## EXAMINERS' ANALYSIS OF QUESTION NO. 4

The issues raised by Ethan that Applicants are asked to evaluate are: adequacy of consideration; expiration of the offer; lack of a writing; lack of a contract term; and mitigation of damages.[1]

### Adequacy of Consideration

Ethan contends that there was "no deal" because Ted "gave nothing" but a promise to give a speech "for an outrageous fee." Ethan is thus arguing that no contract was formed because there was not adequate consideration.

"An essential element of a contract is legal consideration." *Yerkovich v AAA*, 461 Mich 732, 740 (2000). "There must be a benefit on one side, or a detriment suffered, or service done on the other. Courts do not generally inquire into the sufficiency of consideration." *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-39 (2002) (internal quotation marks and citations omitted). "[R]escission of the contract for inadequacy of consideration will not be ordered unless the inadequacy was so gross as to shock the conscience of the court." *Moffit v Sederlund*, 145 Mich App 1, 11 (1985). "It has been said '[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration.'" *Gen Motors Corp*, 466 Mich at 239.

Here, Ted received the benefit of a promised $2,000 payment and incurred the detriment of promising to provide a wine

[1]This question is governed by common-law contract principles rather than the UCC. The contract involves services rather than goods. This question repeatedly references "services": Ethan and Ted chatted "about Ted's services"; Ethan "could not afford Ted's services"; and Ted explained to Wines R Us "that he provided his services only to discriminating wine drinkers." Under Michigan law, "if the purchaser's ultimate goal, is to procure a service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of this service." *Neibarger v Universal Cooperatis, Inc*, 439 Mich 512, 536 (Mich 1992). Here, the "purchaser" of the tasting services was Ethan (not the people attending the tasting).

tasting; Ethan received the benefit of the promised wine tasting and incurred the detriment of promising to pay $2,000. Thus, the agreement was supported by legal consideration. A court would not consider Ethan's argument that $2,000 was an "outrageous fee," as any inadequacy in the price was not so gross as to shock the court's conscience. Ethan's contention is meritless.

Expiration of offer

Ethan contends that no contract was formed because Ted's offer, as set forth in the brochure, had expired. "An offer comes to an end at the expiration of the time given for its acceptance. . . . An offeree cannot accept, either through words or deeds, an offer that has lapsed. . . . [A]n offeror cannot waive the lapse of his offer simply by choosing to disregard it." *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 626 (2004) (internal quotation marks omitted) (brackets in original). Consequently, Ethan is correct that Ted's offer, as set forth in the brochure, had expired.

However, Ethan's statement that he would pay Ted "$2,000 for a tasting on Saturday" was itself an offer, which Ted accepted ("Great!"). See *Id.* Consequently, Ethan's contention that no contract was formed because Ted's offer had expired, is incomplete and thus incorrect.

Lack of writing

Ethan contends that no contract was formed because the agreement was never reduced to writing. However, "[w]hen the minds of the parties have met, when an offer has been made by one and accepted by the other, a contract is thereby entered into. Unless required by some positive law, it need not be reduced to writing in order to be binding upon the parties." *Pangburn v Sifford*, 216 Mich 153, 154 (1921); see also *Strom-Johnson Construction Co v Riverview Furniture Co*, 227 Mich 55, 67 (1924) ("Where the subject-matter does not require the contract to be written, oral agreements are as effective as written ones.").

Here, the agreement between Ted and Ethan was not required by the Statute of Frauds (MCL 566.132) or any other "positive law" to be in writing. (The agreement falls outside the scope of the Statute of Frauds because it was to be performed within one year from its making, and does not fit into any of the

statute's other categories of agreements required to be in writing.) The fact that Ted and Ethan agreed that they should put their understanding in writing, but never did so, does not make their oral agreement unenforceable. "[W]here agreement has been expressed on all the essential terms of the contract, the mere fact that the parties manifest an intention to prepare a written memorial of their agreement does not render the oral contract unenforceable merely because the writing is never prepared." *Scholnick's Importers-Clothiers, Inc v Lent*, 130 Mich App 104, 109 (1983). Ethan's contention is thus meritless.

Lack of contract term

Ethan contends that no contract was formed because he and Ted failed to specify the type of wine to be used at the tasting. "[A] contract requires mutual assent or a meeting of the minds on all the essential terms." *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 246 (2008) (internal quotation marks omitted). However, "when the promises and performances of each party are set forth with reasonable certainty, the contract will not fail for indefiniteness. . . . [T]he absence of certain terms . . . does not necessarily render a contract invalid. . . . [A] contract may be enforced despite some terms being incomplete or indefinite so long as the parties intended to be bound by the agreement . . . ." *Calhoun County v Blue Cross Blue Shield Mich*, 297 Mich App 1, 14-15 (2012); see also *Nichols v Seaks*, 296 Mich 154, 159 (1941) ("So long as the essentials are defined by the parties themselves, the law supplies the missing details by construction.").

Here, Ethan and Ted agreed on the service to be provided ("a two-hour guided wine tasting with commentary," "wine included"), the price ($2,000) and the day on which the service was to be provided (Saturday). The best conclusion is that these were the essential terms of the contract and that the type of wine to be used was merely an incidental or minor term. The fact that Ted's brochure did not specify the type of wine to be provided, and that Ethan and Ted did not discuss this during Ethan's visit, indicates that the type of wine was not an essential term of their agreement; a strong argument can be made that the parties clearly intended to be bound by the terms they agreed on, and that they could easily specify at a later point what type of wine would be used. (It is also possible that Ted could unilaterally make the decision, rendering the issue immaterial to contract formation.) Thus, Ethan's contention lacks merit.

Mitigation of damages

Ethan contends that Ted could have avoided any loss by accepting the offer from Wines R Us. "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages." *Morris v Clawson Tank Co*, 459 Mich 256, 263 (1998) (internal quotation marks omitted). *See also Om-El Export Co, Inc v Newcor, Inc*, 154 Mich App 471, 477 (1986) ("There is no dispute that plaintiffs in tort and breach of contract actions have the duty to take reasonable steps to minimize any damages suffered as a result of a defendant's wrongful breach.").

The issue here is whether Ted was reasonably required to accept the offer from Wines R Us. One could argue that Ted provided his services only "to select groups of aficionados," such as Ethan's "best customers," and that being forced to provide his services to random customers of a mass-market retailer, would unreasonably damage his business/professional reputation. Alternatively, one could argue that requiring Ted to provide the same services that he usually provides, at the same price to a different group of wine drinkers, is entirely reasonable. Examinees will earn credit for making cogent arguments either way.