is: **whether Alberto ceasing to send Tony daily logs is a material breach releasing Tony from performance.** We must weigh the factors in R§241 (*Gibson*).

*First, to what extent was Yo-Go deprived of the benefit it reasonably expected?*

Yo-Go has a reputation for going beyond the USDA Organic Certification standards, and HC claimed its farms are of the same mind. Yo-Go observed a failure on the Arden farm, so without the reports, it cannot be certain that the milk will meet its standards. The chief reason Yo-Go chose to contract with HC was due to its dissatisfaction with the conditions on other farms. HC was aware of this, as Tony had "regaled Alberto with the litany of his disappointments with previous suppliers" prior to their agreement and "asked hundreds of detailed questions" about the farms' operations and living conditions of the cows. Since satisfying Tony's high standards was the purpose of contracting with HC, that purpose would be frustrated if Tony could not verify the quality of the milk through reports.

HC will argue that by providing daily reports for over a month, Yo-Go had benefited as much as possible through this procedure by establishing a stable history of compliance. Ongoing daily reports churned out over an indefinite period would serve no new purpose and would actually hinder HC from managing its operations and ensuring quality. Further, Alberto will assert that Tony was not significantly deprived of what he reasonably expected because HC generally abided by organic practices above the USDA requirements.

*Second, to what extent can Yo-Go be adequately compensated?*

Yo-Go will allege that from the date it stopped receiving reports, it could not be sure about the quality of the milk. Quality is Yo-Go's priority, and it could not produce any yogurt with milk of unconfirmed quality without compromising the integrity of its trademark. Additionally, Yo-Go will argue that it cannot be compensated because the daily reports are time-sensitive documents that were worthless if produced with any delay. Untimely notice of an inferior milk shipment serves no purpose if that product has been dispersed throughout Yo-Go's yogurt supply.

HC will argue that Yo-Go suffered no economic loss from the lack of daily reports, as the only aspect of Yo-Go's operations that was affected was Tony's own subjective self-satisfaction. Yo-Go incurred no damage if HC failed to continuously produce daily reports, particularly since it had already established a stable history of compliance. If HC concedes that Yo-Go suffered any economic losses, it will claim that it is possible to compensate for the deprivation through reimbursement for yogurt Yo-Go was unwilling to sell due to the unconfirmed quality of the milk.

**Comment [GH1]:** Great issue statement and good judgment—that term is more likely to be in (as in, at a minimum) than other sources of an obligation to send reports

**Comment [GH2]:** Careful—you don't intend to shift to this distinct doctrine; stick with the terms of the rule you are applying.

**Comment [GH3]:** Careful here—you are sliding into an argument that this is not a breach; but the material breach analysis assumes it is/

**Comment [GH4]:** This is directly addressed to 'extent' of breach.

**Comment [GH5]:** Compensation goes to monetary compensation—damages. [this is a harder factor for you to evaluate before learning about damages]

*Third, to what extent will HC suffer forfeiture if Yo-Go halts performance?*

Yo-Go will argue that thirty days may be sufficient time to allow HC to adjust production levels to meet with reduced demand, negating the spoilage of excess unsold milk. Also, the milk glut may not affect HC as much as common producers because its organic milk fits into a unique niche.

**Comment [GH6]:** Good

**Comment [GH7]:** Good thinking

HC will assert that it will be unable to find a replacement buyer for the \$4 million worth of milk that Yo-Go was purchasing monthly due to the glut in the milk industry, regardless of quality. Also, HC may be unable to change production to meet with lower demand in such a short time period because of rigid daily production schedules.

**Comment [GH8]:** I'm not sure why rigid production schedules is supposed here—but yes, HC will argue it faces limits in reducing production.

*Fourth, what is the likelihood failure will be cured?*

Yo-Go will argue the daily reports were themselves intended to cure the failure at Arden Farms, and now that this cure has become its own failure. Tony cannot rely on Alberto's assurances. This casts serious doubts on the value of such assurance in the future. Further, Yo-Go has given HC a chance to cure this breach, to which Alberto replied "we don't have to...this is ridiculous" demonstrating his unwillingness to cure. Even if HC does resume the daily reports, those documents will not attest to the quality of past shipments of milk.

**Comment [GH9]:** Nice

**Comment [GH10]:** Good

Alberto will argue he complied with Tony's demands and will continue to do so. The production of the daily reports themselves – although not an express provision of the contract – manifests HC's willingness to work with its clients to ensure compliance. HC didn't have the daily report apparatus integrated into their operations; a failure in the past does not preclude future remedy.

**Comment [GH11]:** Sliding into 'it's not a breach' here.

*Fifth, the extent failure to perform comports with good faith & fair dealing?*

Tony will allege that Alberto made misrepresentations about HC's close relationship with the farms in the collective, saying that all the farms "have been with us since the beginning," which Tony found to be untrue. The daily reports were supposed to cure HC's apparent failure to comply with Yo-Go's demands, and now HC has stated it has no intention of working with Yo-Go to find a satisfactory solution. Yo-Go will also argue that HC was aware that Yo-Go had stringent expectations and made frequent reassurances that it would meet those expectations.

**Comment [GH12]:** I don't see how any of this adds up to an argument that not sending the reports is in bad faith. You need to supply a meaning for 'bad faith' in this context.

HC will argue that it has always made an effort to comply with Yo-Go's demands, and that the very fact that it produced daily reports illustrates its good faith in attempting to resolve any complaints.

**Comment [GH13]:** Again, arguing 'not a breach' not 'not a material breach'

*Conclusion*

We would advise Tony to retract his notice of repudiation (UCC 2-611) and continue to perform. Yo-Go's defense of material breach by HC is not strong enough to warrant the risk of being found in material breach itself, particularly in light of HC's potential for significant forfeiture and ability to cure.

**Comment [GH14]:** You can't go this far in your advise based on your analysis of one material breach strategy he might pursue (which, I agree, is unlikely to win)—you only can reach a judgment about this issue.

*Some very nice thinking here and clearly presented. Be sure you understand*

when an argument slips over to the issue of breach as distinct from the issue of materiality of a breach. Good judgment in focusing on material breach of a 'quality' provision that is most likely to be in—but it's not necessary to limit the identification of breaching conduct to one thing—you could have strengthened this with a broader set of conduct (reports, Arden failure)

### Formation:

#### 1. Battle of the forms:

a. If Yo-Go's "Terms of Agreement" and Happy Cows Collective "Supply Agreement" were both confirmations of the oral agreement between the parties, did any terms conflict (UCC 2-207(2)(c)), specifically the quality and termination clauses, making them not part of the contract?

**Comment [GH15]:** Not the test in 2-207(2)(c)

i. Whether both parties intended, at a minimum, to be bound to an agreement for the seller to work with the buyer to achieve ongoing compliance with best practices.

**Comment [GH16]:** Not a subissue

b. Whether the Yo-Go "Terms of Agreement" was agreed to by Happy Cows, since they accepted it without objection after Tony said "delighted to sign up with you on our usual terms," and if so, whether Happy Cows' "Supply Agreement" proposed terms that materially altered the terms of the party's previous agreement (UCC 2.207(2)(c))?

**Comment [GH17]:** Good

i. Quality Clause: HC's does not include "Further seller agrees to adopt best practices in the organics industry even when such practices exceed those required for USDA organics certification."

**Comment [GH18]:** Not an issue—a statement

ii. Termination Clause:

1. Was this term illusory and thus not consideration because the language was too vague to be considered reasonable? A promise conditional on the satisfaction of one of the parties could fail as consideration unless there is some limitation on that party's ability to claim dissatisfaction.

**Comment [GH19]:** Not a subissue of b. Also, be careful: just because A term is too vague to enforce doesn't make the contract illusory and the contract unenforceable for lack of consideration.

2. Whether the contracts' respective merger clauses supersede and discharge any prior or subsequent oral agreements? (R§210; UCC 2-202, 2-207 – no "mirror image" rule)

2. Whether Alberto induced Tony's agreement through fraud by stating that "all our dairy farmers have been with us since the beginning 10 years ago," making the agreement voidable? (R§162, §164)

a. Whether this statement was essential to the formation of the agreement (R§163)?

**Comment [GH20]:** We'd never have complete failure of formation here—that has to be a misrepresentation of the character or essential terms == not the case here.

### Modification:

1. Whether the subsequent agreement to provide daily reports was a requirement of their oral agreement for Alberto to personally fix anything that Tony was uncomfortable with, or the contract term to "work with buyer to achieve... best practices" encompassed Tony's request for daily reports?

**Comment [GH21]:** Unclear why this is under 'modification' since it is interpretation of the original contract

2. Whether the subsequent agreement to provide daily reports was a modification of

the initial agreement despite the two merger clauses?

- a. Whether the daily agreements became an obligatory condition of supplying the milk to Yo-Go? (R§226)
  - b. Was the modification the result of undue influence or duress since Tony said, "You better fix this immediately"?
3. Whether parol evidence is necessary and available to determine what "best practices in the organics industry" meant in the Yo-Go and Happy Cows contracts? (R§202, §203; UCC 1-205)
- a. Whether "best practices in the organics industry" is clarified by Tony's course of dealing (making "his views known through public lectures and a column he writes in a Santa Barbara daily newsletter," history of abandoning numerous other milk suppliers that had comported with USDA Organic standards) (R§222)?

**Comment [GH22]:** Note you can't have two merger clauses—it can't be that they intended two different documents to be the final and exclusive statement of their agreement. Also, only Yo-Go's applies here—is it in the contract? Check requirements of UCC 2-209

**Comment [GH23]:** Do you mean this? If so, what sub-issue?

**Comment [GH24]:** No legal rule says pe must be 'necessary'.

**Comment [GH25]:** Factual question

**Comment [GH26]:** What turns on this? What legal rule is this?

### Breach:

1. Whether Alberto's failure to provide Tony with daily reports of the cows' outdoor activity constituted a material breach based on Restatement §241?
2. Whether Tony gave Alberto sufficient opportunity to cure the supposed breach?
3. Whether Alberto saying "we don't have to give you these things, this is ridiculous," was a clear and unequivocal statement of repudiation?
4. Whether Elise's letter to Happy Cows was a notice of repudiation, and if so, whether it should be revoked if it is found that Alberto did not materially breach the contract?

**Comment [GH27]:** Of what?

**Comment [GH28]:** Where is the obligation to do so?

**Comment [GH29]:** Definitely is.

**Comment [GH30]:** That's a strategy question