ANSWER TO QUESTION NO. 11

The transaction falls under Article 2 of the Uniform Commercial Code, which governs contracts, whether oral or written, that involve the sale of goods. See MCL 440.2102. The contract involved the purchase of labels, an item movable at the time identified in the contract for sale. MCL 440.2105(1).

Here, Organics made a written offer that memorialized terms of a contract and Sticker attempted to accept the offer through a purchase order form that added a term not in the offer. Although not the focus of the call of the question, an answer may initially question whether the purchase order form operated as an acceptance, given its additional disclaimer. In this regard, MCL 440.2207(1) controls the issues and provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

Here, there is no indication that the purchase order form states that "acceptance is expressly made conditional on assent to the additional or different terms," and thus there is no real reason to dispute that the purchase order form operated as an acceptance.

The more relevant question is whether the disclaimer became part of the contract. The remainder of MCL 440.2207 provides that:

> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
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> (a) the offer expressly limits acceptance to the terms of the offer;
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> (b) they materially alter it; or
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> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
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> (3) Conduct by both parties which recognizes the existence of

> a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writing of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

The question reflects that both parties are merchants under the UCC. MCL 440.2104. Further, there is no indication that the offer expressly limits acceptance to its terms and there was no timely objection. MCL 440.2207(2)(a) and (c).

Thus, the only remaining question whether the disclaimer was part of the contract is whether it "materially altered" the contract. "Material additional terms do not become part of the contract unless expressly agreed to by the other party." *Power Press Sales Co v MSI Battle Creek Stamping,* 238 Mich App 173, 182 (1999), quoting *American Parts Co v American Arbitration Ass'n,* 8 Mich App 156, 173-174 (1967) (internal quotation and citation omitted). Although there is no case law on point, Michigan courts have recognized that "clauses such as those listed in Code comment four, like warranty disclaimers, are routinely deemed material as a matter of law." *Id.,* at 180. Further, given the discussion between the Organics' representative and the Sticker representative in which the Sticker representative indicated that Sticker had provided such labels to other companies, Organics could reasonably be surprised that Sticker would not ensure that the labels would adhere to its product, and suffer hardship as a result of this reliance. Accordingly, a correct answer should simply conclude that the disclaimer clause materially alters the contract and will not be enforced as a matter of law.

In regard to the second question, an answer should conclude that Organics has a strong argument to refuse to order any further labels from Sticker within the one-year contract period.

MCL 440.2612 provides that:

> An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.
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> (2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (3) and the

> seller gives adequate assurance of its cure the buyer must accept that installment.
>
> (3) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

Here, the contract clearly authorizes the delivery of goods in separate lots to be separately accepted. The call of the question does not relate to Organics' decision to reject the plum and apple labels, but asks whether Organics can refuse to order "further labels from Sticker within the one-year contract period." The relevant question is whether the "nonconformity . . . with respect to one or more installments substantially impairs *the value of the whole contract*" and "there is a breach of the whole." MCL 440.2612(3). Here, a strong argument can be made that the failure of the labels to adhere directly to fruit impairs the value of the entire contract. As indicated, Organics entered into the contract because "to sell produce in grocery stores its fruit had to be identified by type, size and how it was grown." Thus, the defect is not a minor nonconformity and is not insignificant to the entire contract. Also, the damages could be considered substantial, as Organics expressed concern that the labels could not be used for other "larger orders." Also very important is that Organics has a reasonable apprehension that the defect will not be cured and that the labels would not adhere to other fruits. When Organics called Sticker and complained about the problem, Sticker's representative simply indicated that sometimes the adhesive did not bond direct to "some fruits," leaving Organics to wonder which fruits could then be distributed. The representative also clearly indicated there would be no refund or any replacement labels. Organics has a strong position to cancel the entire contract under MCL 440.2612(3).