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===== Start of Answer #1 (2767 words) =====

Question 1. What are the various arguments supporting or denying the existence of a contract and the likely results?

To determine what arguments best support or deny the existence of a contract, we must first determine whether the UCC or common law applies. Because the transaction was for the sale of a tugboat, which is otherwise known as a good, the UCC applies to the transaction. Additionally, according to the facts, it is likely that the parties are both merchants such that Galsworthy Oil has been incorporated and Forsythe hold itself out as being a shipbuilding firm. Once we have determined that the UCC applies, we next need to determine what the legal implications could be of each of the communications between the parties and whether a contractual relationship exists, such that there was an offer, acceptance, mutual assent and consideration that led to the formation of a contract.

First, we will determine whether an offer was presented. Generally, to be an offer, the communication must present definite terms of a potential agreement in such a manner that it provides the recipient with the power to accept the terms as a contract, must be communicated to an identifiable offeree, and must demonstrate the offeror's intent to be bound to the terms expressed. Here, the initial purchase order sent by Galsworthy Oil Company specified the goods that the company was looking to buy, a tugboat, specified the amount of money that would be used to secure the purchase of the tugboat, \$100,000, and it was called a purchase order itself, reflecting the intent to make an order to purchase the good. Additionally, the order also limited acceptance to its terms only, therefore, showing that it provided the definite and exclusive terms that could become part of the contract. Subsequently, it is likely that the purchase order sent by Galsworthy was intended to be an offer that could be accepted on its terms only, if Forsythe chose to accept.

Therefore, the next question is whether there was an acceptance. Generally, to be considered a valid acceptance from an offeree who has been given the power to bind himself and the offeror to the terms of the offer, the offeree must expressly provide assent to the offer in a manner that is required by the offeror in the offer or in a manner reasonable in the circumstances. Here, because the offer does not specify the manner of acceptance it is likely that the past relationship between the parties as merchants would serve to show that acceptance can be a communicated response. In general, such a communicated response would satisfy the requirement that the offeree accept the offer by a volitional act and that the volitional act expressly accept the terms of the offer. In the transaction there are two potential communications which could serve as

offers. ?

Acceptance? First, the sales confirmation tracking slip that was sent off automatically whenever orders were received. Because the facts are slim in regards to this confirmation slip, it is unclear if this slip was sent out by a computer generated response to an order as received, or if a person acting as an agent of the company sent out the confirmation. Essentially, in order for a communication to be considered sufficiently volitional, it must be sent by a person or by a computer that a person is directing to send such acceptance. It is not enough to operate as an acceptance merely because the company generally provides such confirmation intending to be able to fulfil the order, without actually assenting to the proposed contract or terms. Therefore, even though the confirmation appears to confirm the fact that the order will be fulfilled at the price specified in the offer, it is not clear if the confirmation is sufficient as a volitional act to operate a valid acceptance. *Good.*

Secondly, the communication sent from Forsythe the following day may operate as an acceptance. Here, the communication was sent after the facts show that the district manager of Forsythe had the opportunity to review the order and respond with a formal purchase/sales contract. As mentioned above, to be an acceptance, an identified offeree must expressly communicated his intent to be bound to the terms of the offer.

Here, because the communication sent by Forsythe was labelled a "Purchase/Sales Contract," which included terms that were different and/or additional to the terms of the potential original offer, it is likely that the purchase, sales contract does not operate as a valid acceptance but moreover, operates as either a rejection and counteroffer or as an acceptance with additional terms to be analyzed under UCC 2-207. Because the communications between the parties after and including this point, do not specifically show that the parties mutually assented to the same contractual terms in a manner where there was a meeting of the minds, it is likely that 2-207 would apply once performance has begun; however, 2-207 is only applicable in situations where there is no formal contractual agreement in place yet the parties perform in a manner that demonstrates the existence of such a contractual agreement. Here, because the first question asks simply whether a contract exists prior to performance, it is not quite time to continue our 2-207 analysis, which we will save for question 2. Moving back to our acceptance analysis, because of the nature of the purchase sales contract in that it is labelled a contract and it has changed or additional terms, it is likely that this would not be found to be a valid acceptance even if the initial communication from Galsworthy was determined to be an offer. Therefore, it is likely that the purchase sales contract is actually a rejection of Galsworthy's initial offer and will serve as a counteroffer, thus making Forsythe the new offeror and Galsworthy the new offeree.

Subsequently, if the purchase sales contract is seen as a counteroffer, the question becomes whether it itself is a valid offer as a communication. As mentioned above, to be an offer, a communication must be directed to an identifiable offeree with definite terms in such a way as to confer the power of acceptance in the offeree and demonstrate the offeror's intention to be bound to the contractual terms once accepted. Here, the purchase sales contract is called a contract, likely showing that there is an intention to create a contractual agreement on the terms included. Additionally, because Forsythe is a merchant firm, it is likely that the sending of a communication labelled purchase sales contract would reasonably be seen as an offer to contract. Additionally, because the terms included in the purchase sales contract cover all the terms of the deal including delivery date, it is likely that the communication is definite

enough to be considered an offer. Therefore, it is likely that the communication from Forsythe to Galsworthy labelled purchase sales contract would be seen as a valid offer.

Therefore, the next question is whether the offer from Forsythe was accepted. In response to receipt of the purchase sales contract, Galsworthy sends an acknowledgment form to Forsythe which contained the same language as set out in the original purchase order with the one change that it provided for arbitration in a different location. The issue that arises here clearly pertains to the level of acceptance. To be a valid acceptance, the communication must be a volitional act that expressly provides acceptance to the terms of the offer. Here, the acceptance is labelled an acknowledgement, potentially showing that they are acknowledging the conditions of the contract, however, the actual terms included are the terms set out in the initial intended offer by Galsworthy and do not echo the terms of Forsythe's purchase sales contract. Clearly, this creates some confusion. Generally, when courts are trying to determine whether an offer an acceptance existed to form a contract, prior to their consideration analysis, courts do not look directly at the subjective intents of the parties involved but rather at their objective intent as demonstrated by their actions and conduct. Looking at the actions and conduct objectively allows courts to determine whether there is apparent mutual assent and limits the ability for a party to simply claim that they didn't actually assent subjectively. This idea of mutual assent becomes central to our analysis here, because it is clear that the actual facts show that the parties may not have had any idea what they were contracting to because they failed to read all included communications and kept echoing their own terms. The objective test for mutual assent allows us to determine whether a reasonable person in the positions of the parties would understand the actions and conduct of the other party to operate as an offer or acceptance. Here, even though the purchase sales contract sent by Forsythe is likely a counteroffer to Galsworthy's initial offer, when Galswothy responds to the counteroffer, they simply include the same terms that they intended in their initial offer. Generally, the parties will likely claim that they didn't intend a contract to exist and since there is no performance, there is no showing of such a contract; however, if the court chooses to look purely to the objective standard, a court could find that faxing a

response labelled "acknowledgement" may serve to satisfy the objective standards for acceptance. While this is not a clear cut case of objective proof, it does tend to show that Galsworthy intended to acknowledge receipt of the offer. With that said however, purely acknowledging receipt is not sufficient to serve as an acceptance; therefore, it is unlikely that Galsworthy's acknowledgement would be considered a valid acceptance to Forsythe's counteroffer.

In sum, prior to any performance at all, it does not appear that the written communications serve to operate as a valid offer and acceptance; however, that does not mean that there is no potential remediation. In cases such as this, especially with both parties having contracted together in the past, it is likely that we can use their past conduct to establish whether an agreement for this type of transaction was generally completed in such an informal way. If the conduct of the parties shows that they often send such communications back and forth and continue to perform regardless, it may be easier to find that an implied contract existed leading to recovery for any reliance by the parties. Therefore, if the parties often transact in their manner or if the industry allows such transaction with acceptance by acknowledgement, then it may be likely that a court would find that a contract existed because it was objectively reasonable in the given industry. Furthermore, even if such a contract doesn't actually exist, the parties may also be able to recover if they have relied to their detriment on the existence of such an agreement even prior to actual performance if they have taken steps towards commencement of such performance.

Question 2. Assume the parties subsequently performed without any further discussion and the tugboat proved defective almost immediately. What are the rights of the parties?

As mentioned above, ~~once the parties have performed, a UCC 2-207 analysis will determine what terms are actually included in a contractual agreement, even if such an agreement would not be found without performance.~~ UCC 2-207 was created by the

drafters of the UCC in an effort to circumvent the traditional common law mirror image rule that was seen as overly restrictive for the sale of goods. In essence, 2-207 is used when the communications between the parties doesn't establish a valid contract; however, the performance by the parties tends to suggest that such a contract existed. To complete a UCC 2-207 analysis to determine the rights of the parties after performance, we first have to determine whether an offer existed. As mentioned above, there are two communications that can potentially serve as offers, the first being the purchase order from Galsworthy and the second being the purchase sales contract from Forsythe.

After it has been determined that a valid offer exists, under 2-207, the next question is whether there was a valid acceptance or confirmation. In this situation, the first offer from Galsworthy fails to be accepted because the terms were changed; however, under a 2-207 analysis, an acceptance can be valid if new or additional terms are included as long as the parties performance is such that it appears that a contract exists between them. So, here, there are two communications that may be seen as valid acceptance or confirmation under a 2-207 analysis when they would not be valid without performance. First, the confirmation tracking slip sent by Forsythe. If this was seen as a valid confirmation of the terms set out by Galsworthy's initial offer, then the confirmation may serve to confirm the offer. Additionally, because the confirmation was not received until after the other communications between the parties, it is likely that we need to analyze whether the purchase sales contract can be seen as an acceptance with additional terms. Here, it is likely that some of the terms are the same as the initial offer from Galsworthy such as price and specified good, along with the additional terms that were set out by Forsythe. Because the terms of the confirmation or the purchase sales contract sent by Forsythe serve to confirm the central terms and then add new or different terms, under the UCC 2-207 it is likely that either of the communications could be seen as an acceptance or confirmation.

Once it has been determined that there was an acceptance or confirmation provided, the next question is whether acceptance was made expressly conditioned on the new or

additional terms. Here, both the confirmation and the purchase sales contract sent by Forsythe in response to Galsworthy's original offer limited acceptance expressly. The two issues that arise here concern the fact that the initial offer also made its terms expressly conditioned on its acceptance and the purchase sales contract claims to supercede all other communications. While generally, both of these would present issues, if there is a finding under 2-207 that acceptance is made expressly conditioned on the new or additional terms, it is likely that we will have to determine which terms are included and which terms are not independent of whether the expressly conditional aspect came into play.

Therefore, we next need to determine if both parties are merchants. Here, as mentioned initially, it is likely that both parties are merchants because they hold themselves out to be; therefore, under 2-207 the terms will be included unless one of the 2-207 exceptions applies. The first exception to discuss was the merchant consideration above. The next exception is whether the terms materially alter the contract and the final exception is whether written objection to the terms was provided within 10 days. In terms of their materiality, it is likely that even though performance may show the creation of a contract, the terms governing the contract may be different than the parties expected. Because the central question in question 2 is whether there would be remedies if the tugboat was defective, it is clearly important whether the warranty is included in the contract. On a side note, generally, binding arbitration clauses are seen to materially alter and are therefore thrown out and replaced with a gap filler which would allow the use of the general legal remedies, but likely not the binding arbitration because even though both parties wanted binding arbitration, they wanted such arbitration in different states which is likely material. In terms of the warranty issue, because the terms that include or preclude a warranty are both from Forsythe, the parties themselves do not disagree on the terms but rather the confirmation to the offer the terms differ. Therefore, even though the term might not be thrown out, it is likely that the warranty would either be included or would be replaced with a gap filler which would also allow for a warranty. If the warranty was included, then Galsworthy would be able to have the defective tugboat fixed, or potentially be able to return it.

2-207(3)?
K. Galsworthy?

Additionally, The Perfect Tender Rule applies to a UCC 2-207 situation where a good is considered non-conforming. Here, clearly the tugboat was intended to work and does not; therefore under this rule, the buyer would be able to return the tugboat immediately or within a reasonable time. If it is still within a reasonable time, under this rule, the tugboat can likely be rejected or returned. So either way, the tugboat should be able to be repaired or returned by Galsworthy.

2)

===== Start of Answer #2 (1185 words) =====

UCC or Common Law

This contract will be governed by common law because it is for services.

Ted v. Bob

What is the Significance of Ted's Flyer of November 1st?

Offer

An offer is a communication to an identifiable offeree by one presently intending to be bound, which creates the power of acceptance in the offeree.

The flyer, posted by Bob, has many elements needed for an offer. The flyer contains subject matter (keyboardist is needed for gigs), time (for the next year), price (20% of all revenue); however, there is no identifiable party. The flyer was hanging in several music stores; this means that it would be difficult to ascertain who the identifiable offeree is. The flyer is merely an advertisement to begin negotiations.

Significance of November 25th Ted telling Bob About the Gig?Offer

Defined, supra

Here, Ted runs into Bob. Bob had seen the advertisement floating around, and he states that he was about to call him. They discussed the upcoming gigs, but Ted said that he would need to speak with his band. Bob discussing the gig most likely would not have been an offer. He did not show any intention to be bound by their conversation.

Significance of Bob's Statement on November 25thOffer

Defined, supra

When Bob and Ted were discussing the opportunity, Bob had replied stating, "I would love to join your band." It is important to note that he had seen the flyer previously, and he intended to call the band. Bob's reply to the flyer would constitute an offer. Bob knew the terms of the offer and was presently intending to be bound. He was assured by Ted that he would check in with his band and get back to him; therefore, the power of acceptance was given to Ted.

Significance of Ted Taking Down the Flyers on November 29th

Termination of an Offer

An offer can terminate in various ways; for example, an offer can be terminated either by rejection by the offeree or revoked by its terms, events, or acts. An Act could be a indirect or direct revocation (if the revocation is indirect, it must be from a reliable source).

On November 29th, Ted takes down the flyer. Because the flyer proved to be an advertisement and not an offer, there is no offer to terminate. However, it can be argued that if Bob were to see that the flyers were taken down, and, at that time, he did not hear back from Ted, then Bob may view it as a rejection of his offer to join the band.

Significance of Voicemessages Left on November 29th

Acceptance

Acceptance is the offeree's assent to the terms of the offer in a manner contemplated or required by the offeree.

Ted left two voicemessages for Bob, accepting his offer to join the band. Because there was no stated contemplated method of acceptance, and because he had his phone number for the reason to join the band, this acceptance is valid. Also, an acceptance of an offer is valid upon dispatch; therefore, the first voicemail acted as an acceptance. The second voicemail is simply a confirmation of the December 15th show, which Bob was previously apprised of.

Significance of the Voicemail Left by Bob December 2ndTermination of an Offer

Defined, Supra

When Bob left the message for Ted stating that he had changed his mind, he attempted to revoke his offer; however, the offer was already accepted by the offeree which then created a binding bilateral contract (promise for a promise). Therefore, Bob no longer had the power to revoke.

Here, Ted could sue for Bob to perform the contract as promised or may sue for damages. Specifically, Ted relied on Bob for the December 15th gig, so Ted potentially could receive reliance damages.

Statute of Frauds

An agreement must be in writing if it is for the sale of goods \$500 or more, the contract cannot be performed within a year of acceptance, it is a surety, for real estate, or marriage.

In this case, it would need to be proven whether the term "through the next year" in the offer is truly, in fact, within a year. Since the Acceptance was made on November 29th, the gigs would presumably go through December of the following year; therefore, Bob could invoke the Statute of Frauds as a defense.

Ted v. SteveSignificance of Steve's Letter Mailed November 30thOffer

Defined, supra

Acceptance

Defined, supra

Because the flyer was solely an advertisement and Ted was not seeking to be bound by the flyer, the letter sent by Steve on November 30th is an offer. And, according to the mailbox rule, an offer is only valid upon receipt.

Significance of Steve's Voicemail of December 1stOffer

Defined, supra

Steve left a message, as Steve Jones. This could not be viewed as a valid offer. This message could potentially be viewed as a new offer, since Ted could infer that Steve was calling in regards to the flyer that had already been taken down (supra). Also,

because this agreement is governed by common law, this is a counter offer due to mirror image rule. If the flyer were to be recognized as an offer, this would be viewed as a counteroffer since it is not a "mirror image" of the original offer. This could be considered an offer by Stevie Jones.

Significance of Ted's Receipt of Letter and Sending of the November 30th Songlist

Acceptance

Defined, supra

Because the offer is valid upon receipt, Ted accepted the offer and sent the song list, as requested by Steve (contemplated method of acceptance). Since the songlist was sent immediately, the acceptance was valid upon dispatch. Also, Ted did not know who Stevie Jones was, that could not have acted as a revocation of the offer.

Because Steve did not show up for practice, and he informed Ted after acceptance and over the phone that he had accepted another job, Steve had breached his contract. Steve may also be found liable. Also, Steve could not have the luxury that Bob had of invoking the Statute of Frauds because Ted had signed written his offer in a letter, therefore, it could be used against him. The Statute of Frauds could not protect him.

Yoshi v. Ted

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Offer

Defined, supra

Acceptance

Defined, supra

Though, we do not know the exact details of the agreement between Yoshi and Ted, the facts do suggest that there was a valid contract to perform on December 15th. When Ted has to cancel his gig with Yoshi, Yoshi had to hire a band at twice the rate of Ted's. Yoshi, therefore, threatened to sue. Here, Ted could be liable for damages and may end up paying the difference to put Yoshi to where they would have been if the contract had, in fact, been performed at Ted's band's price.

===== End of Answer #2 =====

END OF EXAM