STATEMENT OF FACTS

The client, Deere Felt Company ("Deere"), is an Ohio company that manufactures felt for the paper industry. One of Deere's clients is Clark, Greenway & Company ("Clark"), located in New York. The paper industry is currently very depressed.

Deere has filled several orders of felt for Clark. Clark presently has about $225,000 worth of felt purchased from Deere in inventory.

In a letter to Deere dated December 14, 1998, Melvin Marks, Vice-President/Purchasing for Clark, stated:

> The last year has been very difficult for all paper manufacturers. Clark, Parker's position has also been further weakened by the poor performance of many of your wet felts. Your representative, Roger Weaver, has spent a lot of time in the mill but has been unable to take the necessary steps to eliminate the frequent failures. In view of this we are going to return all of your felts currently in inventory and cancel all outstanding orders.

Despite the assertions contained in this letter, tests have shown that Deere's felts last longer than expected on Clark's machines. In addition, Deere contends that Clark's assertion that Roger Weaver has spent a great deal of time attempting to "eliminate the frequent failures" is false.

At the time that Deere began selling felt to Clark, the parties did not enter into a formal written agreement. However, language at the bottom of the front side of Clark's purchase orders states: "THIS ORDER IS SUBJECT TO THE TERMS AND CONDITIONS PRINTED ON THE BACK. BUYER RESERVES THE RIGHT TO CANCEL ORDER AFTER THE ABOVE REVIEW DATE WITHOUT RECOURSE TO THE BUYER."

The backs of the purchase orders contain 11 terms and conditions of sale. The pertinent provisions state:

> 1. Time of delivery is of the essence of this order. Buyer reserves the right to refuse any goods and to cancel all or any part of this order if Seller fails to deliver all or any part of the goods in accordance with the terms of this order. Acceptance of any part of the order shall not bind buyer to accept future shipments, nor deprive it of the right to return goods already accepted.
>
> . . . .
>
> 3. The goods covered by this order may be used in the manufacture of paper products and any defect therein may occasion special damage to the Buyer. Acceptance of all or any part of the goods shall not be deemed to be a waiver of Buyer's right either to cancel or return all or any part thereof because of failure to conform to order or by reason of defects, latent or patent, or other breach of warranty, or to make any claim for damages, including manufacturing costs and loss of profits or other special damages occasioned by the Buyer. Such rights shall be in addition to any other remedies provided by law.

In addition, the purchase orders state that the contract shall be construed and governed by New York law.

Deere representatives did not notice the language of the purchase orders. Instead, Deere referenced the purchase orders only as needed to fill Clark's orders.

After receiving a purchase order, Deere mailed back to Clark a one-page form entitled "Acknowledgment of Scheduled Completion." This form simply lists Clark's purchase order number, the date the order was placed, Clark's customer account number, the felt number, the machine and position, the style, the size of the order, the synthetic content, the per pound price, the scheduled date of completion, and the name of the sales representative.

QUESTIONS PRESENTED

1. Under New York law, do the terms and conditions set forth in the purchase orders constitute the sales contract between the parties?

2. If the purchase orders do constitute the contract, to what extent should their terms be given effect?

3. Does Clark have the right to return all of the felts in its inventory and cancel all outstanding orders?

4. Is Clark liable for repudiating the contract?

DISCUSSION OF AUTHORITY

I. Contract Terms.

Deere and Clark were involved in several transactions whereby Deere shipped felt to Clark, and Clark accepted and paid for the felt. Clearly, the performance of the parties demonstrates the existence of a contract. *See Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 98 (3d Cir. 1991). The parties' respective rights under the contract, however, hinge upon the exact nature of the contract terms.

Because this case involves the sale of goods, the transaction is governed by Article 2 of the Uniform Commercial Code, as enacted in New York. N.Y. U.C.C. § 2-102 (McKinney 1993). In this regard, U.C.C. § 2-207 sets forth certain standards by which the terms of an agreement may be ascertained and provides, in pertinent part:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or

agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it;

. . . .

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

The Official Comment to this section further states:

1. This section is intended to deal with two typical situations. The one is where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal acknowledgments or memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is one in which a wire or letter expressed and intended as the closing or confirmation of an agreement adds further minor suggestions or proposals such as "ship by Tuesday," "rush," "ship draft against bill of lading inspection allowed," or the like.

2. Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained either in the writing intended to close the deal or in a later confirmation falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional terms.

3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which

> would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

Id. Official Comments 1-3. Significantly, U.C.C. § 2-207 was intended to modify the "unrealistic technical rules of the common law of sales and resolve the 'battle of the forms,' by substituting a set of rules and legal principles conforming to the practices and expectations of modern businessmen." *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1, 7 (S.D.N.Y. 1973).

Although U.C.C. § 2-202 permits the parties to reduce an oral agreement to writing, U.C.C. § 2-207 implicitly authorizes the parties to enter into a valid oral agreement concerning the essential terms and conditions of sale. If such an agreement is made, a later writing, such as a purchase order or invoice, becomes a part of the contract only insofar as the written terms and conditions do not materially alter the original contract terms or are expressly accepted by the other party. *First Security Mortgage Co. v. Goldmark Plastics Compounds, Inc.*, 862 F. Supp. 918, 934 (E.D.N.Y. 1994); *Lorbrook Corp. v. G&T Industries, Inc.*, 162 A.D.2d 69, 562 N.Y.S.2d 978, 980 (3d Dep't 1990).[1]

In *Lorbrook Corp.*, for example, the evidence showed that the parties reached an oral agreement concerning the essential terms of a valid requirements contract, including price, identity of goods sold, minimum quantity, delivery, and time and method of payment. 562 N.Y.S.2d at 980. The buyer subsequently sent purchase orders which stated that the

[1]Typically, a contract for the sale of goods for the price of $500 or more is enforceable only if there is a writing sufficient to indicate that a contract for sale has been made and signed by the party to be charged. N.Y. U.C.C. § 2-201(1). However, where goods have been received and accepted, or payment has been made and accepted, the Statute of Frauds does not bar enforcement of the agreement. *Id.* § 2-201(3)(c).

transaction was to be governed and interpreted under the laws of, and legal disputes resolved in, the State of Michigan. *Id.* at 979. The court ruled that the forum selection clause contained in the purchase orders had not become a part of the parties' contract. *Id.* at 980. In this regard, the buyer's purchase orders could be viewed as nothing more than a request to ship a portion of the goods covered by the agreement, and the buyer's insertion of the forum selection clause could be seen as an unsuccessful ploy to unilaterally add a term not covered by the preexisting contract. *Id.* Alternatively, the buyer's purchase orders could be seen as confirmations of the preexisting contract. The forum selection clause was not a part of this contract because it materially altered the prior agreement, and the seller never expressly assented to it. *Id.*

In *Tuck Industries, Inc. v. Reichhold Chemicals, Inc.*, 151 A.D.2d 566, 542 N.Y.S.2d 676 (2d Dep't 1989), the court similarly found that the terms of a later writing had not become a part of the sales contract. There, the seller sold latex to a masking tape manufacturer pursuant to a "largely unwritten" agreement between the parties. 542 N.Y.S.2d at 678. Subsequently, the seller sent invoices with each shipment containing a warranty disclaimer. These invoices were not signed by the buyer. The court ruled that the warranty disclaimer constituted a material alteration of the alleged terms of the sale and, hence, did not become a part of the agreement under U.C.C. § 2-207. *Id.*

The court reached a similar conclusion in *First Security Mortgage Co.*, 862 F. Supp. at 918. There, the court determined that, because the parties had entered into an oral agreement for the sale of goods, the seller's invoices and bills of lading containing a limitation or disclaimer or warranties not signed by the buyer were not part of the contract,

as they would materially alter the terms of sale under § 2-207. *Id.* at 934. In addition, the court found that the plaintiff, the assignee of the seller's secured party, failed to prove that the buyer ever received or even saw the reverse sides of the bills of lading or the relevant language in the invoices. *Id.* Because the buyer had not assented to the stated limitation on damages, he was not bound. *Id.*

In reaching this conclusion, the court cited *Step-Saver Data Systems, Inc.*, 939 F.2d at 91, a decision by the Third Circuit, with approval. In that case, the seller of computer software and terminals included a box-top license containing certain terms and conditions of sale at the time it shipped the software. However, the seller never mentioned these conditions during the parties' negotiations and never obtained the buyer's express assent to the terms of the box-top license. *Id.* at 99. In addition, the court found that the parties had entered into a valid oral agreement for sale prior to the shipment of the programs. *Id.* at 100. As a result, the court concluded that the terms of the box-top license were not a part of the parties' contract. In explaining this conclusion, the court stated:

> U.C.C. § 2-207 establishes a legal rule that proceeding with a contract after receiving a writing that purports to define the terms of the parties' contract is not sufficient to establish the party's consent to the terms of the writing to the extent that the terms of the writing either add to, or differ from, the terms detailed in the parties' earlier writings or discussions. In the absence of a party's express assent to the additional or different terms of the writing, section 2-207 provides a default rule that the parties intended, as the terms of their agreement, those terms to which both parties have agreed, along with any terms implied by the provisions of the U.C.C.

Id. at 99.

The foregoing cases are directly applicable to the case at bar. Here, it appears that Deere and Clark entered into an oral agreement or understanding of the essential terms of the

contract for the periodic sale of felt. The terms set forth in Clark's purchase orders became a part of this sales contract only to the extent that they did not materially alter the original agreement or were expressly consented to by Deere.

Clark's purchase orders state that Clark has the right to cancel an order after the listed review date. The purchase orders may also be interpreted as providing Clark with the unilateral right to return goods already accepted for any or no reason. Clearly, these terms materially alter the original agreement between the parties. In addition, although Deere sent a written acknowledgment of each order which referenced Clark's particular purchase order, it cannot be said that Deere ever expressly assented to the terms and conditions contained in the purchase orders. Indeed, like the seller in *First Security Mortgage Co.*, Deere contends that it never even saw the relevant language of Clark's purchase orders. As a consequence, the language of the purchase orders should not be considered a part of the parties' contract.

II. Effect Of Purchase Order Terms.

On the other hand, if the language of the purchase orders is considered a part of the parties' contract, many of the terms set forth in the purchase orders would likely be given effect. In this regard, U.C.C. § 1-102(3) provides:

> 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 but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

S*ee also Emmanuel Law Outlines, Inc. v. Multi-State Legal Studies, Inc.*, 899 F. Supp. 1081, 1087 (S.D.N.Y. 1995).

In *Society Brand Hat Co. v. Felco Fabrics Corp.*, 92 F. Supp. 499 (S.D.N.Y. 1950), the court interpreted a sales contract that contained a statement directly above the blank spaces for the parties' signatures that the terms and conditions on the reverse side were expressly made a part of the contract. The reverse side contained a statement that merchandise should not be returned after five days of receipt. The court ruled that this five-day limitation was a valid part of the parties' contract. *Id.* at 501.

Here, the front side of the purchase order states: "THIS ORDER IS SUBJECT TO THE TERMS AND CONDITIONS PRINTED ON THE BACK. BUYER RESERVES THE RIGHT TO CANCEL ORDER AFTER THE ABOVE REVIEW DATE WITHOUT RECOURSE TO THE BUYER." The reverse side then sets forth a number of terms and conditions of sale. Because the front side of the order expressly makes the terms and conditions on the reverse side a part of the contract, and the parties were free to vary the provisions of the U.C.C. by agreement, it appears that the terms and conditions on the reverse side would be considered a valid part of the contract.

Even so, it should be emphasized that Clark was still under an implied obligation to act in good faith. *See* N.Y. U.C.C. §§ 1-102(3), 1-203. The U.C.C. defines "good faith" as "honesty in fact in the conduct or transaction concerned." *Id.* § 1-201(19). In the case of a merchant, "good faith" means "honesty in fact and observance of reasonable commercial standards of fair dealing in the trade." *Id.* § 2-103(b). Thus, in determining whether goods

conform to the terms of the contract, the buyer is bound by the good-faith requirement. *Hubbard v. UTZ Quality Foods, Inc.*, 903 F. Supp. 444, 451 (W.D.N.Y. 1995).

Under these principles, it appears that the implied obligation of good faith limited Clark's ability to return Deere's felts in inventory and cancel all outstanding orders to those situations wherein Clark determined in good faith that the felts were nonconforming. Stated another way, Clark could not unilaterally return felts that conformed to the contract for no reason. Such an act would not be in accordance with a merchant's duty to act honestly and to observe reasonable commercial standards of fair dealing in the trade.

III. Revocation Of Acceptance.

Under the U.C.C., acceptance of goods occurs when the buyer

> (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
>
> (b) fails to make an effective rejection . . . but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
>
> (c) does any act inconsistent with the seller's ownership[.]

N.Y. U.C.C. § 2-606(1).

Here, Clark accepted the shipments of felt from Deere by failing to reject them after having had a reasonable opportunity to inspect them and by using the felt in its manufacturing process. *See Sobiech v. International Staple & Machine Co.*, 867 F.2d 778, 781 (2d Cir. 1989) (ruling that where buyer agreed to purchase machines, exercised control over them for more than three years, and obtained benefits from their use, buyer's actions were inconsistent with seller's ownership and amounted to acceptance); *In re Fran Char*

Press, 55 B.R. 55, 57 (Bankr. E.D.N.Y. 1980) (concluding that buyer accepted posters where he took possession of posters and mounted them on cardboard); *Import Traders, Inc. v. Frederick Manufacturing Corp.*, 117 Misc. 2d 305, 457 N.Y.S.2d 742, 743 (Civ. Ct. 1983) (where rubber pads were delivered to buyer in November 1981 and buyer only complained of nonconformity after seller contacted it regarding payment in April 1982, buyer accepted pads; because buyer had reasonable opportunity to inspect goods, his silence for five months amounted to acceptance).

Acceptance of goods precludes their subsequent rejection. N.Y. U.C.C. § 2-607(2). Once goods are accepted, they may be returned only if the buyer makes an effective revocation of acceptance under U.C.C. § 2-608. *Import Traders, Inc.*, 457 N.Y.S.2d at 743.

N.Y. U.C.C. § 2-608 states:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> > (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
> >
> > (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

Thus, to effectively revoke the acceptance of goods, a buyer must show that the nonconformity substantially impaired the value of the goods to him, and that if he did not know of the nonconformity at the time of acceptance his acceptance was induced either by the difficulty of discovering the nonconformity or by the seller's assurances. *Ayanru v. General Motors Acceptance Corp*., 130 Misc. 2d 440, 495 N.Y.S.2d 1018, 1022 (Civ. Ct. 1985).

Significantly, the buyer must also revoke his acceptance within a reasonable time after he discovers or should have discovered the defect in the goods. The phrase "reasonable time" is a flexible term. Its meaning depends on the nature, purpose, and circumstances of the particular case. *See* N.Y. U.C.C. § 1-204(2); *First Security Mortgage Co.*, 862 F. Supp. at 933.

Here, it may be argued that Clark did not timely revoke its acceptance of Deere's felt. Clark accepted several shipments of felt, used the felt in its manufacturing process, and allowed approximately $225,000 worth of felt to build up in inventory. *See Sobiech*, 867 F.2d at 781 (finding that buyer did not timely revoke acceptance where he had continued use of machines for more than three years); *Society Brand Hat Co.*, 92 F. Supp. at 502 (concluding that where buyer of flannel pieces did not notify seller that goods were defective until 12 days after first notice of defect and 44 days after receipt of first shipment and 36 days after receipt of second shipment, buyer's notice was not timely); *Mayo v. Caldwell*, 145 Misc. 2d 533, 547 N.Y.S.2d 207, 209 (Just. Ct. 1989) (ruling that buyer of magnetic sign failed to timely revoke acceptance of the sign, as buyer did not apprise seller of any objection to the sign's failure to adhere to buyer's truck panel for approximately three months).

If the buyer effectively revokes his acceptance of the goods, he has the same rights as if he had rejected the goods prior to acceptance. N.Y. U.C.C. § 2-608(3). In regard to rejection, the U.C.C. discards the common-law rule of perfect tender. *Ayanru*, 495 N.Y.S.2d at 1022. Instead, the seller has the right to seasonably cure a defective tender, under the guidelines of good faith and observance of reasonable commercial standards of fair dealing. *Id.*; *see also Mayo*, 547 N.Y.S.2d at 209. *See generally* N.Y. U.C.C. § 2-508.

In the present case, it appears that Clark has taken the position that it gave timely notice of the defective felt to Deere and provided Deere with the right to cure by allowing George Beaver numerous opportunities to "eliminate the frequent failures" of Deere's felt in Clark's plant. Deere should thus establish facts which rebut these assertions and thereby indicate that Clark did not revoke its acceptance of the felt within a reasonable time or provide Deere with a reasonable opportunity to cure. *See Mayo*, 547 N.Y.S.2d at 209.

In addition, the fact that Deere made several shipments of felt to Clark is significant. In this regard, the U.C.C. states:

> (1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.
>
> (2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.
>
> (3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of

> cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

N.Y. U.C.C. § 2-612.

Here, Deere delivered felt in separate lots to Clark. Because these lots were to be separately accepted, the contract at issue is an installment contract. *See Hubbard*, 903 F. Supp. at 450; *Emmanuel Law Outlines, Inc.*, 899 F. Supp. at 1087. Thus, Clark had the right to cancel the entire contract only if it is able to show a substantial impairment to the whole contract. *Emmanuel Law Outlines, Inc.*, 899 F. Supp. at 1087; *see* N.Y. U.C.C. § 2-612(3). The purpose of this requirement is to preclude a party from canceling a contract for trivial defects. *Hubbard*, 903 F. Supp. at 450; *Emmanuel Law Outlines, Inc.*, 899 F. Supp. at 1087.

In *Hubbard*, a farmer's contract for the sale of potatoes to a potato chip processor stated that the potatoes were required to be a certain color. The processor rejected installments of potatoes that failed to conform to the required color and canceled the remaining installments ordered. 903 F. Supp. at 450. In determining whether the farmer's failure to satisfy the color requirement was a substantial impairment of the whole contract, the court emphasized that the quality standards were the most detailed aspect of the contract. *Id.* at 451. Where quality standards are set forth with great specificity, the failure to satisfy one of the specifically enumerated standards is a substantial impairment to the whole contract. *Id.*

The court reached the opposite conclusion in *Emmanuel Law Outlines, Inc.*, 899 F. Supp. at 1081. There, the seller failed to meet a deadline for printing the supplement to a legal outline. However, the court ruled that this breach did not amount to a substantial

impairment of the whole contract. *Id.* at 1088. The buyer failed to show that it was damaged by the late shipment, and it did not expedite delivery of the supplement once the document was received. *Id.*

In the case at bar, the purchase orders do not set forth any quality standards in great detail. In addition, it is not clear that Clark has been damaged in any way by the quality of Deere's felt. Thus, it is questionable whether the alleged defects in question amount to a substantial impairment of the whole contract.

Further, the contract at issue could be considered one for incremental deliveries under U.C.C. § 2-208. This statute provides, in relevant part:

> (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

Id. § 2-208(1).

In *Hyosung America, Inc. v. Sumagh Textile Co.*, 137 F.3d 75 (2d Cir. 1998), a textile merchant's assignee alleged that the fabric delivered by the fabric supplier did not have the wool content specified in the purchase order. The textile merchant accepted and paid for three shipments of the fabric without objection. After the textile merchant became aware of the improper fabric content, it continued to accept shipments of the fabric but refused to pay for them. *Id.* at 80. The court ruled that because the buyer accepted the earlier three shipments without objection "it acquiesced in accepting future shipments of the same nonconforming fabric because those later shipments were also accepted without objection." *Id.*

In the present case, Clark apparently accepted several shipments of felt from Deere without objection. Clark's letter also implies that it continued to accept shipments of felt even after it became aware of the alleged defects in the felt. By accepting the earlier shipments without objection, Clark also acquiesced in the later shipments by failing to object to them until its letter of December 14, 1998.

IV. Anticipatory Repudiation.

Under the foregoing principles, a good argument can be made that Clark did not properly revoke its acceptance of the felt. Clark's letter should thus be viewed as an anticipatory repudiation of the contract.

Repudiation occurs when one party makes an overt communication of an intention not to perform that is positive and unequivocal. *Emmanuel Law Outlines, Inc.*, 899 F. Supp. at 1088; *Tenavision, Inc. v. Neuman*, 45 N.Y.2d 145, 408 N.Y.S.2d 36, 38 (1978). "'[A] wrongful repudiation of the contract by one party before the time for performance entitles the nonrepudiating party to immediately claim damages for a total breach.'" *Emmanuel Law Outlines, Inc.*, 899 F. Supp. at 1088 (quoting *American List v. U.S. News*, 75 N.Y.2d 38, 550 N.Y.S.2d 590, 593 (1989)); *see also* N.Y. U.C.C. § 2-610; *In re R. Hoe & Co.*, 508 F.2d 1126, 1129 (2d Cir. 1974). In other words, although the tender of goods is ordinarily required, repudiation of the contract by the buyer eliminates the need for further performance from the seller. *Tenavision*, 408 N.Y.S.2d at 38.

Here, Clark's letter clearly states that Clark is going to return Deere's felt in inventory and will not accept further orders of felt from Deere. To the extent that the letter refers to orders of felt not yet due, the letter amounts to an anticipatory repudiation. *See id*. (ruling

that where nursing home informed seller that television sets were no longer needed and that delivery would not be accepted, anticipatory repudiation occurred).

In cases of anticipatory repudiation, the aggrieved party "may resort to any remedy for breach." N.Y. U.C.C. § 2-610(b). Thus, appropriate damages are those "'general damages which are the natural and probable consequence of the breach.'" *Emmanuel Law Outlines, Inc.*, 899 F. Supp. at 1089 (quoting *Kenford Co. v. County of Erie*, 73 N.Y.2d 312, 540 N.Y.S.2d 1, 3 (1989)). In cases dealing with an installment contract, such damages may equal the balance due on the agreement. *Emmanuel Law Outlines, Inc.*, 899 F. Supp. at 1089; *see also Hyosung America, Inc.*, 137 F.3d at 81; *Sobiech*, 867 F.2d at 781.

Generally speaking, the remedies to a seller for breach of a sales contract by the buyer are set forth in N.Y. U.C.C. § 2-703. *See Import Traders, Inc*., 457 N.Y.S.2d at 743. Notably, however, specific performance is not listed among the seller's remedies.[2]

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[2]N.Y. U.C.C. § 2-703 provides:

> Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract . . . , then also with respect to the whole undelivered balance, the aggrieved seller may:
>
> (a) withhold delivery of such goods;
>
> (b) stop delivery by any bailee as hereafter provided . . . ;
>
> (c) proceed under the next section respecting goods still unidentified to the contract;
>
> (d) resell and recover damages as hereafter provided (Section 2-706);
>
> (e) recover damages for non-acceptance (Section 2-708) or in a proper

case the price (Section 2-709);

(f) cancel.