Sample Answer

Part (a): An offer is a communication that a reasonable person in the position of the offeree would interpret as creating a power of acceptance. Is the initial communication from LACSS an offer? Certainly not: it does not include quantity, price, or an intention to be bound ("expressing an interest").

Is the price list sent by Glass, Inc., an offer? Perhaps: it includes specific prices and sizes and includes a handwritten note indicating that it was not distributed to a large number of potential buyers. And while the communication does not specify quantities, it could be an offer giving discretion in the offeree to select any reasonable quantity. On the other hand, because the communication is largely pre-printed and does not expressly limit quantity, a reasonable recipient might properly conclude that it lacks sufficient detail to create a power of acceptance. However, because Glass presumably can fabricate almost any quantity (glass is made from sand), the lack of a limitation on the quantity that can be ordered (along with the implicit limitation that LACSS has a finite number of windows that need panes), the communication may well be an offer.

If the communication from Glass is not an offer, then the reply order from LACSS probably is an offer because it provides specific quantities, prices, and indicates a desire for an immediate transaction. In this case, the confirmation sent by Glass seems unlikely to be treated as an effective acceptance because it deviates so significantly from the offer: an increase in price and a dramatic reduction in quantity. (Recall that the one essential term required by the UCC to form a contract is quantity.) If this deviant acceptance is treated as an acceptance under UCC 2-207(1) (that is, if it is treated as falling before the comma), then the changed terms plainly are material and so, as discussed below, will not form a part of the contract.

Under UCC 2-207(1), a seasonable expression of acceptance operates as an acceptance even if it includes new or different terms unless it is "expressly conditional" on the new or different terms. A court is unlikely to conclude that a deviant acceptance is expressly conditional on new (or different) terms unless it requires an expression of confirmation or otherwise makes clear there is no binding agreement unless the recipient takes additional steps.

If the order from LACSS is an acceptance, then it is a mirror acceptance (a) unless the expressed desire that all panes be made from the same run or (b) the "delivery at once" is treated as a new or additional term. Because the communication merely "requests" the single run, it does not seem to be a term imposed by LACSS. If the "request" is determined to be a new term, then under UCC 2-207(2), this new term becomes part of the agreement unless the offer expressly excludes new terms (which does not seem to be true here), notification of objection has been given (which does not seem to be true here), or it materially alters the contract. This last exclusion may be applicable depending on how burdensome imposition of the request is on Glass. If the "request" is a mere request, then the acceptance will be treated as a mirror acceptance in which case the terms of the contract are 18,000 of the 16 by 48 panes at $9.00 per pane and 6,000 of the 48 by 48 panes at $22.50 per pane, shipment within 14 days. The same analysis should apply to the "delivery at once" statement although given the prior communication's statement that shipment will be made in 14 days, an alternate interpretation is that "delivery at once" means no more than start production at once and deliver as quickly as possible (but in all events within 14 days). The terms of the contract also include a 10% discount on quantities on order of 10,000 panes or more, although the meaning of that term is ambiguous.

Does the quantity discount apply only to orders of more than 10,000 panes of a single size? Note that the writing says "orders of 10,000 panes or more" without a limitation. Unless there is a trade usage

of which both parties should be aware or past dealings between the parties that indicates a special meaning, presumably a court would interpret the discount as applicable to all panes so long as the combined order totals more than 10,000 panes. However, because the discount presumably reflects some manufacturing economy of scale, a court might be sympathetic to the argument that no such economy is likely to arise if the order is composed of multiple sizes. Still, that is not what the writing says and because it would be so easy for the seller to make such a limitation clear in its writing, Glass is unlikely to prevail on this argument.

If the order from LACSS is an offer rather than an acceptance, then there is no written acceptance and no contract is formed unless behavior of the parties forms a contract. Here, there are no facts indicating any such behavior occurred.

Part (b): Under the common law, an acceptance is effective only if it mirrors the terms of the offer. If the order from LACSS is an acceptance, then it is effective only if the "request" is treated as a suggestion rather than a proposed term of contract (see discussion above) and the "delivery at once" is treated as consistent with the offered delivery in 14 days (see discussion above). If there is a contract, the quantity was specified by LACSS as including 18,000 of the smaller panes and 6,000 of the larger planes as well as a 10% quantity discount (see discussion above).

Part (c): A party can sue on the contract only if there is a breach by the other side. Here, the only possible breach by LACSS is the failure to pay for the partial delivery, but that is a breach only if LACSS's promise to pay is not excused. In general, it is a condition of every promise that all prior promises were substantially performed. Here, that means it is a condition precedent to LACSS's promise to pay that GLASS substantially performed its obligation to deliver the promised panes. "Substantial performance" means that the promisee receive the substantial benefit anticipated from the contract (see *B&B Equipment Co. v. Bowen* and Restatement (Second) of Contracts §275). If the contract is indivisible, then it is almost certain that Glass's breach is material (i.e., that its performance was not substantial) because LACSS will need to find a new supplier for 18,000 of the 24,000 panes ordered. Further, if obtained from a different manufacturer, they might not match (note the request for a single run). Finally, the panes might have to be installed at a single time, thereby imposing on LACSS the obligation to store fragile equipment for what might be a very long time. On the other hand, if the contract is divisible, then Glass has fully performed its divisible obligation to deliver the larger panes and so is entitled to be paid at the contract rate less any damage to LACSS arising from its failure to fully perform its obligation under the contract to deliver the smaller panes.

Is the contract divisible? Only if the contract imposes multiple duties upon each party and their obligations appropriately can be divided into agreed exchanges. Separate prices for the two sizes of panes supports divisibility although Glass's interpretation of the discount (whether or not accepted) indicates there is some connection between the two sizes. The request for a single run supports a lack of divisibility, and if there is a need to install all the panes at one time, the total order likely will be treated as divisible. We need more information to determine if LACSS's ability to use the larger panes is compromised by the failure to obtain the smaller panes.