

Dueling Purchase Orders and More: ANOTHER "BATTLE OF THE FORMS"

TRADE CREDITORS KNOW ALL TOO WELL THAT THE TERMS GOVERNING A SALE OF GOODS ARE NOT ALWAYS NEATLY PACKAGED IN A SINGLE, FULLY EXECUTED AGREEMENT WITH CLEAR TERMS AND CONDITIONS. A "CONTRACT" BETWEEN A BUYER AND SELLER OFTEN EMERGES THROUGH PURCHASE ORDERS, INVOICES, EMAIL EXCHANGES AND OTHER TRANSACTIONAL DOCUMENTS EXCHANGED IN THE ORDINARY COURSE OF BUSINESS. WHEN THOSE DOCUMENTS CONTAIN COMPETING TERMS, A DISPUTE MAY ARISE AS TO THE EXISTENCE OF A CONTRACT, AND THE GOVERNING TERMS—A "BATTLE OF THE FORMS."

A 2024 decision by the United States District Court for the Central District of California, in *United Products and Technology Limited v. Above Edge, LLC*, illustrates how courts resolve these disputes under the Uniform Commercial Code (UCC). Although the case arose from the chaotic and unprecedented early days of the COVID-19 pandemic, the court's analysis of contract formation under California's UCC § 2207 carries lessons for any trade creditor whose transaction documents may not perfectly align with its counterparty's documents.

SOME BACKGROUND ON UCC ARTICLE 2 AND THE "BATTLE OF THE FORMS"

Article 2 of the Uniform Commercial Code (UCC) governs the sale of goods, including (among other things) the formation of a contract and terms for the sale of goods. A contract is generally formed via an offer by one party (such as a buyer's purchase order) and acceptance by the other party (such as a seller's email response or acknowledgment). However, a "battle of the forms" ensues when a party's acceptance of an offer includes additional or different terms compared to an offering party's terms.

UCC § 2-207 establishes the guidelines for determining the terms of a contract where there is a battle of the forms:

(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.*

(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: a. the offer expressly limits acceptance to the terms of the offer; b. they materially alter it; or c. notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(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 writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

In the *United Products* case, the court applied California's version of the UCC, California Commercial Code § 2207(1) and (2), to address a battle of the forms that arose from competing versions of a purchase order exchanged between the seller and buyer.

RELEVANT BACKGROUND REGARDING THE *UNITED PRODUCTS* CASE

United Products and Technology Limited is a company that manufactures personal protective equipment (PPE) in China. Above Edge, LLC and its principal sought to purchase ear loop face masks for resale to hospitals and the general public during the COVID-19 pandemic.

In March 2020, as demand for PPE had skyrocketed, Above Edge contacted United Products to explore purchasing eight million ear loop masks from United Products. Based on that conversation, on or about Apr. 13, 2020, United Products prepared Purchase Order No. 1079, which confirmed and memorialized the purchase and sale of eight million units of three-ply ear loop masks at a price per unit of $0.30, for a total

A CONTRACT IS GENERALLY FORMED VIA AN OFFER BY ONE PARTY (SUCH AS A BUYER'S PURCHASE ORDER) AND ACCEPTANCE BY THE OTHER PARTY (SUCH AS A SELLER'S E-MAIL RESPONSE OR ACKNOWLEDGMENT). **HOWEVER, A "BATTLE OF THE FORMS" ENSUES WHEN A PARTY'S ACCEPTANCE OF AN OFFER INCLUDES ADDITIONAL OR DIFFERENT TERMS COMPARED TO AN OFFERING PARTY'S TERMS.**

SELLERS AND BUYERS OF GOODS SHOULD CLOSELY SCRUTINIZE THE LANGUAGE CONTAINED NOT ONLY IN THEIR OWN TRANSACTION DOCUMENTS, BUT ALSO IN THE **TRANSACTION DOCUMENTS THEY MAY RECEIVE FROM THEIR RESPECTIVE COUNTERPARTIES.**

of $2.4 million. The Purchase Order's "Description" field stated, "3 Ply FDA Approved in Boxes."

Above Edge responded with its own version of the Purchase Order. Its version added a shipping address and the following text under "Comments or Special Instructions": "FDA APPROVED, LEVEL 1 EAR LOOP CIVIL MASK, PACKAGED IN A BOX, PAYMENT TERMS 50% DEPOSIT, 50% AT BOL." Critically, Above Edge did not expressly condition its acceptance on United Products' assent to these additional terms.

The first batch of 1,270,000 masks arrived at LAX on May 2, 2020 and were ultimately delivered, and United Products received $1,035,000 in partial payment for these masks. A second shipment of 6,730,000 units followed for which Above Edge never tendered payment. Following these deliveries, Above Edge raised complaints about the quality and merchantability of the masks.

United Products ultimately filed suit, asserting $1,333,000 in damages for breach of contract, quantum meruit, common count (goods and services received), promissory estoppel, and declaratory relief. Above Edge asserted counterclaims for breach of contract, unjust enrichment, breach of the implied warranty of merchantability, breach of the warranty of fitness for a particular purpose, and declaratory relief.

THE PARTIES' BATTLE OF THE FORMS

At the heart of the contract formation dispute was a familiar question: was a contract actually created between the seller, United Products, and the buyer, Above Edge, where they exchanged slightly different versions of a purchase order?

United Products argued that a contract with Above Edge was created, notwithstanding any discrepancies between the competing purchase orders, because Above Edge neither modified the substantive aspects of the agreement nor objected to United Products' purchase order. United Products also argued that its invoice and Above Edge's email response were "incontrovertible proof of a valid contract between the parties". Above Edge disputed the existence of a contract with United Products, relying on its own alternate version of the Purchase Order.

Both versions of the Purchase Order reflected the same core deal: the purchase of three-ply FDA-approved ear loop masks in boxes. The differences were limited to Above Edge's added shipping address and the "Comments or Special Instructions" language regarding FDA approval level, packaging, and payment terms.

THE COURT'S DECISION

The court sided with United Products on the threshold issue of contract formation. Applying California's Commercial Code § 2207, the court held that Above Edge's email response and course of conduct signaled its acceptance, regardless of Above Edge's additional language in the Purchase Order. The court emphasized that the UCC recognizes that the terms of an offer and acceptance "will seldom be identical" in many commercial cases for the sale of goods, and that § 2207 was written to reflect that reality.

Critically, the court also concluded that Above Edge did not condition its acceptance on the additional terms. Therefore, its response operated as an acceptance and a contract was formed, even though the parties had slightly different understandings of the applicable terms.

The court further analyzed whether the additional terms in Above Edge's version of the Purchase Order constituted material alterations under UCC § 2207(2) that would have precluded formation of a contract. The court concluded that neither of the contested changes in the Purchase Order "would have caused 'surprise or hardship' to either party", and that Above Edge did not argue otherwise. As such, the additional terms did not prevent contract formation.

Having found the existence of a valid contract between United Products and Above Edge, the court then proceeded to analyze performance and breach, ultimately granting summary judgment in favor of United Products on its breach of contract claim.

THE COURT'S OTHER HOLDINGS:

- **Substantial Performance:** The court held that United Products substantially performed its obligations under the Purchase Order. The court concluded it was undisputed that United Products had performed its obligation to deliver 8 million masks and that Above Edge only paid $1,055,000 out of the $2,400,000 it was required to pay for the masks. The court also rejected Above Edge's claim

that the parties had "scrapped the Purchase Order" and entered into separate agreements with a third party (Imperial Glove & Safety) as unsupported by anything beyond a vague, self-serving declaration by Above Edge, which lacked specific details about the alleged separate contract's terms.

- **Acceptance of Goods and Merchantability:** The court also granted summary judgment in favor of United Products and against Above Edge on its counterclaims for restitution, unjust enrichment, and United Products' breach of its implied warranties of fitness and merchantability. Above Edge did not raise any disputes and merchantability issues with the masks until long after accepting the masks, and there was no evidence that Above Edge asked for verification of the masks' FDA-approved status. The court held that Above Edge accepted the goods under California Commercial Code § 2606, which provides that acceptance occurs when a buyer fails to make an effective rejection after a reasonable opportunity to inspect.

TAKEAWAYS FROM THE DECISION

The *United Products* decision reinforces several critical lessons for goods sellers and buyers:

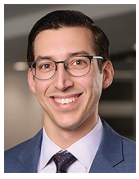
- **Under UCC § 2-207, an acceptance containing additional or different terms may give rise to a contract**. Unless the responding party expressly conditions its acceptance on the counterparty's assent to those additional or different terms, the responding party risks the creation of a contract omitting these terms.
- **"Surprise or hardship" is the test for material alteration.** Additional terms that do not cause surprise or hardship to either party might be incorporated into a contract. Trade creditors should carefully evaluate whether the additional terms in a counterparty's response are truly material and adversely affect the creditors' rights and remedies.
- **Course of conduct may give rise to or support acceptance.** Above Edge's email response and course of conduct reinforced the court's conclusion that Above Edge had reached an agreement with United Products. Trade creditors should be aware that their actions in performing under a purchase order may be deemed acceptance of the order's terms.

Sellers and buyers of goods should closely scrutinize the language contained not only in their own transaction documents, but also in the transaction documents they may receive from their respective counterparties.

Trade creditors seeking clarity on the terms of their dealings with a counterparty should consider entering into a written agreement containing favorable terms and conditions that is signed by both parties—particularly in fast-moving transactions where deal terms are finalized informally over emails and messaging platforms. BC



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