ANSWER TO QUESTION NO. 14

For the following reasons, I would advise Plush Resorts ("PR") that it would be likely to succeed in a breach of contract suit against Mighty Machines ("MM"), which could be brought immediately.

1. PR does not have to wait until after MM's performance under the contract is due (February 2009) to sue. MM repudiated the contract (also called an anticipatory breach) on September 1, 2008. If a party to a contract unequivocally declares its intention not to perform its obligations before they are due, the nonbreaching party may immediately bring an action for damages. *Stanton v Dachille,* 186 Mich App 247, 252 (1990).

2. The fact that PR no longer holds a four-star rating is not an adequate excuse for MM to breach the contract even though the rating was discussed during the parties' negotiations. The contract does not make it a condition of MM's performance that PR have the four-star rating; in fact, the contract includes an express merger or integration clause providing that the parties' complete agreement with respect to the reservation is stated in the contract. While MM may argue that parol (also called extrinsic) evidence of these discussions can be admitted to show that PR's maintaining a four-star rating was part of the parties' agreement, that argument should not succeed.

In general, parol evidence of prior or contemporaneous agreements or negotiations is not admissible to vary or contradict the terms of an unambiguous written contract. The chief exceptions to the parol evidence rule allow parol evidence to be admitted to show that (1) the parties did not intend the document to be a complete and final expression of their agreement (a "fully integrated" agreement), or (2) the agreement was only partially integrated because essential elements were not reduced to writing, or (3) the contract has no legal effect because of fraud, illegality, or mistake. *NAG Enterprises, Inc v Allstate Industries, Inc,* 407 Mich 407, 410-411 (1979). But exceptions (1) and (2) cannot apply because Michigan law does not allow extrinsic evidence on the threshold question of whether the contract is integrated when the parties include an express merger clause declaring that the written contract *is* the entire agreement. *UAW-GM Recreation Center v KSL Recreation Corp,* 228 Mich App 486, 493-497 (1998). This is consistent with the general principle, strongly emphasized by Michigan courts, of respecting unambiguous agreements that the parties have written for themselves and not making new contracts for them. Nor does exception (3) apply. What PR told MM was not a misstatement of an existing fact, so MM has no basis to argue that it was fraudulently induced to make the

contract or made it under a mistake of fact (which, in any case, would have to be mutual). At most, the statement about the four-star rating was a promise about a future state of affairs, but that promise is not part of the parties' agreement because of the merger clause.

Comment: The drafter believes that full credit should be given for all answers that spot a potential parol evidence issue and recognize that the merger clause is fatal to parol evidence arguments. "Extra" credit can be given to those who identify circumstances where parol evidence may be admitted while recognizing that under Michigan law the merger clause controls. Some credit can be given if the applicant fails to recognize the merger clause as conclusive, but rationally argues that testimony about the rating discussion may be admissible under one or more of the above-stated exceptions to the parol evidence rule.

3. The next question is whether MM can successfully defend on the ground that other changes in conditions occurring after the contract was signed, and not caused by either party, have made it "impracticable" for MM to perform the contract or "frustrated the purpose" of the contract. The essence of the modern defense of impracticability (formerly called "impossibility") of performance because of changed circumstances is that since the contract was executed the promised performance has become impracticable because it now involves some extreme or unforeseeable difficulty, expense, injury or loss. Mere increased difficulty or financial strain are not enough to invoke this defense. While MM is more financially pinched in September 2008 than it was one year earlier, the cost of renting the facility is the same cost it agreed to and it is capable of making the required payments.

The defense of frustration of purpose is a closer question, but also unlikely to prevail. The conditions to applying frustration of purpose are: (1) the contract must be at least partially executory (here this is true); (2) the frustrated party's purpose in making the contract must have been known to both parties at the time the contract was made (this is also true); (3) this purpose must have been thoroughly frustrated by an event not reasonably foreseeable at the time the contract was made, which event is not due to the fault of the frustrated party and the risk of which he did not assume (MM can make a non-frivolous argument that this is also true). *Liggett v City of Pontiac,* 260 Mich App 127, 134-35 (2003). MM could argue that the extent of the economic slowdown and the resulting need for it to rush its strategic planning has made the meeting unnecessary, that this urgency was not its doing and was unforeseeable when the contract was made, and that it did not assume this risk. However, the comments to the Restatement (Second) of Contracts, §265, suggest a high standard for finding frustration: "The object must be so completely the basis of the contract that, as both parties understand, without it

the transaction would make little sense," and "the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made." It is doubtful that MM can meet that standard. When the contract was made, the parties assumed that there would be recreation as well as strategic planning going on (MM reserved other amenities besides meeting rooms). Furthermore, accelerating strategic planning was MM's decision, and some useful business meetings at the resort could still take place.

Comment: This is a more extended discussion of the frustration doctrine than an applicant can be expected to provide. Full credit on this point should be given if an applicant recognizes and correctly labels the possibility of a "frustration" defense being raised, and further recognizes that frustration is not to be found too easily in order to preserve the stability of commercial relationships.

4. The logical approach to damages would be to seek the most common measure of contract damages, PR's "expectation interest." Sometimes called "benefit of the bargain damages," this measure is intended to place a party in the same position it would be in if the breaching party had fully performed its contract obligations. Here, the starting point for measuring PR's expectation interest is the unpaid balance of the contract price: $900,000. PR could add to that any other reasonably foreseeable loss caused by the breach Restatement (Second) of Contracts, §347(b), such as advertising to find a replacement. The unpaid price must be reduced for any expenses that PR avoids by not having to perform. *Id.*, §347(c). Thus, if during litigation MM develops evidence that PR saved on wages or other expenses (buying food, providing limos, etc.) that it would have paid as part of providing the promised accommodations to MM, that evidence will reduce PR's $900,000 expectation interest. And PR must also keep up reasonable efforts to mitigate its damages by finding a replacement for MM.

Comment: The concepts of (1) adding in incidental and consequential losses and (2) keeping an eye on mitigation are nonessential to full credit.