

**Monterey College of Law**

**CONTRACTS - Section 1**

**Final Examination**

**Spring 2022**

**Professors Patterson & Kutter**

**General Instructions:**

Answer Two Essay Questions.

Answer 20 MBE Questions.

Total Time Allotted: Three (3) Hours

Recommended Allocation of Time: Equal Time per Question

Contracts  
Final Examination  
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### Question 1

Art Dealer rear ended the vehicle of Lucky Mann. Because of his poor driving record, Dealer didn't want a police report, insurance claim or lawsuit. So he orally offered to settle the damage to Mann's vehicle by giving him a very valuable Van Gough original painting in exchange for Mann not pursuing a claim against him.

Mann, knowing that his daughter Candy's 18<sup>th</sup> birthday was soon and that she treasured fine art and paintings, agreed to the deal so that he could give her the painting for her birthday. Mann then excitedly told his daughter of the painting as a gift.

Days prior to Candy's birthday, Mann called Dealer to arrange to pickup the painting only to be rebuffed by Dealer who told him that they didn't have a valid enforceable agreement and that "anyway it wasn't in writing."

What are the rights of Lucky Mann and Candy Mann against Art Dealer? Explain.

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## Question 2

Jessica wants to turn her vacant garage into a hair salon. She decides to purchase and install a state-of-the-art heating and cooling system, which Mitch, the Contractor, agrees to sell and install at a cost of \$40,000. Jessica had specific ideas about the heating and cooling systems and was excited that Mitch was on board with the project.

On April 13<sup>th</sup>, the parties agree to the arrangement in a valid written contract in which Mitch promises to start the job on April 17<sup>th</sup>, and to complete it by June 1<sup>st</sup>. The contract includes a recital stating, "Time is of the essence for the purpose of avoiding any delay in the opening of Jessica's Salon."

State law requires that all installations of the new state-of-the-art heating and cooling systems be done by a certified heating and cooling technician.

On April 15<sup>th</sup>, the only certified technician who works for Mitch, Braden, is injured in a car accident. Mitch immediately notifies Jessica and advises her that the start of the work will be delayed because of Braden's accident. Jessica replies, "You know that time is of the essence. Yesterday, the city announced special tax breaks for businesses that open by June 1<sup>st</sup>. Can you still finish by then?" Mitch replies, "I don't know when we can start. It depends on how quickly Braden recovers. Give me a moment to see if I can think of something." Jessica tells Mitch that she is terminating the contract.

Mitch, worried about losing the business, calls up his friend Scott, who also works with similar state-of-the-art heating and cooling systems and is a certified technician. Mitch asks Scott if he can take over the contract and head over to Jessica's place immediately and finish the job that Braden was supposed to do. Scott agrees to take over the contract and heads over to Jessica's place and introduces himself. Jessica tells Scott that she contracted with Mitch previously, does not know Scott, and refuses service from Scott. Scott heads home.

Jessica finds an alternative supplier and installer of a similar state-of-the-art heating and cooling system at a cost of \$50,000, but he can't start work immediately and the salon opens on July 1<sup>st</sup>. Jessica misses the deadline for the city tax break.

Jessica sues Mitch for breach of contract.

1. Can Jessica prevail in her lawsuit against Mitch? Discuss
2. If Jessica were to prevail in her lawsuit against Mitch, can Jessica recover:
  - a. The \$10,000 in increased costs for the state-of-the-art system? Discuss
  - b. The lost profits for the delay in opening the salon? Discuss
  - c. The value of the tax reduction? Discuss

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## Contracts - Final Examination-Spring 2022-Professors Patterson & Kutter

*Answer Outline-Question 1-Contracts-Spring 2022-Patterson&Kutter*

*Offer*

*Offer Open*

*Acceptance*

*Consideration-painting for forbearance to sue of good faith claim*

*Minor ca avoid a contract but can enforce a contract*

*Stat. of frauds – N/A – not 1 of 5. Note sale of goods.*

*3pb- pee ----- por-----3pb-----done*

*Lucky Mann     Art Dealer             Candy     Intended*

*Vested*

*Conclusion – Both Lucky and Candy can sue Art but only 1 recovery. Candy can sue for s/p*

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Answer Outline

Spring 2022 Contracts Essay #2

1. Contract for services or UCC. Discuss governing body of law and predominant factor test.
2. Conditions – time is of essence, express condition precedent, strict compliance. Discuss
3. Delegation – was Mitch’s delegation to Scott invalid? Discuss
4. Anticipatory breach – was there an unequivocal express renunciation of no performance by Mitch? Discuss voluntary disablement, request of assurances by Jessica, and failure to provide assurances by Mitch.
5. Damages – FUC analysis for each requested damage amount, speculative damages for lost profits? Did Jessica mitigate damages?

1)

To determine the rights of the parties we must first establish whether a valid, enforceable contract exists. A valid, enforceable contract consists of an offer that is open at the time of acceptance, accepted, and supported with valid consideration. An offer is a promise to do or not do something consisting of terms which are firm and definite.

### **Governing Law**

When a contract deals predominantly with goods, provisions of the UCC apply. When a contract deals predominantly with services, provisions of common law apply. Here, there is a hybrid contract because it is a promise to provide a good (a "very valuable Van Gough painting") in exchange for forbearance to sue. Because the purpose of Dealer's offer was to avoid a lawsuit and settle the damage to Mann's vehicle, it is most likely that the court will find that services are predominant, and apply common law. *Not a "sale" of goods*

### **Offer**

An offer is an intent to be bound to terms that are certain and definite (subject, parties, time, and price) that is communicated to the offeree giving them the power of acceptance. Here, Dealer made a clear offer by his statement. The subject is the settlement of damage, the parties are Dealer and Mann, the time is not specified, and the price is a specified exchange (more below under consideration). In the absence of a specified time, the court may substitute a reasonable time. There was most likely a valid offer.

Dealer's best argument against the formation of a valid, enforceable contract will be to point out that the exact painting was not sufficiently described or identified as to be certain. Dealer will try to convince the court that this ambiguity means the offer was not valid because it did not consist of definite terms. Most likely this argument will fail,

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Lucky Mann agreed based on the description provided ("very valuable Van Gough"), and that was sufficiently specific.

### **Offer Open**

Lucky Mann "agreed to the deal" on the spot, and there was nothing done to terminate or revoke the offer prior to his acceptance. The offer was open. ✓

### **Acceptance**

Acceptance is a voluntary act of unequivocal assent to each and every term. Lucky Mann unequivocally agreed to the terms of the offer--forbearance to sue in exchange for a very valuable Van Gough painting.

### **Consideration**

Consideration in a bilateral contract (a promise for a promise) is a mutually bargained for exchange of contemporaneous legal detriment. Here, Dealer is offering to give up a painting, and Mann is agreeing not to pursue a lawsuit. Forbearance to sue is valid consideration. Therefore, this contract was supported by consideration. ✓

Dealer may try to claim that the vagueness of his promise was not valid consideration--that it was illusory. However, a "very valuable Van Gough" is a reasonably clear description. Although he did not promise a specific painting, he did describe something that was not purely illusory. Illusory consideration would be something that was not only vague, but subjective. Here, it could be objectively determined that the painting was what he promised or not, therefore the court would probably consider it valid consideration.

### **Statute of Frauds**

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A contract must be in writing if it deals with the sale of goods over \$500. Here, Dealer has raised Statute of Frauds as a defense. A writing is a memorandum of essential terms signed by the party against whom enforcement is sought. Dealer did not sign a memorandum of essential terms, so if Statute of Frauds applies this would be a valid defense. However, there is nothing that states the value of the painting. It may be inferred that the painting is worth more than \$500, but that is not certain. For example, if it is a painting by a "Van Gough" who is not the world-famous impressionist "Vincent Van Gogh" it is quite possible the painting is worth less than \$500. If Dealer had specified a monetary value to the painting, his argument that the contract must be in writing would be much stronger. Here, the court's determination will depend on whether Dealer can make a case that it was clear to both he and Lucky Mann at the time of the agreement that the painting was worth more than \$500, and that because of this the Statute of Frauds must apply.

✓ Lucky Mann will argue that the value was vague, and more importantly, that the exchange was not a "sale of goods" but an exchange of an item of value for a service--his forbearance to sue Dealer. If he were buying the painting outright, then it is much more likely that the Statute of Frauds would apply. Here, because it is not a true sale of goods, the Statute of Frauds most likely does not apply and the contract did not need to be in writing.

### **Third-Party Beneficiary**

A third-party beneficiary (3PB) must be intended and vested to have rights under a contract.

### **Intended**

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inferred if performance runs to the 3PB, and if they are named or can be inferred in the agreement. Here, Candy Mann is a donee beneficiary because the painting is meant as a gift to her. Because Candy Mann is Lucky Mann's daughter, they have a special relationship, and so Candy may be inferred as an intended 3PB under the law.

### **Vested**

To have rights in a contract claim, a 3PB must also be vested. A 3PB is vested when they have knowledge of the contract and either: sue, rely to their detriment, or assent. Lucky Mann told Candy Mann about the painting, so she meets the first part of the two-pronged test for vested. If she chose to bring suit, this would satisfy that she was vested. Therefore, Candy Mann does have rights under the contract.

### **Parties**

Here, the promisee in the contract is Lucky Mann because he intends to benefit Candy Mann, and the promisor is Dealer because he makes the promise to provide the painting. ✓

### **Donee Beneficiary**

A donee beneficiary may sue the promisor for specific performance. Here, Candy Mann ✓ could potentially sue Dealer for the painting.

### **Defenses**

A promisor may raise any defenses against a 3PB that they have against the promisee. Here, Dealer specifically raises the defense of writing, that is, statute of frauds. As discussed above, because the value of the painting is not specified, it is likely that this defense will fail. If, however, Dealer can show that it was clear to both he and Lucky ✓

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Mann at the time of the agreement that the painting was worth more than \$500, then he may raise the Statute of Frauds defense against both Lucky Mann and Candy Mann.

## **Rights Against Art Dealer**

### Lucky Mann

When Dealer told Lucky Mann that he would not provide the painting, he repudiated the contract in word (anticipatory repudiation). Lucky Mann in response may demand assurances, suspend performance, and bring suit.

By suspending performance, Lucky Mann could immediately bring a suit for the damages to his car. Later, if Dealer agreed to provide the painting, Lucky Mann would have to resume performance (withdraw the lawsuit). Once Dealer provided the painting this would satisfy the condition, and Lucky Mann's obligation to not sue in the future would mature.

However, if Dealer did not agree to provide the painting after a request for assurances, Lucky Mann would have the right to sue for specific performance.

## **Specific Performance**

Specific Performance is available when the following criteria are met:

1. Balancing test between the interests of the parties - here, the court will look at the interests of Dealer in avoiding a lawsuit balanced against the interests of Lucky Mann and Candy Mann in having the painting. As there is no evidence to suggest that this is unbalanced, this criteria will likely succeed.

Contract exists - as discussed above, a valid, enforceable contract most likely exists. If, however, the court upholds the defense of Statute of Frauds, then the demand for specific performance would fail.

3. Certain and definite terms - as discussed above, the terms of the offer were certain and definite. Even though Dealer may not have provided a lot number, he adequately described what he intended to offer and his intent to be bound was made clear.

4. Inadequate legal remedy - here, the uniqueness of the painting lends weight to a claim for specific performance. When an item is unique, it cannot be replaced or substituted, and it is not enough to simply compensate with a monetary award.

5. Feasible - it is possible for Dealer to give the painting, and for the court to enforce this performance, therefore it is feasible.

6. Mutuality of performance - the non-breaching party must be ready to perform immediately; here, Mann is able to perform immediately by not suing for damages to his car.

Under these criteria, assuming a valid, enforceable contract exists, Lucky Mann may sue for specific performance. He may also pursue any lawsuit or insurance claim against Dealer so long as Dealer refuses to complete his condition.

### Candy Mann

As a donee beneficiary, Candy Mann may sue Dealer for contract performance. Her claim would also be for specific performance.

### **Conclusion**

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Contract did exist between Lucky Mann and Dealer because there was an offer, that was accepted while it was open, and supported by valid consideration. The defense of Statute of Frauds would most likely not apply because it is not a "sale" of goods over \$500, however this would be the strongest defense available to Dealer to avoid having to provide the painting.

Candy Mann, as a donee beneficiary who is intended and vested, has the right to sue Dealer, assuming a valid, enforceable contract exists.

Only one recovery would be allowed, meaning Dealer would only have to give up one painting, not a separate painting to each. The painting would need to be a "very valuable Van Gough" as per his description, because the court would most likely order specific performance.

To determine the rights of the parties we must first establish whether a valid, enforceable contract exists. A valid and enforceable contract consists of an offer that is open at the time of acceptance, accepted, supported by valid consideration, and for which no defenses to formation exist. Here, we know that on April 13 the parties agreed "in a valid written contract." ✓

### **Governing Law**

The contract in question is a hybrid contract, consisting of both goods and services. Here, there is a purchase and installation of the state-of-the-art heating and cooling system ("system"). The description of the agreement not only leads with the word purchase, but there would be no purpose to installation if the system was not purchased. Therefore, this contract will most likely be determined to be predominantly for goods, and provisions of the UCC will apply. However, if a court was to determine that - because of the specialized nature of the service, the "specific ideas" and reliance on Mitch's expertise and Jessica's trust in him - the services were in fact predominant, then provisions of the common law would apply. ✓✓

### **Valid Agreement**

There is a valid agreement, in writing. Mitch will deliver and install

### **Condition (Precedent) ✓**

Conditions set the time and order of performance. A condition precedent is a condition that must take place before the obligation of the other party matures. Here, Mitch had an obligation to perform the delivery and installation of the system before Jessica's obligation to pay would mature. ✓

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impossible) ✓

A condition/obligation may be discharged if it is made impossible by a supervening event. Here, Mitch may argue that Braden's accident made performance of the contract impossible because he was the only employee of Mitch's who had the necessary license to complete the work. However, his subsequent behavior indicates that he did not intend to discharge the contract, but did attempt to seek a modification in the term related to time.

### **Discharge (Impracticable)**

A condition/obligation may be discharged if performing it would result in gross material hardship to an extreme degree. Here, Mitch will be unable to argue any impracticability because the cost of hiring a substitute for Braden, even if it resulted in a loss, would not amount to a gross hardship.

### **Modification of Contracts**

A modification of a contract requires additional consideration unless certain elements are met. Under UCC, these are good faith and fair dealings. If the court has determined that this hybrid contract is governed by UCC (see above) then Mitch would argue that he sought a modification in good faith and consistent with fair dealing. Because the contract contained a recital that included reference to the need to avoid delays in opening, it is unlikely that Mitch could claim that any modification was in fair dealing, since he knew about the hardship this could impose on Jessica.

If the court determines that the contract deals primarily with services, and so common law applies, then Mitch would argue that he was affected by unforeseen circumstances that would result in gross hardship if modification were not allowed. ✓ Unfortunately for Mitch, in both cases his arguments are likely to fail. Mitch's ability to delegate the contract to Scott suggests that he would probably have been able to hire a substitute for Braden

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who was licensed, and even if he had to do so at a small loss, it would not be a gross hardship. ✓ *Excellent*

### **Excuse of Condition**

A condition may be excused by prevention, estoppel, waiver, forfeiture relief, impossibility, or repudiation. Here, there are three theories of excuse that we must examine: estoppel, impossibility, and repudiation.

### **Estoppel (Excuse of Condition)**

With estoppel, a condition may be excused if a party expressly indicates that it need not be completed prior to that condition being satisfied. An estopped condition may be reinstated. Mitch may argue that his condition of performance was estopped on April 15 when Jessica stated that the contract was terminated. This could be interpreted as an express condition not to perform. Jessica would have had until April 17 to reinstate that condition, because that was the date that Mitch was supposed to begin the work.

During that time, Mitch attempted to delegate the contract. However, Jessica never informed Mitch of her intention to reinstate the condition. Therefore, it is likely that Mitch has a strong case that his condition of performance was estopped on April 15 and never reinstated. Nonetheless, he continued in his attempt to complete his obligation by delegating the contract (more on this below).

### **Impossibility (Excuse of Condition)**

A condition may be excused if it becomes impossible to perform. Although the work in this case does require a specific license, and Mitch himself does not possess the license, it is likely that the court will infer by his relationship with Scott (and the importance of this

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license to the trade Mitch is engaged in) that Braden's accident does not make the condition impossible. ✓

## Repudiation

There are two types of repudiation, and both apply here but to the different parties.

### Voluntary Disablement ✓

First, Mitch contacted Jessica and said that "the start of the work would be delayed." This was a voluntary disablement, conduct that indicated to Jessica that Mitch might not complete the work on time. Jessica then immediately sought reassurances, which is required before a party can claim voluntary disablement. She clarified whether the work could be completed on June 1. Mitch replied that he did not know and that "it depends," and he requested more time to think of an alternative. ✓

### Anticipatory Repudiation

At this point Jessica terminated the contract. When she informed Mitch of this it raised the issue of anticipatory repudiation. Anticipatory repudiation is an express statement that performance will not be completed. At this point, Mitch had the right to suspend performance, seek assurances, and bring suit. Rather than suspend performance, he delegates the contract to Scott. ✓

## Delegation

When Mitch asked Scott to take over the contract he delegated his duty to perform. Under UCC, delegation is allowed unless it materially alters the obligee's expectancy, or the risk or obligation of any party. Under common law, delegation is allowed unless it applies to personal services or is based in a special trust or relationship. ✓✓

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Here, the parties after delegation will be:

1. Jessica, the obligee, to whom the duty is owed
2. Scott, the delegate, who will perform the duty
3. Mitch, the delegor, who had the original obligation now delegated

Jessica will argue that (1) this contract is governed by common law, (2) she contracted with Mitch based on a special trust, and (3) therefore the delegation was invalid. *Yes*

Mitch, on the other hand, will argue that (1) this contract is governed by UCC, (2) the contract was based on a professional standard--namely, the license required to install the system, and (3) therefore this delegation was valid. ✓

As discussed above, it is likely the court will find that provisions of the UCC apply to this contract, and as such, Mitch is more likely to succeed on the question of delegation. His delegation of the contract to Scott was valid because it was based on an objective standard of professional service and qualification, the existence of the license.

If Jessica was able to convince the court that she truly had a special trust in Mitch, this might still be a compelling argument to invalidating the delegation, however her subsequent behavior--finding an alternative supplier and installer--undermines this position. She would need to show something about her alternate that was not true about Scott and offered a compelling reason why trust in one was not established while trust in the other was. *Yes*

### **Damages (FUC)**

Damages must be foreseeable, unavoidable, and certain. In considering damages that Jessica may seek to recover:

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... \$10,000 ... increased costs for the state-of-the-art system would potentially be recoverable as expectancy damages, or the benefit of the bargain. Expectancy damages put the non-breaching party in the position as though the contract were fully performed. Here, if the contract had been fully performed by Mitch, Jessica would owe \$40,000 instead of the \$50,000 she paid. To recover the \$10,000, Jessica would need to prove that these damages were foreseeable, unavoidable, and certain.

### Foreseeable

Here, the damage could be considered foreseeable in that another service provider might cost more, especially on short notice.

### Unavoidable (Duty to Mitigate)

Jessica would have a more difficult time establishing that these damages were unavoidable. To show that damages were unavoidable a plaintiff first has a duty to mitigate. This duty to mitigate means that they must make every reasonable attempt to reduce the damages. Here, Jessica had an opportunity to get the service for \$40,000, the original contract price, from Scott, the delegate. Because she refused, Mitch will argue that she failed in her duty to mitigate. Jessica will respond as mentioned above that the refusal was based in a special trust relationship.

As above this argument is weak because she hired a subsequent service provider and there is nothing to indicate special trust was satisfied by this second contractor that could not be satisfied by Scott. Especially where UCC applies, the professional licensing standard is likely to take precedence. However, if Jessica is able to convince the court to apply common law she still might have a slim chance of success on this issue. ✓

### Certain

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Finally, Jessica would need to show that the damages were certain. For the additional \$10,000 this is clearly not a problem. She merely shows the original written contract and receipts for the higher cost of the final installation, and the certainty is established.

Because of her refusal of Scott as delegate, Jessica most likely failed in her duty to mitigate, and therefore would not recover on the \$10,000.

**B.** The lost profits for the delay in opening the salon is another type of damages that Jessica may try to recover. Lost profits are also expectancy damages, a type of restitution. As above, these must be foreseeable, unavoidable, and certain. However, unlike reliance damages, expectancy damages give the party the benefit of the bargain--putting them in the position they would have been in had the contract been fully performed.

#### Foreseeable

Here, these damages were definitely foreseeable. It was part of the written contract that "time was of the essence" and by the contract terms work was to be completed by June 1. Therefore, Mitch cannot argue that he did not know or could not foresee the possibility of lost profits by delay in opening caused by work not being completed on time.

#### Unavoidable (Duty to Mitigate)

However, as above, Jessica had an opportunity to mitigate these damages when Mitch delegated his duty to Scott. If Jessica had accepted Scott as delegate and allowed him to do the work - which he was properly licensed to do - she would not have suffered the delay. As above, if the court applies UCC it is most likely that Jessica will have failed her duty to mitigate because Scott was a viable delegate based on his professional credentials. However, if the court were applying common law (based on a determination that the installation service was predominant) then they might find for Jessica here, on the basis that there was a special trust relationship. It would again be essential to this argument that

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Jessica show that the contractor she hired to do the work in the end satisfied the trust in a way Scott did not.

### Certain

Finally, Jessica would need to show that the damages were certain. It is almost impossible to quantify how much she would have made when opening a new business. She had no reliable history or records, and even if she did there would be no way to show that she would have performed as projections suggested. Therefore, it is likely her claim on lost profits would fail for lack of certainty.

C. Jessica may also attempt to claim damages on the value of the tax reduction. These are, as above, expectancy damages, and the requirement of foreseeable, unavoidable, and certain applies.

### Foreseeable

Here, it will be very difficult for Jessica to show that these damages were foreseeable. The reason for that is they were never mentioned in the original agreement. The city only announced the special tax breaks on April 14, one day after the contract was signed on April 13. She only informed Mitch of them on April 15, when he informed Jessica of Braden's accident. So not only were these damages unforeseeable to Mitch, they were unforeseeable to Jessica at the time of contract formation. On this basis alone, her claim for damages on the value of tax reduction will fail.

### **Conclusion**

1. Jessica will likely fail in her lawsuit against Mitch. The outcome will depend in a significant way on the court's determination of governing law, as the delegation by Mitch to Scott is critical to this question. Under UCC, the delegation was most likely valid, and

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Jessica was required to accept the delegate, because he had the necessary professional credential. In addition, she estopped Mitch's obligation and performed an anticipatory repudiation on April 15. Although Mitch still attempted to delegate his duty, the condition was never reinstated and the repudiation was never withdrawn.

If, however, the court holds that services are predominant, especially services requiring a special trust and relationship - most likely referring to the "special ideas" Jessica had about the installation of the system - then it is possible that Jessica had the right to refuse the delegation. In that case, Jessica would argue that when Mitch performed a voluntary disablement (indicating he might not be able to complete), she demanded assurances that he failed to provide, thus giving her the right to sue and recover.

## 2. Damages

a. \$10,000 in increased costs -- if Jessica's claim succeeds, she would most likely be able to recover this cost. These damages are foreseeable and certain. If they are unavoidable depends on whether Jessica had an opportunity to mitigate by allowing Scott to complete the work. If Jessica is able to convince the court to recognize the delegation as invalid, which she will argue, then she did mitigate by hiring the more expensive provider. Therefore, these damages would be valid and recoverable.

b. Lost profits -- the lost profits damages are uncertain. It is unlikely Jessica would be able to recover these.

c. Tax reduction -- these damages were not foreseeable because they were not known at the time of contract formation. It would not be possible for Jessica to recover these.

END OF EXAM *Excellent answer  
well thought out statements*