

**QUESTION 6     THE ANSWER TO THIS QUESTION SHOULD GO IN BLUEBOOK II**

Able Broadcasting had a five-year written contract with Zenith Media for Zenith to sell commercials on Able's TV station. The contract between Able and Zenith contained these relevant terms:

- (1) Zenith was to provide Able with weekly sales reports that detailed its past week's sales and projected sales for the next four weeks;
- (2) Zenith's sales goal was \$100,000 per week;
- (3) Zenith was to receive a 10% commission on gross sales;
- (4) Able was to pay Zenith's invoices within 30 days of receipt;
- (5) The contract was set to expire on December 31, 2013.

The contract did not address whether, or on what grounds, it could be terminated before the end of its term. As 2013 began, Able was troubled because during 2012, Zenith's average weekly sales had fallen from \$100,000 to \$80,000 despite Zenith's diligent efforts. Lately, Zenith had been providing sales reports only every two weeks, sometimes without projections.

During 2012, Able wrote Zenith every time a sales goal was missed, expressing dissatisfaction and encouraging Zenith to do better in the coming weeks. Less consistently, Able complained about not receiving sales reports and projections as promised, advising Zenith that Able needed this information to project the amount of funds it would have available to buy supplemental programming.

In January 2013, Able sent Zenith a letter reviewing Zenith's history of not following the contract. The letter ended: "Effective immediately, we insist that you comply fully with each of your contractual obligations, including meeting weekly sales requirements and providing weekly reports and projections. Failure to do this will result in termination of the contract."

Zenith improved for a few weeks, then slipped back to its previous pattern. On March 15, Able notified Zenith it was terminating the contract as of April 1 because of Zenith's repeated breaches.

On May 1, Zenith sued Able for breaching the contract by unilaterally terminating it early. Able defends against Zenith's breach of contract claim by asserting that Zenith's breaches justified termination. Zenith responds that Able had waived strict performance of the contract.

Should Zenith prevail based on these arguments? If Zenith prevails, what remedy or remedies can Zenith obtain on the facts provided, and why? (You are not expected to compute damages in a specific amount.) Explain your answers.

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