

Question One

The purchasing agent of Galsworthy Oil Company sent off the usual company purchase order to the Forsythe Shipbuilding firm for the purchase of a \$100,000 tugboat. The Order contained a clause stating "This order shall be accepted by Seller without alteration or modification. Buyer expressly objects in advance to any changes Seller attempts to make to the terms of this purchase order." The Order also contained a clause providing that any and all disputes between the parties be resolved by binding arbitration in California.

On receiving the Order, the sales agent of Forsythe mailed off the usual company sales "confirmation tracking slip" which was sent out automatically whenever an order was received by the company. At the top of the page, it stated: "This Tracking Confirmation is Subject to All Terms and Conditions Contained in the Sales Contract to Follow." The slip confirmed the order and the price. On the back of the slip contained the following clause: "Seller does not warrant its goods in any way, and specifically disclaims any warranty of merchantability or of fitness. This form is not an 'acceptance' unless Buyer expressly agrees to all terms proposed by Seller."

After reviewing the term of the purchase order the following day, Forsythe's district manager faxed Galsworthy a formal 3 page Purchase/Sales Contract that set forth all of the terms of the deal, including delivery date. The Contract stated that it "shall expressly supersede any and all contractual agreements between the parties, express or implied." The Contract provided that all orders were subject to a 1 year warranty and provided for binding arbitration in New York. The Contract also contained language that required Buyer to expressly agree to all changes proposed by Seller.

After receiving the faxed Contract, the purchasing agent of Galsworthy faxed an Acknowledgment Form to Forsythe. The Acknowledgment Form included the same language contained in its purchase order, except it provided for arbitration in Texas, the location of its main office.

The following day Galsworthy received the slip confirmation but did not review its contents, believing it was a reiteration of the Sales Contract. Prior to actual delivery, however, the market changed so that Galsworthy Oil wanted to get out of the deal. Galsworthy's district office, upon reviewing all the documents, including the confirmation, sent a letter to Forsythe denying a contract had been formed. Galsworthy comes to you for advice prior to any performance.

1. What are the various arguments supporting/denying the existence of a contract and the likely result?
2. Assume the parties subsequently performed without any further discussion and the tugboat proved defective almost immediately. What are the rights of the parties?

Question Two

Ted plays lead guitar in a rock n' roll band. The band needs a new keyboard player, a key component to their sound, to play a number of gigs over the next year. On November 1st, the band posts the following flyer in several local music stores:

WANTED: Local band wants to hire keyboard player (background vocals a plus) through next year. Pay is 20% of all revenues received by the band. To accept, respond to Ted (phone: 555-1212. Mail: P.O. Box 1234 Santa Rosa) by December 1st.

On November 25th, Ted runs into Bob, an accomplished keyboard player, who has just returned to town after a month long tour. Bob tells him he has seen the flyer and was about to call him. They discuss the band's upcoming gigs, including a possible one on December 15th at Yoshi's. Bob states: "I would love to join your band." Ted said he'd get back to Bob after speaking with the others.

On November 29th, Ted takes down the flyers from the music stores after talking to other band members.

On November 30th, Steve mails the following letter to Ted: "Saw your flyer the other day, and I accept your offer to play keyboards in your band. Send me your song list and let me know the practice and gig schedule---I'm wide open through next year. My number is 555-2323, signed, S. Jones"

Later that same day, Ted leaves a message on Bob's answering machine telling him that he has spoken with all band members and the band has given him the thumbs up. Ted then books the Yoshi's gig for December 15th and leaves another message on Bob's machine advising him of the gig.

On December 1st, Steve gets an offer from another band and early the next morning (December 2nd) he leaves a voicemail message on Ted's machine identifying himself as Stevie Jones, and saying that he will need 30% of the door. Ted doesn't know what Steve is talking about but has heard of Stevie Jones, the former keyboard player for Journey.

The following day Bob leaves a message on Ted's answering machine and tells him that he's changed his mind. Ted then received the November 30th letter, and immediately sends Steve the song list and practice and gig schedule as requested. When Steve doesn't show up for practice, Ted calls Steve, who says he has accepted an offer from another band. Angry and upset, Ted calls Yoshi's to cancel the gig. Yoshi's hires another band at twice the rate and threatens to sue.

Please discuss the rights and remedies, if any, of the parties.