SMOKIN'! MODIFICATION IN BOOMTOWN: WHEN BUSINESS IS BOOMING, LOOK TO THE UNITED STATES DISTRICT COURT FOR THE POTENTIAL EFFECT OF AN INSTANT MESSAGE, AN ANALYSIS OF THE RECENT *CX DIGITAL MEDIA, INC. V. SMOKING EVERYWHERE, INC.*

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ABSTRACT

The oil boom in western North Dakota is also causing a boom in many other businesses. With business booming, deals are being made and changed rapidly to keep up with the pace. Consequently, if instant messages were determined to not be oral communications, and could lead to modification of a contract with a no-oral modifications clause, this would draw attention. This Article analyzes the United States District Court for the Southern District of Florida's decision in *CX Digital Media, Inc. v. Smoking Everywhere, Inc.* that concluded, under the common law, instant messages modified a contract with a no-oral modifications clause. Instant messaging is a commonly used method of communicating with one's business network; thus, the implications of the *CX Digital Media* decision could be far reaching. This Article further examines the impact of the *CX Digital Media* decision in the context of the sale of goods under the Uniform Commercial Code's Article 2 in North Dakota's boomtown. The Article concludes by approving of the reliability and flexibility that the *CX Digital* decision upholds for the benefit of contracting and continually improving technology.

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I. INTRODUCTION

"*Holy cow, I didn't think it would happen this fast . . . .*"[1]

In North Dakota, the towns of Dickinson and Williston are the seat of the oil boom that is rapidly transforming the western part of the state.[2] Oil workers are flocking to the two towns, causing rents to soar, temporary housing to be thrown together, man camps to spring up, fast-food outlets and over-priced motels to dot the landscape, and construction sites to appear like – well – oil rigs on a North Dakota prairie.[3] In the 1950s and 1980s, the Williston Basin was also the site of two previous oil surges in

1. Statement by Ron Ness, President of the North Dakota Petroleum Council; *see also* Stephen J. Lee, *Step Aside Alaskas, N.D. No. 2 for Oil Production*, GRAND FORKS HERALD, May 15, 2012, at A2. The North Dakota Petroleum Council is a nonprofit trade group that is nearing 400 member companies, an increase from about 160 members five years ago. *Id.*

2. Peter Gorrie, *Trip Through Oil Country in a Fuel Miser: Prius v a Fine Choice for Long-Distance Trek in Western Badlands*, TORONTO STAR, Sept. 8, 2012, at W23.

3. *Id.*; *see also* Jim Mackinnon, *PBS Examines Tradeoffs in Developing North Dakota's Bakken Shale*, AKRON BEACON J. (Aug. 10, 2012), http://www.ohio.com/blogs/drilling/ohio-utica-shale-1.291290/pbs-examines-tradeoffs-in-developing-north-dakota-s-bakken-shale-1.326171 (indicating that "unemployment is well below the national average and where people come from other states to find a job").

North Dakota, but the spread was relatively contained.[4] With the advances in technology, today's oil boom is much more widespread, affecting almost all of western and part of northern North Dakota.[5]

The extreme economic effect of the latest oil boom was described by Williston's Mayor Ward Koeser in the spring of 2012: "The average annual salary in 2006 for Williston was $31,956. The annual salary now averages $71,000 a year."[6] Alongside the increase in salary, the Williston population has shot up.[7] Earlier this year Mayor Koeser explained,

> [a]ccording to the United States census for 2000, the population of Williston was 12,500 . . . . The 2010 census put Williston at 17,000. It is now estimated to be 20,000 to 25,000 . . . . If you include what the 2010 census says along with the temporary workers, we have close to 30,000 people here.[8]

It is not surprising then that, in the words of Ron Ness, Director of the North Dakota Petroleum Council: "Infrastructure can't grow fast enough to meet the demand of business."[9] Development in Dickinson and Williston has surged as a result of the oil boom.[10] Between January to March of 2012, Williston set a record for building permits' values[11] at over $33.55 million.[12] The town of Dickinson recorded building permit total values at almost $36.11 million for the month of March 2012 alone.[13] With an oil boom and the corresponding development of infrastructure to support the

4. Clay Jenkinson, *OK, Here's Where You Draw the Line*, BISMARCK TRIB., May 5, 2012, at C1.

5. *Id.*

6. Kevin Brant, *Seeing the Impact: Members of ND Legislative Council Meet in Williston*, WILLISTON DAILY HERALD (May 31, 2012), http://www.willistonherald.com/news/seeing-the-impact-members-of-nd-legislative-council-meet-in/article_4c3d6c00-ab4e-11e1-8c1d-001a4bcf887a html.

7. *Id.*

8. *Id.*

9. *Id.* ("The lack of infrastructure makes it hard to keep up with the demand of businesses and housing. Many companies will do what it takes to get employees, even if it means housing them in temporary camps.").

10. April Baumgarten, *Dickinson Issues Building Permits Worth More in 1 Month than Williston Does in 3 Months*, DICKINSON PRESS (May 6, 2012), http://www.thedickinsonpress.com/event/article/id/57812/ (citing to code enforcement reports) (quoting Kelly Aberle, office manager and plans examiner of the Williston Building Department).

11. Values include buildings, additions and alterations. *Id.*

12. *Id.* (citing to code enforcement reports).

13. *Id.* "Based upon contacts from the developers and from property owners and companies outside of it, Dickinson is a city that a lot of people want to do business in and reside in." *Id.* (quoting Dickinson City Planner Ed Courton).

oil boom, lawyers will be busy crafting, among other things, contracts, and parties, no doubt, will need to reach agreement fast and frequently.[14]

Meanwhile, in Florida, the United States District Court for the Southern District of Florida rendered a decision in *CX Digital Media, Inc. v. Smoking Everywhere, Inc.*,[15] concluding that a contract with a no-oral modifications clause (a NOM) had been modified by instant messaging.[16] While this is an unpublished district court decision, *CX Digital* provides guidance on the treatment of contract modification that embodies the right balance of rigidity and flexibility.[17] When business is booming in North Dakota and the infrastructure is barely able to keep up, people will be communicating with each other in the most accessible and fastest means available. Instant messaging is at the forefront of the fast communication.[18] Instant messaging is a commonly used method of communicating with one's business network: buyers, sellers, distributors, contractors – and the list goes on.[19] Thus, the implications for the *CX Digital* decision could be far reaching.

This Article explores the ramifications of the *CX Digital* decision in the context of the general law of contracts and law of contracts for the sale of goods under the Uniform Commercial Code (U.C.C.).[20] This Article finds that, in light of the *CX Digital* decision, an Article 2 analysis of modification is more complex than under a common law analysis.[21] This is true, most particularly, because of the complexity and lack of clarity of section 2-209, the modification section, of the U.C.C., and the recognition under Article 2 of NOM clauses.[22] After wading through the U.C.C., this Article concludes that the *CX Digital* decision provides the right direction for contract modification in both the law of contracts and law of contracts for the sale of goods.[23] The decision balances the concerns for reliability

14. *See, e.g.*, Jacquie McNish, *Oil and Gas Lawyer Extends Reach Beyond Borders*, GLOBE & MAIL, May 10, 2016, at B9 (referring to lawyers inundated with work in the Calgary oil boom).

15. No. 09-62020-CIV, 2011 WL 1102782 (S.D. Fla. Mar. 23, 2011). It is noted that this case is a district court decision and applies the general law of contract.

16. *CX Digitial Media, Inc*., 2011 WL 1102782, at *12.

17. *See generally id.*

18. J.D. Biersdorfer, *No Hype: Four Web Tools that Work and Save Money; to Nail the Sale, E-mail's too Slow*, NY TIMES, June 13, 2001, at H3 ("[T]he very thing that makes instant messaging so useful at home – namely fast communication – makes it equally valuable as a business tool."); Jennifer Brown, *Five Ways to Grow in Any Economy: Learn to Keep Your Company Moving Even When Things Are Stagnant*, DAILY NEWS (Jan. 4, 2010), http://www.dailynews.lk/2010/01/04/bus49.asp.

19. Biersdorfer, *supra* note 18, at H3.

20. *See infra* Part III.

21. *See id.*

22. *See* U.C.C. § 2-209 (2012).

23. *See infra* Part IV.

and flexibility of contracting by using an analysis of the actual business environments to reach a determination. This approach is consistent with the direction of the general law of contracts and the legislative intent of the U.C.C.

Consistent with the common law of contracts, the *CX Digital* decision promotes the flexibility in contracting that would encourage economic growth, yet the reliability that does not reward a party for taking advantage of the performance based on reliance of another party. The law of Article 2 of the U.C.C. creates a mixture of flexibility and rigidity (and, perhaps, confusion). Pursuant to section 1-103(b) of the U.C.C., courts may apply common law when the U.C.C. provisions are silent and ambiguous.[24] Noting that the U.C.C. is silent as to whether instant messages may modify a contract and, the case law interpreting Article 2 provides no specific guidance, a court may consult other law in other jurisdictions for guidance.[25] In addition, and perhaps more important, section 2-209 of the U.C.C. governs modification and has been a source of confusion.[26] Courts have applied differing analyses under the section and have reached differing conclusions. The *CX Digital* decision assists to provide clarity to modification under section 2-209.

The first consideration, as mentioned, is that section 1-103 of the U.C.C. directs a court to consult general principles of law to supplement the provisions of the U.C.C.[27] The result is that courts refer to common law, such as the *CX Digital* decision, and other statutes to guide the interpretation of ambiguities or gaps in the U.C.C.[28] In general, a court may fill the U.C.C. ambiguities or gaps by application of existing common law or by creating new common law.[29]

The second consideration for a court, when interpreting an ambiguous part of the U.C.C. or a gap, is to consider the legislative intent of the U.C.C. Article 2 of the U.C.C provides that, with regards to contract modifications, the U.C.C. seeks "to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments."[30] Section 1-102(1) requires, "[t]his Act

24. U.C.C. § 1-103.

25. *Id.*

26. U.C.C. § 2-209.

27. Gregory E. Maggs, *Patterns of Drafting Errors in the Uniform Commercial Code and How Courts Should Respond to Them*, 2002 U. ILL. L. REV. 81, 100 (2002).

28. *Id.*

29. *Id.* at 105 (referencing in the context of circular definitions of cross-references).

30. U.C.C. § 1-102(2)(a); U.C.C. § 2-209 cmt.1; *see also*, Douglass K. Newell, *Cleaning up U.C.C. Section 2-209*, 27 IDAHO L. REV. 487, 488 (1991) (describing U.C.C. section 1-102(2)(a); U.C.C. section 2-209 cmt. 1 (1989)).

shall be liberally construed and applied to promote its underlying purposes . . . ."[31] Section 1-102 identifies clear underlying purposes and policies of the U.C.C.: "(a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions."[32]

These three parameters of Section 1-102 provide guidance to courts confronted with ambiguous U.C.C. terms and gaps.[33] In particular, parameter (c) implies the important concept that courts should follow precedent from other jurisdictions in order to promote uniformity.[34] Consistent with this approach, a court in North Dakota is strongly advised to follow the precedent of other jurisdictions, including Florida, when considering whether an instant message exchange modified a contract.[35]

II. *CX DIGITAL MEDIA, INC. V. SMOKING EVERYWHERE, INC.*

> pedramcx [Pedram Soltani] (10:22:00 AM): good morning Nick!
>
> pedramcx (10:22:23 AM): Have you placed the pixels for the two new pages?[36]

And thus begins the instant message communication that is the subject of the *CX Digital*[37] decision.[38] This case provides clear guidance into when an instant message exchange may modify the underlying contract under the general law of contracts. In this breach of contract action, the Canadian advertising company, CX Digital Media, Inc., claimed the defendant, a Florida-based electronic cigarette distributor, Smoking Everywhere, Inc.,[39]

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31. U.C.C. § 1-102(1).

32. U.C.C. § 1-102(1)-(2); *see* Maggs, *supra* note 27, at 102-03 (citing U.C.C. § 1-102(1)-(2)).

33. Maggs, *supra* note 27, at 103.

34. *Id.* "Although factors (a) and (b) provide some guidance, few courts would want to complicate the law or inhibit commercial development even if such factors were expressly stated in § 1-102(2)." *Id.*

35. Given the concept of legislative supremacy, this argues against a textualist approach to the U.C.C. Clearly, the drafters of the U.C.C. sought to improve upon existing common law and provide flexibility and uniformity. U.C.C. § 1-102(2)(a).

36. CX Digital Media, Inc. v. Smoking Everywhere, Inc., No. 09-62020-CIV, 2011 WL 1102782, at *2 (S.D. Fla. Mar. 23, 2011).

37. *Id.*

38. *Id.*

39. Note that Smoking Everywhere, Inc. is no stranger to legal issues. The company has been the defendant in class action lawsuits for misrepresentation of the safety of its smoking products as a healthier alternative to traditional cigarettes. *See E-Cigarette Vendor Bailed on*

failed to pay fees amounting to more than $1.36 million.[40] CX Digital claimed in 2009, Smoking Everywhere secured its services to use CX Digital's network of affiliates to offer free trials of its products.[41] CX Digital linked customers to Smoking Everywhere's web pages to register for the free trial.[42] If the customers did not cancel the trial and return the trial kit, they were charged by Smoking Everywhere for the products.[43] The plaintiff claimed that on August 4, 2009, Smoking Everywhere agreed to pay CX Digital $45 for each customer that registered for the free trial offer and that on September 14, 2009, Smoking Everywhere agreed to an increase to $51 for each customer.[44] CX Digital maintained that Smoking Everywhere ignored CX Digital's invoices for $25,150 in August, and $1.3 million in September.[45]

In January 2011, the case was tried over five days.[46] The court described CX Digital's business as serving as "a middleman between its network[s] of affiliates . . . on the internet, and businesses that want to advertise online."[47] CX Digital would enter into an agreement, an "Insertion Order", with a new business client, like Smoking Everywhere, and then work with the client to design a campaign, including the web pages.[48] In the campaign, each advertisement could be clicked on by a client's customer.[49] Once the customer clicked on the advertisement, the technology allowed tracking of what the customer did and, thereby, how much CX Digital's client owed CX Digital for customers directed to client's web pages.[50] For each completed sale by the client's customers, CX Digital owed a fee to its affiliate that referred the customer.[51] CX Digital paid its affiliates on a weekly basis, despite not having received payment from its own client, Smoking Everywhere.[52]

The court concluded that Smoking Everywhere, "approached [p]laintiff, CX Digital Media, Inc., about a free-trial offer that Smoking

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$1.36 Million Bill, Advertiser Says, ANDREWS TOBACCO INDUS. LITIG. REP., Jan. 15, 2010, at 1 [hereinafter *E-Cigarette Vendor Bailed*].

40. *Id.*
41. *CX Digital Media, Inc.*, 2011 WL 1102782, at *1.
42. *Id.* at *2.
43. *Id.*
44. *Id.* at *5.
45. *Id.* at *2; *see also E-Cigarette Vendor Bailed*, *supra* note 39, at 1.
46. *CX Digital Media, Inc.*, 2011 WL 1102782, at *2.
47. *Id.* at *1.
48. *Id.* at *2-3.
49. *Id.* at *1.
50. *Id.* at *2-3.
51. *Id.* at *2.
52. *Id.* at *2-3.

Everywhere wanted to promote."[53] As the court determined, pursuant to the Smoking Everywhere Insertion Order during August 2009, CX Digital directed 670 sales to Smoking Everywhere.[54] During that time, on any given day, CX Digital did not direct more than 200 sales.[55] For example, during the period from August 13, 2009 to August 31, 2009, CX Digital directed an average number of sales per day of 39 to Smoking Everywhere.[56] In turn, CX Digital sent an invoice to Smoking Everywhere for $25,150 for the 670 sales in August.[57] This amount on the invoice reflected a $5000 deduction for a deposit that Smoking Everywhere had already made.[58] Although the payment for the August invoice was due on September 15, 2009, Smoking Everywhere never paid the bill.[59]

On September 2, 2009, Nick Touris, the vice president of advertising from Smoking Everywhere, and Pedram Soltani, an account manager at CX Digital, engaged in an instant message exchange covering a number of topics, including the operation of "two new pages,"[60] and whether CX Digital would send "2000 orders/day by Friday."[61] CX Digital claims the instant message conversation amounted to a memorialization of a modification of the original agreement, the Insertion Order, between CX Digital and Smoking Everywhere.[62]

Touris and Soltani had an instant message exchange about switching the Smoking Everywhere web page to which CX Digital was to direct the customers.[63] As the court stated, "[t]he conversation began with a long, technical discussion about switching away from the ecig.smoking everywhere.com link . . . . Touris had difficulty receiving the pixel by email, so Soltani sent it to him by instant message, and then the conversation continued with Touris complaining . . . ." about the testing and process in an effort to get it done correctly.[64] An example of a section of

53. *Id.* at *2.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* After this exchange, Touris and Soltani then entered into an exchange about removing the 1-800 phone number from one of Smoking Everywhere's web pages. Additionally, Soltani offered that CX Digital could re-code some of Smoking Everywhere's pages. *Id.* at *3. When the recoding was finished, CX Digital sent the pages back to Smoking Everywhere for uploading. *Id.* Then an instant message exchange occurred about switching the page. *Id.* at *2-3.
61. *Id.* at *2.
62. *Id.*
63. *Id.* at *3.
64. *Id.* at *2-3.

the exchange, where Touris and Soltani try to correct problems with linking to the two new pages is as follows:

> nicktouris (2:09:32 PM):
> http://www.incentaclick.com/click/mc973327df/test_ 6562/ is taking me to ecig
>
> nicktouris (2:11:48 PM): when I type it in it take me to the old ecig page
>
> pedramcx (2:12:04 PM): yeah . . . sorry give me a second
>
> pedramcx (2:12:08 PM): I guess it didn't save it
>
> pedramcx (2:12:14 PM): let me switch the link again
>
> pedramcx (2:12:15 PM): one sec
>
> pedramcx (2:13:07 PM): done
>
> pedramcx (2:13:16 PM): send the tests
>
> nicktouris (2:19:34 PM): sent[65]

As the court would rightfully note later, the level of trouble-shooting engaged in by Touris on behalf of Smoking Everywhere cooperatively with CX Digital makes it very hard to imagine that Smoking Everywhere had not agreed to switch to the two new pages.[66] In addition, consider the fact that, days later, Touris of Smoking Everywhere further complained about the content of the new pages and worked with CX Digital in an effort to get better functionality.[67]

Immediately following the instant message exchange about switching to the two new pages, Soltani of CX Digital began a conversation about increasing the number of customer sales it was directing to Smoking Everywhere.[68] The following is an excerpted section of the instant message exchange that the court highlighted:

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65. *Id.* at *3.

66. *Id.* at *10.

67. On September 10, 2009, "Touris complained that he had come across one site that had the wrong terms and was 'advertising [the offer] as FREE.'" *Id.* at *4 (citing Def.'s Trial Ex. 6-1) (alteration in original).

68. *Id.* at *3.

pedramcx (2:49:45 PM): A few of our big guys are really excited about the new page and they're ready to run it

pedramcx (2:50:08 PM): We can do 2000 orders/day by Friday if I have your blessing

pedramcx (2:50:39 PM): You also have to find some way to get the Sub IDs working

pedramcx (2:52:13 PM): those 2000 leads are going to be generated by our best affiliate and he's legit

nicktouris is available (3:42:42 PM): I am away from my computer right now.

pedramcx (4:07:57 PM): And I want the AOR when we make your offer # 1 on the network

nicktouris (4:43:09 PM): NO LIMIT

pedramcx (4:43:21 PM): awesome![69]

The same day, September 2, CX Digital began to substantially increase the number of sales sent to Smoking Everywhere.[70] "Between September 2, 2009 and September 23, 2009, CX Digital sent an average of 1,244 Sales per day, with a peak of 2,896 Sales on September 22, 2009."[71] When Smoking Everywhere had not paid the August invoice by September 23 or 24, CX Digital stopped directing customer sales to its pages.[72] As of the date of the *CX Digital* decision, Smoking Everywhere had not paid either the August or September CX Digital invoices. While CX Digital acknowledges that Smoking Everywhere paid a $5000 deposit, Smoking Everywhere had not paid the full amount CX Digital claimed it was owed.[73]

69. *Id.* at *3-4.
70. *Id.* at *4.
71. *Id.*
72. *Id.* The court clarified that there was no dispute that CX Digital fulfilled its obligations under the Insertion Order during August 2009, providing fewer than 200 sales per day to Smoking Everywhere. *Id.* at *5. There also was no dispute that in August CX Digital directed all of the consumer traffic to Smoking Everywhere to the pages listed in the Insertion Order. *Id.*
73. *Id.* at *2.

In its complaint, CX Digital alleged breach of contract and sought compensatory damages and attorney's fees.[74] The defendant, Smoking Everywhere, argued it should not have to pay the amounts claimed by CX Digital because the company, among other things, breached the Insertion Order by directing more than the Insertion Order's allotted 200 sales per day to Smoking Everywhere and by sending the sales traffic to web pages other than those identified in the Insertion Order.[75] CX Digital argued that, while it did engage in this conduct, the conduct was consistent with the modified Insertion Order.[76] CX Digital urged that the instant message exchange between Touris and Soltani on September 2, 2009 modified the Insertion Order in two ways.[77] First, it switched the Smoking Everywhere web pages to which CX Digital was supposed to send the customer sales traffic; and, second, it eliminated the limit on customer sales per day directed to Smoking Everywhere.[78]

Thus, the determination of whether or not there was a breach of contract by CX Digital depended on whether there was "an enforceable modification to the Insertion Order" that allowed for CX Digital to direct an unlimited number of leads to the "two new pages . . . ."[79] Thus, the questions the court sought to answer were: (1) did Touris and Soltani agree to modify the Insertion Order during their September 2, 2009, instant message exchange; and, if so, (2) is their agreement to modify the Insertion Order enforceable?[80] The court analyzed the instant message exchange under the lens of the general law of contract, noting that the law of Delaware governed the analysis of the Insertion Order because the Insertion Order so provided, and the parties had so agreed.[81] The court conducted its analysis of (a) the change from the old to the "two new pages" and (b) the elimination of the limit separately.[82] In addition, the court provided analysis of the effect of the no-oral modifications clause in the Insertion Order and whether or not consideration was required and adequate.[83]

74. *Id.* at *5.
75. *Id.*
76. *Id.* at *6.
77. *Id.*
78. *Id.*
79. *Id.* at *6-7.
80. *Id.* at *6.
81. *Id.*
82. *Id.* at *7.
83. *Id.* at *10.

A. CHANGE TO THE "TWO NEW PAGES"

To determine whether or not the Insertion Order had been modified to include the "two new pages," the court provided legal analysis of contract formation pursuant to common law.[84] Under section 19 of the Second Restatement of Contracts, "[t]he manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."[85] Citing to *Industrial American, Inc. v. Fulton Industries, Inc.*,[86] the court stated that Delaware law holds:

> overt manifestation of assent – not subjective intent – controls the formation of a contract; [and] the 'only intent of the parties to a contract which is essential is an intent to say the words or do the acts which constitute their manifestation of assent'; . . . 'the intention to accept is unimportant except as manifested.'[87]

The court considered the content of the instant messages and the behavior of the parties to the exchange, and concluded there is an indication of "clear assent on the part of both parties to stop sending traffic to the 'old' [page] and to begin sending the traffic to the two new [pages]."[88] In the instant message exchange, Soltani of CX Digital asked Touris of Smoking Everywhere, "[h]ave you placed the pixels for the *two* new pages?"[89] Soltani continued, "if so, then I can switch the ecig.smokingeverywhere.com link . . . and we can do the test . . . for *both* campaigns."[90] When Touris of Smoking Everywhere apparently had not received the pixels from CX Digital that he wanted to place, he asked "please send me *both* pixels and test *links* so we make sure we get this correct."[91] Soltani sent the pixels to Touris by instant message.[92]

Once Touris of Smoking Everywhere had placed the pixels, Soltani sent an instant message "ok . . . so now I'm quickly switching the link."[93] Due to troubles in the process, the switch had to be repeated a few times before it worked, which involved back and forth instant message

84. *Id.* at *6.
85. RESTATEMENT (SECOND) OF CONTRACTS § 19 (1981).
86. 285 A.2d 412 (Del. 1971).
87. *CX Digital Media, Inc.*, 2011 WL 1102782, at *6 (quoting Indus. Am., Inc. v. Fulton Indus., Inc., 285 A.2d 412, 415 (Del. 1971)).
88. *Id.* at *7.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

communication between Soltani and Touris.[94] In addition, Touris and Soltani tested the "two new pages" to make sure they worked properly.[95] The court concluded: "[t]hese actions do not make any sense unless the parties had agreed to switch the [pages] to which CX Affiliate traffic was being directed."[96] The September 2, 2009 instant message exchange "demonstrate[d] an overt manifestation of assent on the part of Smoking Everywhere to modify the Insertion Order to permit the web traffic to be directed to the [two new pages]. Therefore, Touris agreed on behalf of Smoking Everywhere to modify the URL term of the Insertion Order."[97]

B. ELIMINATION OF THE LIMIT

The court also analyzed whether, as CX Digital claimed, on September 2, an agreement was reached to remove the limit on the number of customer sales per day directed to Smoking Everywhere.[98] Along this line, the court laid out the relevant Delaware contract law. In an analysis of the law related to section 58 of the Second Restatement of Contracts, the court cited to *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*,[99] and quoted: "[i]n order to constitute an 'acceptance,' a response to an offer must be on identical terms as the offer and must be unconditional."[100]

Section 59 of the Second Restatement of Contracts states "[a] reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer."[101] Further, Section 202 of the Restatement would have us approach the analysis such that: "[t]he words and conduct of the response are to be interpreted in light of all the circumstances."[102] At this

94. *Id*. "This switch has to be repeated several times before it works properly. During the process, Touris twice observes that the test links lead to the 'old page' which 'has not been touched,' and shortly thereafter complains another test link also takes him to 'ecig.' Soltani responds to each of these complaints by switching the link again." *Id.* (citations omitted).

95. *Id.* at *3.

96. *Id.* at *7.

97. *Id.* at *8.

98. *Id.*

99. 857 A.2d 998, 1015 (Del. Ch. 2004).

100. *CX Digital Media, Inc.*, 2011 WL 1102782, at *8 (quoting PAMI–LEMB I Inc. v. EMB–NHC, L.L.C., 857 A.2d 998, 1015 (Del. Ch. 2004)). Note that this approach differs from the approach under Article 2 of the U.C.C. Section 2-207 of the U.C.C. eliminates the mirror image rule of the general contract law. U.C.C. § 2-207 (2012). Consequently, under section 2-207 analysis, the parties would have been found to have reached agreement as to the number of customer sales to be delivered by CX Digital with Touris' reply of "No Limit." In other words, Touris' reply would arguably be a valid acceptance.

101. *CX Digital Media, Inc.*, 2011 WL 1102782, at *8 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 59 (1981)).

102. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981)).

point in the analysis, the court indicated the relevant text in the Insertion Order: "[i]n the 'Campaign Details' section on the first page of the Insertion Order, the term 'VOLUME:' appears in bold type followed by '200 leads/day."[103] Following their exchange about switching to the "two new pages," Soltani of CX Digital sent an instant message to Touris stating: "[w]e can do 2000 orders/day by Friday if I have your blessing . . . [a]nd I want the AOR when we make your offer number one on the network."[104] The court characterized this instant message as an offer to modify the original agreement, the Insertion Order.[105] In response to Soltani's offer, Touris of Smoking Everywhere sent an instant message "NO LIMIT."[106] The court characterized this instant message as a rejection of Soltani's offer and a counter-offer.[107] In response to Touris' instant message of "No Limit", Soltani replied in an instant message "awesome!"[108] The court characterized Soltani's reply as an acceptance to Touris' offered modification of the insertion order.[109]

Soltani offered that CX Digital provide 2000 sales per day to Smoking Everywhere, and that it be the exclusive provider of the affiliate advertising on the campaign.[110] Touris' response of "NO LIMIT," indicating that there be no limit on the number of sales per day generated by CX Digital's affiliates, varies from Soltani's two specific terms and, therefore, under the common law of contract, amounts to a counter-offer.[111] Touris is silent about the exclusive provider term. Soltani's enthusiastic response of "awesome!," along with increasing the volume of sales directed to Smoking Everywhere by CX Digital, is an acceptance of the counter-offer.[112] The offer, rejection-counter-offer, and acceptance were all in writing.[113] "[W]hen the parties' statements and conduct are considered, the parties' intent to modify the Insertion Order to change target [pages] and to remove the limit on the number of Sales is clear, specific, and direct."[114]

As the court aptly noted: "[i]t is difficult to imagine more specific and direct evidence of an agreement than the two parties actually sitting down

103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *See generally id.*
114. *Id.* at *10.

simultaneously and doing what they had agreed to do."[115] Therefore, the court concludes that the modification of the Insertion Order as to the "two new pages" and the elimination of the limit are supported by specific and direct evidence.[116]

C. NO-ORAL MODIFICATION CLAUSE

The subject Insertion Order contained a no-oral modifications clause (NOM) stating the Insertion Order "may be changed only by a subsequent writing signed by both parties."[117] In response to the defendant's claim that the instant message exchange as a modification is unenforceable due to the Insertion Order's NOM, the court stated the law of Delaware with respect to NOMs.[118] Delaware follows the common law rule embodied in Restatement section 149 that "an oral agreement is sufficient to modify or rescind a written contract, notwithstanding a provision in the written contract purporting to require that subsequent modifications be evidenced by writing."[119] Essentially, the common law does not allow for the intended effect of no-oral modification clauses. The court quoted the Delaware Supreme Court: "We think, therefore, that a written agreement between contracting parties, despite its terms, is not necessarily only to be amended by formal written agreement."[120]

However, the court clearly indicates "the modification was not oral, but appeared in writing in an instant-message conversation."[121] Even though the court thought the instant message exchange was in an unsigned writing, the court determined the same principle applied to the instant message as to an oral modification.[122] "[T]he instant messages operate[d] collectively as

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115. *Id.*

116. *Id.*

117. *Id.* at *11.

118. *Id.*

119. *Id*. (citing RICHARD A. LORD, WILLISTON ON CONTRACTS § 29.42 (4th ed. 1999)). The court notes in a footnote that: "The common-law rule applies because this [is] a contract for the sale of services, not goods. Therefore, Delaware Code § 2-209, derived from the Uniform Commercial Code and permitting a signed-writing requirement, does not apply." *Id.* at *11 n.19.

120. *Id.* at *12 (quoting Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc., 297 A.2d 28, 33 (Del. 1972).

121. *Id*. (citing Haft v. Dart Group Corp., 841 F. Supp. 549, 567 (D. Del. 1993)) (footnote omitted).

> [T]he Court has satisfied itself that neither the agreement memorialized by the Insertion Order nor the modification of the Insertion Order made during the instant-message conversation falls within Delaware's statute of frauds . . . . In any case, the statute of frauds is an affirmative defense; it was not pleaded by the Defendant and is therefore waived.

Id. at *12 n.20 (citing DEL. CODE ANN. tit. 6, § 2714 (2012)).

122. *Id.* at *12.

an unsigned writing containing the terms of the agreement to modify the Insertion Order. CX Digital [was] not alleging there are additional oral terms to the modification that [were] not evident from the instant messages."[123]

Further, the court stated that even if the instant message exchange did not amount to an enforceable modification, and the NOM clause in the Insertion Order was enforceable, Smoking Everywhere would have waived the NOM provision.[124] The court cited to *Williston on Contracts*, indicating "where, following the oral modification, one of the parties materially changes position in reliance on the oral modification, the courts are in general agreement that the other party will be held to have waived or be estopped from asserting the no oral modification clause."[125]

Smoking Everywhere's waiver occurred because, after the instant message exchange, CX Digital "materially changed its position in reliance" on the modifications articulated in the instant message exchange.[126] CX Digital changed its course of performance and sent a significantly increased number of sales to Smoking Everywhere at the "two new pages." Further, Smoking Everywhere received the increased number of sales without complaint. As a result of CX Digital's reliance and the fact that Smoking Everywhere did not complain, Smoking Everywhere was estopped from asserting the NOM as a defense.[127]

D. CONSIDERATION

Smoking Everywhere claimed that it did not provide the necessary consideration for the modification to render it enforceable.[128] The court again articulated Delaware law and found that there was adequate consideration for the elimination of the limit on sales directed to Smoking Everywhere.[129] Therefore, if there is not adequate consideration for the change to "two new pages," justice required binding Smoking Everywhere because of CX Digital's reliance.[130]

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123. *Id.* at *11.

124. *Id.* at *12.

125. *Id.* (citing RICHARD A. LORD, WILLISTON ON CONTRACTS § 29.42 (4th ed.1999)).

126. *Id.*

127. *Id.*

128. *Id.* at *13.

129. *Id.*

130. *Id.* ("Delaware courts define consideration as a benefit to a promisor or a detriment to a promisee pursuant to the promisor's request." (citing Cont'l Ins. Co. v. Rutledge & Co., Inc., 1219, 1232 (Del. Ch. 2000))); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 75 (1981) ("[A] promise which is bargained for is consideration.").

> In exchange for CX Digital's promise to provide an unlimited number of Sales to Smoking Everywhere, Smoking Everywhere made an implied promise to pay for those

III. LAW OF CONTRACTS

Under the law of contract modification, a promisee may agree to change the terms of a contract with a promisor, provided certain requirements are met. The common law on contract modification and the enforceability of modifications emphasizes the need for additional consideration.[131] The Second Restatement of Contracts offers guidance about contract modifications.[132] Section 73 of the Restatement continues the common law's requirement of additional consideration for modification.[133] Section 73 provides that modifications supported by consideration are enforceable unless the consideration is a "pretense" or obtained by duress.[134] It states:

> Performance of Legal Duty: Performance of a legal duty owed to a promisor, which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.[135]

Section 73 embodies the "pre-existing duty rule."[136] Under this Restatement approach, modifications will be considered "an express or implied threat to withhold performance of a legal duty" unless supported by additional consideration from the promise.[137] Further, under the common law and Restatement, to be enforceable, modifications must be "fair and equitable in view of circumstances not anticipated by the parties when the contract was made."[138] This approach presumes that coercion exists

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> additional Sales at the rate defined in the Insertion Order – $45 per Sale. Smoking Everywhere's implied promise to pay is the consideration for CX Digital sending more Sales.

CX Digital Media, Inc., 2011 WL 1102782, at *12.

131. Robert A. Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680, 684-85 (1982).

132. Subha Narasimhan, *Modification: The Self-Help Specific Performance Remedy*, 97 YALE L.J. 61, 75 (1987); *see also* RESTATEMENT (SECOND) OF CONTRACTS §§ 73, 75 (1981). "While the *Restatement* does not in itself carry legal authority, its treatment of modification is an accurate formulation of the developing law of modification for contracts not governed by the U.C.C." Narasimhan, *supra* note, at n.71; *see, e.g.*, Brian Const. & Dev. Co. v. Brightenti, 405 A.2d 72, 76 (1978) (asserting the Second Restatement of Contracts is a source of law applicable to contract modifications).

133. RESTATEMENT (SECOND) OF CONTRACTS § 73; *see* Narasimhan, *supra* note 132, at 75.

134. RESTATEMENT (SECOND) OF CONTRACTS § 73; *see* Narasimhan, *supra* note 132, at 75.

135. RESTATEMENT (SECOND) OF CONTRACTS § 73.

136. *See id.*

137. Hillman, *supra* note 131, at 681 n.6.

138. Narasimhan, *supra* note 132, at 75.

> While, as in the U.C.C., the *Restatement* does not explicitly allocate the burden of proof, again the promisor is usually assigned the burden, and he cannot enforce the modification unless he can demonstrate that it was a fair response to an unanticipated

between promisor and promisee, unless additional consideration has been included by the promisee.[139]

Much of the analysis of the common law of contract modification delves into the voluntariness of the modification and, while not explicitly stating, the *CX Digital* decision was no exception. Under traditional contract modification law, the guiding premise is the belief that only the party to the contract that requests the modification actually seeks to gain more than his due under the original contract.[140] The reason for this belief derives from the concept that the other party to the contract is, without modification, entitled to her original contractual rights and, therefore, without more, stands to gain nothing with the modification.[141] It has been urged that this approach wrongly leads to the bar of enforcement of voluntary modifications without consideration.[142] Alternatively, the modern approach to contract modification law deemphasizes this presumption, and endeavors to accommodate the need for flexibility of the contracting parties but, meanwhile, trying to limit the danger to one party that the other party may leverage the contractual relationship to get more than their due.[143] The court in *CX Digital* seems to have followed this approach in its written opinion and in the effect of the opinion on practices.

To many practitioners and academics, the U.C.C. has greatly simplified commercial transactions and, over all, significantly improved commercial law.[144] As its name suggests, the U.C.C. sought to make the relevant law "uniform . . . among the various jurisdictions."[145] Behind the efforts of the drafters of the U.C.C., and particularly Article 2, ran the notion that the

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> circumstance. The comments and illustrations emphasize that the unanticipated circumstances must be 'objectively demonstrable' and that the increase in price not exceed additional costs imposed by the 'unanticipated circumstance.

Id.

139. Hillman, *supra* note 131, at 686. "To avoid the problem of sham consideration rendering a modification enforceable, section 73 also requires that additional consideration reflect 'more than a pretense of bargain.'" *Id.* at 686-87 ("As a result, the Restatement Second's approach to contract modification inevitably will lead to the enforcement of some coerced modifications and the denial of some voluntary ones.").

140. *Id.*

141. Narasimhan, *supra* note 132, at 62.

142. Hillman, *supra* note 131, at 702-03. "The Restatement Second approach suffers from lack of clarity because of the difficulties of defining 'unanticipated circumstances' and the broadness of the 'fair and equitable,' 'honesty' and 'justice requires' terminology." *Id.*

143. Narasimhan, *supra* note 132, at 61.

144. Maggs, *supra* note 27, at 85. "The UCC has served the commercial law well for fifty years and will continue to do so for a long time in the future. Courts have come to treat it with respect and even admiration." *Id.* at 120.

145. U.C.C. § 1-102(2)(c) (2012); Maggs, *supra* note 27, at 103.

Code would "permit the continued expansion of commercial practices."[146] Due to its appeal, history has witnessed the adoption in every state in the United States (to the exclusion of Louisiana), the District of Columbia, and some of the federal territories of the U.C.C. in its entirety.[147]

Certainly, those same practitioners and academics may also find the U.C.C. (and its revisions) less than perfect.[148] Arguments exist that the U.C.C. already contains antiquated ideas, fails to respond to recent developments in law or commercial practices, and the statute resists adaption and change.[149] Of course, in light of the analysis in this Article, the instant messaging medium is most definitely a recent development in commercial practices. A question arises: is the U.C.C. adaptable to accommodate recent developments and the surrounding business circumstances?

The U.C.C. covers subjects the common law used to address.[150] For instance, the law related to contracts for the sale of goods is now embodied principally in Article 2 of the U.C.C. More specifically, the law of sale of goods contract modification is governed by section 2-209 of the U.C.C.[151] The law of modification under the U.C.C. focuses on an analysis of the facts and circumstances that lead to the demand for modification and the fairness of the actual modification.[152] However, the U.C.C. did not, nor arguably could not, completely replace the common law in each of the areas the U.C.C. was designed to address. It is not intended that the U.C.C. provide exclusive law in those areas.[153] As Professor Gilmore described:

> The Uniform Commercial Code, so-called, is not that sort of Code – even in theory. . . . We shall do better to think of it as a big statute – or a collection of statutes bound together in the same book – which goes as far as it goes but no further. It assumes the continuing existence of a large body of pre-Code and non-Code

146. U.C.C. § 1-102(2)(b); *see* 3 RICHARD A. LORD, WILLISTON ON CONTRACTS § 7:38, at 714 (4th ed. 2007) (arguing that the U.C.C. creates flexibility).

147. Maggs, *supra* note 27, at 85.

148. *Id.* at 86 n.38.

149. *Id.* (citing as an example U.C.C. § 2A-201(1)(b) (2001)).

150. Maggs, *supra* note 27, at 93. "The UCC replaces the Uniform Sales Act, which previously replaced the common law. The common law treated contracts for the sale of goods differently from other contracts in several ways." *Id.*

151. U.C.C. § 2-209 (2012).

152. Narasimhan, *supra* note 132, at 75.

153. *Id.* at 94.

> law on which it rests for support, which it displaces to the least possible extent, and without which it could not survive."[154]

When drafting the U.C.C., the drafters were not limited only to restating and strictly adhering to existing law. Instead, the drafters created a code that has several sections, and a general theme that would support adaptation and change.[155] In fact, consistent with these concepts, the drafters of the U.C.C. provided for the continued role of the common law rules by including section 1-103 of the U.C.C. Section 1-103 of the U.C.C. states:

> [u]nless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause *shall supplement* its provisions.[156]

What is a court to do if it faces a situation not covered by the U.C.C.? The court continues by using other principles of law to supplement its analysis. The supplementing materials include the common law. If nothing exists in the common law, a court may create a new common law approach.[157] Specifically, the drafters of Article 2 of the U.C.C. sought to codify, clarify, and make uniform the then existing law related to the sale of goods. Therefore, when a court confronts gaps in the provisions of the U.C.C. or ambiguities, it may resort to consulting preexisting law, including prior version(s) of the U.C.C., other statutory law or the common law.[158] In the process of using the common law to supplement the U.C.C., the court must keep in the mind the legislative intent of the U.C.C.

But, as has been observed and commented on in one fashion or another: "the drafting [of the U.C.C.] is perhaps the worst . . . ."[159] and, specifically, section 2-209, has caused much confusion.[160] In this way, as discussed in more depth below, the *CX Digital* decision may shed light on the sale of goods transactions and modifications because the legal impact of an instant message exchange on modification is not provided for in the U.C.C. specifically, nor in the common law related to Article 2. Further,

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154. Maggs, *supra* note 27, at 94 (citing to Grant Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285, 285-86 (1966)).

155. Newell, *supra* note 30, at 492.

156. U.C.C. § 1-103 (emphasis added).

157. Maggs, *supra* note 27, at 94 (citing Girard Bank v. Mount Holly State Bank, 474 F. Supp. 1225, 1239 (D.N.J. 1979)) (noting courts may improvise new common-law rights to supplement the U.C.C.).

158. *Id.* at 117-18.

159. Newell, *supra* note 30, at 487.

160. Maggs, *supra* note 27, at 95.

section 2-209 of the U.C.C. perplexes academics, practitioners, and courts. As such, the *CX Digital* decision sheds light on how to interpret instant message modification under the U.C.C.

A. GENERAL U.C.C. PROVISIONS

Article 2 of the U.C.C. applies to the sale of goods.[161] In addition to establishing provisions to uniformly govern sale of goods transactions, it also provides provisions for contract formation, contract enforcement, contract terms, and warranties.[162] In order for Article 2 to apply, the transaction must involve a sale of goods. Section 2-105(1) defines "goods" as "all things . . . which are movable at the time of identification to the contract for sale" including future goods.[163] When does a contract for the sale of goods transaction exist? Section 2-204(1) identifies the provision for the basic identification of a contract, indicating "[a] contract for the sale of goods may be made in any manner sufficient to show agreement."[164] This manner may include the conduct of the parties.[165] Section 2-206 of the U.C.C identifies the manner in which acceptance of an offer may be made: "[u]nless otherwise unambiguously indicated . . . an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances."[166]

In the circumstances of an evaluation of the effect of a purported acceptance, the common law of contracts, uniformly identified in the Restatements, applies the mirror image rule. Contrary to this approach, section 2-207 of the U.C.C permits: "[a] definite and seasonable expression of acceptance . . . sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered . . . unless acceptance is expressly made conditional on assent to the additional or different terms."[167] Even in this way, an acceptance does not have to be the mirror image of the offer.

Further, Article 2 is similarly much more apt to find a contract when terms are left open or omitted than the common law of contracts.[168] Section 2-204 of the U.C.C. allows that terms may be left open. "Even though one

161. U.C.C. § 2-102.

162. BRUCE S. NATHAN ET AL., FIFTY WAYS TO LEAVE YOUR DEBTOR: LESSER-KNOWN REMEDIES FOR JILTED CREDITORS (2007), WL 041207 ABI-CLE 1015.

163. U.C.C. § 2-105(2).

164. *Id.* § 2-204(1).

165. *Id.*

166. *Id.* § 2-206.

167. *Id.* § 2-207.

168. *See, e.g.*, Newell, *supra* note 30, at 500.

or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."[169] In light of the decision in *CX Digital*, it is important to note four particular differences between the common law of contracts and the law of the U.C.C. related to the sale of goods. With regard to contract formation: 1) the mirror image rule does not apply under Article 2, and 2) Article 2's emphasis is on finding agreement even when terms are missing. In an analysis of the modification, 1) Article 2 of the U.C.C. does not require consideration; and 2) the common law of contract does not enforce NOM clauses.

B. MODIFICATION OF CONTRACTS: SECTION 2-209

Section 2-209 of the U.C.C. governs modification of contracts for the sale of goods. It supports the enforcement of a modification that is entered into freely and clearly.[170] As stated in comment 1 of the official comments of section 2-209: "[t]his section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments."[171] However, it has been noted:

> Section 2-209 is complex, not simple; murky, not clear; and, with the exception of subsection (1), antiquated, not modern . . . There is a "schizophrenic" quality about the section as it wanders back and forth between language which supports easier modification of sales contracts and language which makes effective modifications more difficult.[172]

While certain differences between the law of contracts and Article 2 of the U.C.C have not caused courts much consternation, the differences as to modification and application of section 2-209 of the U.C.C. have caused difficulty.[173]

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169. U.C.C. § 2-204(3).

170. *See* Newell, *supra* note 30, at 489.

171. U.C.C. § 2-209 cmt. 1.

172. Newell, *supra* note 30, at 489.

> From a style standpoint, the drafting of section 2-209 seems to suffer from one or a combination of the following ills: 'committee' drafting, 'bad Restatement' drafting, 'Rube Goldberg' drafting or 'old soil' drafting. The result of these drafting ills is a Code section which can be interpreted in a wide variety of ways to justify a rigid or flexible approach to modifications or something in between.

Id. at 491.

173. LORD, *supra* note 146, § 7:38, at 722.

1. *No Consideration*

Unlike the common law of contracts, Article 2 of the U.C.C. does not require consideration for modification to be binding.[174] As a result, while the *CX Digital* court responded to Smoking Everywhere's claim of lack of consideration in the common law context, this Article need not with regards to modification of a contract for the sale of goods. Instead, Article 2 requires that the parties must conduct themselves in good faith. While modification under the U.C.C. does not require consideration, the modification must be made in good faith, "and the extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith."[175] "Good faith" is honesty in fact in the transaction at issue and reasonable commercial standards of fairness in dealing.[176]

Guiding an analysis of modification under Article 2, the U.C.C. created the overarching requirement of good faith embodied in revised section 1-304 of the U.C.C. Further, section 2-209 of the U.C.C. specifically governs modification of a contract for the sale of goods,[177] and requires the contracting parties exercise good faith in their modification of the contract.[178] Arguably this requirement of good faith in contract modification for a sale of goods contract (without the requirement for additional consideration) has not caused great consternation for the courts.[179] Given that modifications differ in context from the original contract, many of the reasons for the requirement of a promise for a promise (consideration) loses force since enforceable promises have already been made in the original contract.[180] With the concept of the promise for a promise of the original contract, the U.C.C. encourages flexibility by not requiring consideration for modification.

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174. U.C.C. § 2-209(1). *See* Narasimhan, *supra* note 132, at 73-74. "This might suggest that all modifications that do not run afoul of the laws of duress are enforceable. Few modifications would be defeated under traditional duress scrutiny."

175. UCC § 2-209 cmt. 2.

176. UCC § 1-102(20) [Rev.]; *see* LORD, *supra* note 146, § 7:38, at 717-19 (citing RESTATEMENT (SECOND) OF CONTRACTS § 89(a); U.C.C. § 1-201(19); U.C.C § 2-103(1)(b)).

177. "[T]he most significant revision to Section 2-209 is the substitution of the term 'record' for the term 'writing,' a substitution made throughout the Uniform Commercial Code, including throughout Article 2, to ensure that electronic transactions, which store the parties' agreement, will be as viable under Article 2 as traditional paper writings." LORD, *supra* note 146, § 7:38, at 722.

178. U.C.C. § 2-209 cmt. 2; *see* Newell, *supra* note 30, at 489.

179. LORD, *supra* note 146, § 7:38, at 722. "The requirements that contracting parties under Article 2 of the Uniform Commercial Code exercise good faith, in lieu of the traditional requirements of consideration, when modifying a contract for the sale of goods, has not created significant problems for the court." *Id.*

180. Newell, *supra* note 30, at 489-90.

However, under the sale of goods analysis, a party, like CX Digital, may have an argument that the corresponding party, like Smoking Everywhere, failed to act in good faith during the modification of the Insertion Order, if it can be established that Smoking Everywhere entered into the contract modification with the intent to benefit, and not keep its promise, instead claiming the NOM clause as a defense. The test for good faith, found in U.C.C. section 1-201(20) [Revised] and official comment 20 is "honesty in fact" and "observance of reasonable commercial standards of fair dealing."[181] Arguably, if the client were to conduct itself knowing of the NOM, not disclosing it (if, for instance, the opposing party might have forgotten), and intending to benefit but not keep its promise using the NOM as a defense, this may not arise to the level of "honesty in fact" and "observance of reasonable commercial standards of fair dealing" that embody good faith. While the U.C.C., specifically section 2-209, does not explicitly identify the previously mentioned opportunism of the promisee assumed under traditional common law doctrine,[182] the U.C.C. does require that the parties act in good faith and, thereby, seeks to thwart promisee opportunism.

2. *No-Oral Modifications Clause*

While the lack of need for consideration may provide greater flexibility for business people attempting to modify a contract, arguably section 2-209(2), the NOM section, does not. Section 2-209(2) states "[a] signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded . . . ."[183] As stated earlier and by the court in the *CX Digital* decision, the common law of contract modification does not enforce NOM clauses:

> The law is crystal clear that a written contract may be modified orally. Even where the contract provides that any non-written modification will not be recognized. Such a contract may be modified, changed or a new one substituted for it and this may be

181. UCC § 1-201(20) cmt. 20. "While the U.C.C. is not explicit on this issue, courts and commentators usually assume that the promisor, the party attempting to enforce a modification, has the burden of proof as to the contract's enforceability. The promisor, therefore, must demonstrate that the modification was made in good faith." Narasimhan, *supra* note 132, at 74 (footnote omitted).

182. *Id.* at 74-75. "This is equally true of the Restatement." *Id.*

183. U.C.C. § 2-209(2).

> established by parole evidence showing either an express agreement or actions necessarily involving alterations.[184]

This Article explores the application of the *CX Digital* line of analysis to circumstances involving a contract for the sale of goods under Article 2 of the U.C.C. in addition to a common law analysis as in the actual decision.

Arguments exist that section 2-209 actually makes modification more difficult than under the common law of contracts.[185] Due to the confusion of 2-209, courts take different approaches in their analysis and reach different results. In fact, the results have been so disparate that decisions have been made that equally forbid and allow certain modifications under a NOM for similar transactions.[186] Unlike the common law,[187] Article 2 of the U.C.C. recognizes parties' right to put a NOM clause in their agreement.[188] Under section 2-209(2) of the U.C.C., a contract may have a clause that requires a signed writing for modifications.[189] It is worth noting that the official comment 3 to section 2-209 states "subsections (2) and (3) are intended to protect against false allegations of oral modifications."[190] This type of clause has been referred to as a private statute of frauds or a

184. Wymard v. McCloskey & Co., 217 F. Supp. 143, 147 (E.D. Pa. 1963) (citations omitted).

185. Newell, *supra* note 30, at 497. Referencing a widely cited case discussing these subsections of the U.C.C., *Wisconsin Knife Works v. National Metal Crafters*, in which Professors Richard Posner and Frank Easterbrook disagree, one author writes "[p]ity the average lawyer or judge confronting these subsections if these heavy hitters cannot agree. Not only will many lawyers and judges face uncertainty but that uncertainty will inevitably lead to frustration as they struggle with the complexity of the provision." *Id.* at 493-94 (citing Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280 (7th Cir. 1986)).

186. *Id.* at 497.

187. *Wymard*, 217 F. Supp. at 147; *see* LORD, *supra* note 146, § 7:38, at 722-23 (citing to Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280 (7th Cir. 1986); Wymard v. McCloskey & Co., 217 F. Supp. 143 (E.D. Pa. 1963)).

188. UCC § 1-201(b)(31)[Rev.]; LORD, *supra* note 146, § 7:38, at 722-23.

189. Newell, *supra* note 30, at 490.

190. U.C.C. § 2-209 cmt. 3.

NOMs clause.[191] However, for this reason, some argue the U.C.C.'s provisions regarding NOM clauses are antiquated.[192]

In the *CX Digital* decision, the court responded to Smoking Everywhere's claim that they did not pay CX Digital because there was an unenforceable modification to the NOM clause in the Insertion Order.[193] The court in *CX Digital* applied three layers of analysis to this issue: (1) an oral agreement "is sufficient to modify or rescind a written contract, notwithstanding" a NOM in the contract; (2) the modification by instant message exchange was not oral, it was in writing; and (3) even if the NOM clause had effect, Smoking Everywhere would have waived the NOM based on CX Digital's reliance and Smoking Everywhere's failure to complain.[194] Professor Douglas Newell has also identified a helpful three-step approach to a NOM analysis under section 2-209(2) of the U.C.C. "Three basic questions seem to recur: First, what is excluded by a NOM clause under subsection (2)? Second, what is waived by a "waiver" under subsection (3)? Third, how does a party waive something under subsection (4) and (5)?"[195]

Addressing Newell's first question, section 2-209(2) seems to be screaming a simple answer that a NOM clause excludes anything that is not in a signed writing that purports to modify the original contract. Of the interpretations of 2-209(2), this is the most expansive reading and has been adopted by several courts.[196] In this situation, if there is no signed writing evidencing the modification, i.e., if the alleged modification fails under 2-209(2) (or the 2-201 statute of frauds) the party must establish waiver under section 2-209(4).[197]

A second approach under the interpretation of section 2-209(2) is that "the NOM clause only blocks proof of the terms of an executory oral

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191. *See*, *e.g.*, Newell, *supra* note 30, at 497-98.

> Labeling a NOM clause as a "private" statute of frauds is customary for the obvious reasons that the parties include it in the contract and the typical clause requires a signed writing for any modification. In the context of section 2-209, the "private" statute of frauds of subsection (2) appears to have a broader reach than the "public" provision in subsection (3). If every modification needed a signed writing to satisfy subsection (3), there would seem to be no need for subsection (2). The better reading of subsection (3) is that its writing requirement applies to the contract as a whole, including any modification. If that is so, the original writing may satisfy the "public" statute of frauds without a separate writing for the modification unless the modification changes the quantity of goods covered.

Id.

192. *Id.* at 487.

193. CX Digital Media, Inc. v. Smoking Everywhere, Inc., No. 09-62020-CIV, 2011 WL 1102782, at *6 (S.D. Fla. Mar. 23, 2011).

194. *Id.* at *11-12.

195. Newell, *supra* note 30, at 494.

196. *Id.*

197. U.C.C. § 2-209(4); *see* discussion *infra* pp. 639-42 as to waiver.

agreement to modify the original contract."[198] The result of this approach is that the party advocating the modification that was not evidenced in a signed writing could put forth evidence to show that the parties' course of performance modified the contract.[199] The conduct of the parties to a sale of goods contract may be such as to constitute a modification of their agreement.[200] This approach also recognizes the intent of the drafters explained in comment 3 to section 2-209. Since the intent was to "protect against false allegations of oral modifications," if the parties had engaged in a modifying course of performance the inference of a false allegation is much harder to prove, if not eliminated (as is the case in *CX Digital*). If this approach were pursued by the party advocating the modification, proof of waiver pursuant to section 2-209(4) is less important.[201]

As a result of the complicated issues related to contract modification under Article 2, establishing an enforceable modification may be more difficult than the original contract.[202] Looking at the facts of the *CX Digital* case, a party in CX Digital's shoes in a sale of goods transaction would be faced with these two approaches. First, the CX Digital party may argue the modification was not oral because it was made in an instant message exchange, a writing. This follows the conclusion that the *CX Digital* court made.[203] Arguably, the instant messages may not have been signed. However, the CX Digital party may make the argument that the instant messages were signed. The definition of "signed" under section 1-201(37) of the U.C.C. provides "'[s]igned' includes using any symbol executed or adopted with present intention to adopt or accept a writing."[204] The usernames of "nicktouris" and "pedramcx" arguably may be considered signatures if the "intention to adopt" can be established. One can imagine, however, a situation where the username is not so closely aligned to the user. In that case, the "signed" argument is much more difficult.

If, however, the instant message exchange is determined to not qualify as a modification because it is not a *signed* writing as required by the NOM

198. Newell, *supra* note 30, at 494.

199. *Id.*

200. 67 AM. JUR. 2D *Sales* § 332 (2012).

201. Newell, *supra* note 30, at 495.

202. *Id.* at 501. "Such a result seems both possible and absurd." *Id.*

> [P]ermitting a NOM clause seems contrary to the spirit of the Article 2 contract formation provisions and to the newer ideas of relational contract. While the "waiver" language of subsection (4) may help in some cases, the overall effect of section 2-209 is to make the sales contract formation process more rigid.

Id. at 497.

203. *See generally* CX Digital Media, Inc. v. Smoking Everywhere, Inc., No. 09-62020-CIV, 2011 WL 1102782 (S.D. Fla. Mar. 23, 2011).

204. U.C.C. § 1-201(37) (2012).

clause (or for another reason), the CX Digital party in a sale of goods transaction may pursue waiver or modification by course of performance. Professor Newell's suggested three-part analysis addresses the issue of waiver as well, and will be discussed in depth below. First, however, this Article considers the CX Digital party's argument for modification by course of performance. Section 1-303(a) of the U.C.C identifies course of performance as:

> [A] sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.[205]

As applied to the situation of an oral agreement to modify, the argument is set forth well in the appellate brief in *Paulsen Real Estate Corp. v. Grammick*.[206]

> [W]hen the oral agreement to modify has [i]n fact been acted upon to completion, the [sic] need to protect the integrity of the written agreement from false claims of modifications does not arise. In such [c]ase, not only may past oral discussions be relied upon to test the alleged modification, but the actions taken may demonstrate, objectively, the nature and extent of the modification . . . Moreover, apart from statute, a contract once made can be unmade, and a contractual prohibition against oral modification may itself be waived . . . .[207]

An oral modification may be enforceable if full performance has occurred. As in *CX Digital*, an oral modification may be fully enforceable when the modification has been fully performed.[208] If, on the other hand, there is only partial performance under the contract that is inconsistent with the contract, the parties may effectuate a modification without a signed writing when the "partial performance be unequivocally referable to the oral modification."[209]

Further, section 1-303(f) provides "[s]ubject to Section 2-20 . . . a course of performance is relevant to show a waiver or modification of any

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205. *Id.* § 1-303(a).

206. Brief for Respondent at 17, *In re* Paulsen Real Estate Corp. v. Grammick, 663 N.Y.S.2d 660 (N.Y. App. Div. 1997) (No. 1996-07816), 1997 WL 34664043.

207. *Id.* at 18-19.

208. *Id.* at 19.

209. *Id.*

term inconsistent with the course of performance." What is the difference? A party waives a term when it relinquishes a right already known and held by the party. The party that waived the term or right has not permanently lost the right if retraction is possible. With an effective retraction, the term or right that had been waived may be reinstated to full effect. On the other hand, through a modification the parties agree to change the terms of the contract.[210] At such point, parties may change the modification through another modification.

The course of performance relevant to this Article's analysis is the sending of sales by the CX Digital party, acceptance by Smoking Everywhere to the "two new pages" and of the increased customer sales, without the Smoking Everywhere party's complaint. Comment 1 to section 1-303 states the intent of the drafters of the UCC as to "reject[s] both the 'lay-dictionary' and the 'conveyancer's' reading of a commercial agreement. Instead, the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances."[211]

A party like CX Digital in a sale of goods transaction could argue that a modification of the agreement had been effectuated when the CX Digital party immediately increased the number of customer sales sent to the Smoking Everywhere party and to the two new pages without complaint from the Smoking Everywhere party over a month. In fact, the Smoking Everywhere party, through its agent Touris, worked to ensure that problems with receipt to the two new pages of the increased sales went without problem. The course of performance modified the contract.

Professor Newell clarified that his second question for a NOM analysis, "concerning what is waived," has potential also to produce more than one approach and, therefore, more than one answer.[212] Some may have suspected that removal of the requirement for consideration would be the biggest issue that Article 2 would create for the law of contracts as it applies to the sale of goods, but, in reality, courts have been most stumped by whether an attempted modification is a modification in light of a NOM and whether something has been waived.[213] First, some have interpreted a waiver to apply to the specific provision of the original agreement,[214] i.e., in the case of a *CX Digital*-like situation the specific provisions would be the

210. SCOTT J. BURNHAM, GLANNON GUIDE TO SALES 98 (2d ed. 2012).
211. U.C.C. § 1-303 cmt. 1 (2012).
212. Newell, *supra* note 30, at 495-96.
213. LORD, *supra* note 146, § 7:38, at 727.
214. Newell, *supra* note 30, at 495-96.

"Volume" and identified pages in the Insertion Order. In this way, the parties may eliminate the specific terms by waiving them, replacing them with new terms. Therefore, section 1-303(f) would allow course of performance of the parties to help prove elimination of the old terms through waiver and replacement. If the waiver is not retracted, the waiver stands.

Another waiver approach argues that the party waived the NOM clause.[215] This is the approach the *CX Digital* court articulated briefly.[216] The court held that the reliance by CX Digital and failure to complain by Smoking Everywhere amounted to a waiver of the NOM, and Smoking Everywhere was estopped from claiming the NOM as a defense. Through the course of performance, once again, the CX Digital party may claim that the NOM clause was waived by Smoking Everywhere. Once the NOM clause is removed, the oral modification or, in this case, a written but, perhaps, unsigned modification of the Insertion Order terms for web pages and "volume", would be enforceable.

Professor Newell's final question addresses how the waiver was done.

> At least one court required an express waiver. Conduct of the parties ignoring the NOM clause is another possible avenue. The most obvious reading of section 2-209(4) is that the failed oral agreement itself is the basis of the waiver and at least can be shown to establish a waiver if not to establish all the terms of the modification.[217]

The U.C.C. has been interpreted to hold that even if there is a NOM clause, it is possible that the parties may try to modify or rescind the agreement orally and end up waiving the NOM clause.[218] In addition, if a waiver occurred, it may be retracted by reasonable notification by the waiving party and the effect is not unjust to the other party.[219]

The parties' course of performance is important evidence to determine if any rights have been waived or modified. A repeated course of conduct that is inconsistent with the terms of the contract with a NOM may be waiver or modification.[220] As the court determined in *CX Digital*, if the

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215. *Id.*

216. *See generally* CX Digital Media, Inc. v. Smoking Everywhere, Inc., No. 09-62020-CIV, 2011 WL 1102782 (S.D. Fla. Mar. 23, 2011).

217. Newell, *supra* note 30, at 496.

218. U.C.C. § 2-209(4); U.C.C. § 2-209(4) [Rev.]; LORD, *supra* note 146, § 7:38, at 724-25.

219. U.C.C. § 2-209(5); *see* LORD, *supra* note 146, § 7:38, at 725-26 (indicating also that Second Restatement of Contracts section 89(c), comment d adopts this approach).

220. 67 AM. JUR. 2D *Sales* § 332 (2012).

NOM had been an issue, Smoking Everywhere waived it because CX Digital performed in reliance, and Smoking Everywhere did not complain.

C. STATUTE OF FRAUDS

Also relevant to the analysis of a modification under Article 2 of the U.C.C. is a determination of whether the statute of frauds has been satisfied. Section 2-201 of the U.C.C. embodies the statute of frauds, also referred to as the public statute of frauds to distinguish it from the NOM, which is referred to as the private statute of frauds.[221] While not part of the analysis in this Article discussing the *CX Digital* decision, proper analysis of the modification requirements of the U.C.C. begs a mention of the requirements of the statute of frauds. Non-compliance with the statute of frauds may present a modification from being enforceable under section 2-209(3).[222] Section 2-201 of the U.C.C. requires that a contract for the sale of goods in the amount of five hundred dollars or more must be in writing, contain the quantity term, and be signed by the party against whom enforcement is sought.[223] Section 2-209(3) requires that any modification satisfy the statute of frauds of 2-201 if "the contract as modified is within its provisions."[224]

IV. WESTERN NORTH DAKOTA AND CONCLUSION

> *"Men increasingly rely upon the spoken word, given in person or by telephone; and it is the function of the courts to do justice in such cases. It no longer serves for the court to throw a plaintiff out of court saying, 'It was your folly not to get his signature.'"*[225]

Imagine, now, a boomtown – where business is flying so fast it is smoking. Business cannot keep up with the needs of development. As building plans are made, materials purchased, man-power hired: contracts are being entered into at an equally fast pace. Similarly, circumstances are continually in flux for the participants. A delivery may be delayed, parts may be unavailable, or work is postponed until the delayed delivery arrives. When business is booming, so, too, are contract modifications.[226] As western North Dakota is experiencing monumental economic growth, just

221. *See* U.C.C. § 2-201.
222. *Id.* §§ 2-209(3), 2-201; *see* LORD, *supra* note 146, § 7:38, at 723-24.
223. U.C.C. § 2-201.
224. *Id.*
225. Newell, *supra* note 30, at 590 (quoting ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1295, at 212 (1962)).
226. Gorrie, *supra* note 2, at W23; *see also* Mackinnon, *supra* note 3.

like any rapidly changing business situation, it is helpful to note that one of the primary goals of contract law is allocation of risk. Moreover, the law of contract modification should promote and uphold the necessary flexibility and reliability to achieve the enforcement of uncoerced alterations of existing contractual arrangements.[227] In turn, upholding freely-made contract modifications allows for freedom of contract which promotes economic growth, such as in western North Dakota.[228] Whether in codified laws, rules, regulations or judge made law, law that prohibits or stymies parties' ability to change contract terms when parties freely wish to change the terms, would serve to discourage parties from entering into contractual relations in the first place. This constriction, thereby, negatively affects economic growth.[229] Such laws would clearly stymy commercial practices, in general, and particularly in places teaming with commercial development, like western North Dakota.[230]

However, on the flip side of the coin, while freedom of contract supports voluntary alteration of the parties' agreement, the parties to the agreement should also be able to rely on the contract and its terms. Without being able to rely on the contract and the commitment made therein, parties would be challenged to plan for the future.[231] Similarly, the inability to rely on contract commitment could stymy economic development. Consequently, we see that law must by reliable and adaptable just like the contracts that govern the relations between parties. The necessary balance then is finding a doctrine that allows for flexibility while policing against opportunism.[232]

The decision in *CX Digital* supports the concepts of flexibility and reliability in contracting by identifying that instant message exchanges may cause modification of a contract with a NOM and ensuring that when parties willingly enter into a modification it is upheld, especially when another party has relied on the modification. Therefore, an essential element of the analysis is an evaluation of the voluntariness of each party's entry into the modification.[233] Pursuant to the provisions of the U.C.C., when there are gaps or ambiguities, courts should follow the common law

227. Hillman, *supra* note 131, at 681.
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 681-82.
232. Narasimhan, *supra* note 132, at 61.
233. Hillman, *supra* note 131, at 682. "Literally hundreds of cases deciding the enforceability of contract modifications confirm that this is the paramount, although rarely articulated, concern of courts facing the question. The challenge of modification law is to prescribe workable rules that take into account this issue of voluntariness." *Id.*

and legislative intent.[234] In North Dakota, the law recognizes that, for interpretation of gaps and ambiguities, the North Dakota version of the U.C.C. may be supplemented by the "general principles of law and equity, unless specifically displaced by the Code."[235]

Parties may opt to insert a NOM clause into their agreement. It allows a party to decide, ahead of time, that subsequent agreements that are not written and signed will not be effective modifications of the original agreement. However, there are decisions that apply similar reasoning to CX Digital's line of reasoning, allowing for waiver of the NOM clause by course of performance and then, allowing for subsequent oral modification. In North Dakota, law has defined waiver as the "voluntary and intentional relinquishment and abandonment of a known existing rights, advantage, benefit, claim, or privilege which, except for such waiver, the party would have enjoyed. Although, closely related to estoppel, waiver is a somewhat different concept."[236] If the lawyer combines the NOM clause with a merger clause, the effect may be to restrict the parties to the terms of only one document at a time. This restricts the flexibility and ability for the parties to function rapidly. They are bound to the original contract.[237]

Bottom line, however, the U.C.C. and its ambiguities do not create unavoidable obstacles for the contracting parties. The U.C.C. provisions, including in Article 2, represent the default rule. The parties may modify the default rules through agreement, express and implied.[238] Accordingly, courts and parties should view the U.C.C. mostly as a collection of default rules.[239] In the rapid business of situations like western North Dakota's boom town, it is important that the parties may modify the default rules of the U.C.C. The U.C.C. "specifically allows the parties by contract to change most of its rules. Section 1-102(3) states: 'The effect of provisions

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234. 1 MORTON MOSKIN ET AL., COMMERCIAL CONTRACTS: STRATEGIES FOR DRAFTING AND NEGOTIATING § 9.02, at 9-4 (2013); *see also* Maggs, *supra* note 27, at 120.

235. Farmers Elevator Co. of Reserve v. Anderson, 552 P.2d 63, 65 (1976) (citations omitted).

236. Stenehjem v. Sette, 240 N.W.2d 596, 600-01 (1976).

237. Newell, *supra* note 30, at 498-99.

238. Maggs, *supra* note 27, at 99.

> Nothing in section 1-103(2), however, suggests that parties may change the default rules only by express agreement. Accordingly, courts should consider whether the facts of the particular transaction suggest that the parties implicitly agreed to create an exception. Even if the parties do not say anything, their past course of dealing and the usage of the trade may show an agreement. Section 1-205(3) says: "A course of dealing between the parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement."

Id.

239. *Id.* at 118.

of this Act may be varied by agreement, except as otherwise provided in this Act . . . .'"[240] In general, because parties may modify the default rules of the U.C.C. by private agreement, the decisions of the court in the context of the U.C.C. analysis may not have as great an impact. In other words, if parties do not like a U.C.C. default rule or a decision by the court, the parties are free to modify it.[241] In turn, those agreements may be modified or provisions waived.[242]

Counsel for the parties may seek, despite decisions such as the *CX Digital* decision that find for waiver, to contract away the possible waiver or modification. The parties may attempt to accomplish this by inserting additional language into the agreement after a NOM clause to specifically exclude instant message exchanges from modifying the original contract, or constituting a waiver of terms in the original contract. Another effort that lawyers may attempt, after the *CX Digital* decision, is to provide a clause in the instant message that the instant message shall not be construed as binding upon the sender-party. Once again, this restricts the flexibility and ability of the parties to function rapidly in the business environment. Some reliability is to be gained in these efforts. An important consideration for this analysis is the way business parties usually conduct themselves, especially in a fast-paced environment. Like the parties in *CX Digital*, parties may not be aware or attentive to the NOM clause (or similar language) or choose to ignore it. If the parties are aware of the impact of these binding clauses, the parties may continue their business development, attempting to modify the agreement but, in explicit terms, violate it. This is also especially true of just a NOM clause. When the NOM is stuck into the boilerplate, where they often find themselves, the parties may not even look to the small print in the boiler plate and know it is there.[243]

In the context of a rapidly developing business environment, the parties may know, or should know of the NOM clause and language in the instant message, but the fast pace of the business environment dissuades the parties from spending the time and figuring out what a writing would require. While this may frustrate counsel, this often happens in rapidly changing business when the requirements created by law, in the minds of the businessmen, clog the development of the business. The interactions between the parties may modify or waive the underlying agreement, either

240. *Id.* at 117.
241. *Id.* at 83-84.
242. Stenehjem v. Sette, 240 N.W.2d 596, 600 (1976).
243. Newell, *supra* note 30, at 499-500.

by express or implied agreement.[244] This is consistent with the legislative intent of the U.C.C. If waiver or modification were not recognized by course of performance, parties would either be hesitant to or refrain from, for example, asking for a little accommodation. The other alternative is they conduct themselves as if the NOM or the instant message clause did not exist and, if problems arise, then consult counsel. Therefore, instead of expressly altering the default rules of the U.C.C., the parties may have impliedly modified the default rules.[245]

With the drafting of the U.C.C., the legislature intended to reflect business practices and, therefore, allow "necessary and desirable modifications of sale contracts without regard to the technicalities which, at common law, hamper such adjustments."[246] The *CX Digital* decision, while not about Article 2, tracks the legislative intent of the drafters of the U.C.C. by reaching a decision that endeavors to reflect the realities of the business environment and can be used to supplement the provisions of the U.C.C. An analysis should proceed that reflects the notion that both parties have the opportunity in modification to receive more than they bargained for in the original contract.[247] As a result, the analysis will need to evaluate, as the *CX Decision* performed, the business circumstances for the possible modification and not merely, in the case of sale of goods, a strict reading of the statute, to determine the voluntariness of the transaction.[248] The drafters of the U.C.C. intended that the U.C.C. provide flexibility and allow business to flow without trappings getting in the way of business through contract adjustments. Contract modification, like the *CX Digital* decision, should provide the reliability and flexibility to permit business to move forward even at boom town speed. Consequently, the contracting and the lawyers involved will have to adapt and similarly provide the reliability and flexibility, including educating their clients about the possible effects of instant message exchanges and being educated by their clients as to their needs in boom town development.

"Strap on your seatbelts . . . . Here we go."[249]

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244. Maggs, *supra* note 27, at 83-84 n.12. "The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement . . . ." *Id*.

245. *Id.* at 83, 99, 100.

246. UCC § 2-209(1); UCC § 2-209(1) [Rev.] "The revised version of UCC Article 2 has not been adopted by a jurisdiction. In addition, the only substantive modification from the current version of Article 2 to the revised, is the change from the reference of a 'writing' to 'record.'" LORD, *supra* note 146, § 7:38, at 722.

247. *See* Narasimhan, *supra* note 132, at 64.

248. Hillman, *supra* note 131, at 682.

249. Baumgarten, *supra* note 10.