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There are several issues to address-- whether there was mutual assent and whether the licensing agreement was part of the terms of the contract, and therefore the venue clause is enforceable.

**Was there mutual assent?**

The first issue to be addressed is whether there was an offer. An offer is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it" (Rest. (2d) §18). The Proposal itself was not an offer, but rather a proposal for Wachter to offer to purchase the software. By signing the Proposal, Wachter and DCI manifested their mutual assent. The signing of the document was evidence of manifestation of mutual assent because "a manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined" (Rest. (2d) §22). Using the test of *Embry v. Hargadine, McKittrick Dry Goods Co.*, first, the court looks at whether a reasonable person would view the offeror's words to construe an offer. If this is the case, the court then determines whether a reasonable person in the offeree's position would consider this an offer. If so, then unless the offeree knew or had reason to know the subjective intent of the offeror, that s/he did not intend to make an offer, there is a contract. Because a reasonable person in either party's position would consider the words of the other to be an intent to enter into a contract, and because neither DCI nor Wachter knew or should have known that the other did not intend to enter into a contract, there is mutual assent. Wachter will argue that the Proposal was the final agreement of the parties, because DCI never indicated that additional terms would follow. The court finds, though, that there was the requisite mutual

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assent.

**Is the licensing agreement part of the contract?**

Because a contract was formed, the next issue is whether the licensing agreement, sent with the software, is an enforceable part of the contract. There has been much dispute over whether terms that follow, in shrink wrap or otherwise, are included in the contract. Some courts, as in *ProCD v. Zeidenberg*, have found that terms included in the shrink wrap are enforceable if consumers who use the product have an opportunity to read the terms and reject them by returning the product. Others, as in *Klocek v. Gateway*, have found UCC §2-207 controlling in the analysis. DCI will argue this case is analogous to *ProCD*, where the court found "*ProCD* proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure" and upheld the shrink wrap license (*ProCD*, p.456). In *ProCD*, the court held "shrink wrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general" (p.451). Citing E. Allan Farnsworth, the court reasons that "notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike" (p.454).

Wachter will distinguish this case from *ProCD*, where the court declined to apply §2-207 since there was only one form involved, because here there is more than one form--the Proposal and the license agreement. While the consumer in the instant case did have the opportunity to read the terms before accepting them, by not returning the product, the court will apply §2-207 to determine whether the terms become part of the contract.

Using the §2-207 analysis, first it must be determined whether there were forms exchanged to evidence the contract, or whether it was inferred from the conduct of the parties. In this case, the forms were exchanged, beginning with the Proposal. Next, it must be

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determined whether the acceptance was expressly made conditional on assent to the additional or different terms (UCC §2-207(1)). DCI will argue that because it gave Wachter notice that "opening" the package would constitute agreement to the terms, and if they were not agreed to they must be returned, this expressly made their acceptance conditional on the terms. Wachter will argue, however, that as in *Step-Saver v. Wyse Technology*, where the court found that "the integration clause and the 'consent by opening' language" was not sufficient to render the defendant's acceptance conditional, DCI's acceptance was not conditional on the terms. The court reasoned, in *Step-Saver*, that this type of language provides no real indication that the party is willing to forego the transaction if the additional language is not included." Also, "even with a refund term...the offeree/counterofferor may be relying on the purchaser's investment in time and energy in reaching this point in the transaction to prevent the purchaser from returning the item" (*Step-Saver* p.447). Using the court's reasoning, it is concluded that DCI's acceptance was not conditional on the addition of the terms of the license, and was therefore not a counter-offer.

Next, because both DCI and Wachter are merchants, as defined in UCC §2-104, the additional terms of the license agreement become part of the contract unless the original offer expressly limits acceptance to the terms of the offer, the additional terms materially alter it, or notification or objection to them has already been given or is given within a reasonable time after notice of them is received (UCC §2-207(2)). In the instant case, Wachter will not be able to argue that the offer precluded the license agreement. On the contrary, DCI will argue, the Proposal signed by Wachter did not contain an integration clause or purport to be the final and complete agreement of the parties. In addition, Wachter will not be able to argue that they notified DCI of their rejection of the terms because they did not do so until the instant lawsuit. Wachter argue, though, that the choice of law/ venue provision materially altered the contract, and was therefore not a part of the contract. DCI will analogize its case to the defendant in

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*Carnival Cruise Lines v. Shute*, where the plaintiff was forced to adhere to the forum selection clause because they had notice of the terms and therefore assented to all of the terms. The court came up with several reasons to allow forum selection clauses including lower prices of defendant's products due to decreased litigation costs, conserving litigation time and energy, and a business' interest in not exposing itself to lawsuits around the country. In *Carnival*, the court determines that the plaintiff's would have decided to take the cruise, regardless of the forum selection clause. Todd Rakoff, in *Contracts of Adhesion: An Essay in Reconstruction*, would find a forum selection clause to be a clause that is invisible, since it is not shopped-around for by consumers, and therefore generally unenforceable. Because a consumer would likely proceed with the transaction, disregarding the venue clause, the court finds that it did not materially alter the contract.

### **Conclusion**

Because the additional terms, including the venue selection clause, did not materially alter the contract, they are part of the contract and are enforceable. Therefore, the courts of Utopia have no power to adjudicate this lawsuit, and it must be transferred to the state courts of King County, Washington.

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Question #1 Final Word Count = 1232

Question #1 Final Character Count = 7500

Question #1 Final Character Count (No Spaces, No Returns) = 6250

2)

In the case of Empire and Vegas there are several issues to be discussed in determining each entity's rights in respect to the other. These issues can be categorized as issues of mutual assent and remedies—whether the advertisement was an offer, whether the bid was an irrevocable offer, whether there was acceptance and revocation, and whether remedies are available.

### **I. Was there an offer?**

The "manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has further manifestation of assent" (Rest. 2nd § 26). An advertisement is not an offer unless there is some language of commitment or an invitation to take action without further communication, where the advertisement is "clear, definite, and explicitly, and leaves nothing open for negotiation" (*Leonard v. Pepsico* quoting *Lefkowitz v. Great Minneapolis*, p.298). The advertisement on January 1, inviting contractors to submit bids, is distinguishable from the *Lefkowitz* case, because it was not definite and was an invitation to invite bids. Empire will argue that this was not an offer, but rather an offer to invite offers. Likely, the court will find that this advertisement was not an offer.

An offer is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it" (Rest. (2d) §18). The letter from Empire on January 20 was an offer— its terms were certain and definite, and showed that the only thing required for mutual assent to be complete was Empire's acceptance. Because an offer is usually freely revocable until acceptance is dispatched, Empire will argue this offer could not be revoked because it was an option contract. Empire will argue that the language "promise to leave this offer open until March

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1st," created an option contract. He will not be able to argue this was a firm offer, and therefore irrevocable, because this is a service contract, not a contract for the sale of goods. Vegas will argue there is no option contract because no consideration was paid for the promise. As in *Dickinson v. Dodds*, where the offer "to be left open" was found to be a *nudum pactum*, and there was therefore revocable until acceptance for lack of consideration, Empire paid Vegas no consideration, in the facts stated, and therefore did not receive an option contract. The courts will likely find that this offer did not create a binding, irrevocable option contract.

## **II. Was acceptance terminated by revocation?**

Acceptance that shows an intent to prepare a written memorial in the future may show that the acceptance is merely a preliminary negotiation (Rest. (2d) §27). Letters of intent and other agreements that are "subject to" approval only set the stage for negotiations and are not binding agreements (*Em pro Mfg. Co. v. Ball-Co Mfg., Inc.*). Empire will argue that the letter on February 1st was a valid acceptance because they manifested their intent to enter into the contract. However, Vegas will argue the after language expressing Empire's intention to "review [Vegas] plans and notify [it] by February 15" was similar to the letter of intent in *Empro*, and therefore the telegram was not an acceptance. The court would likely find the February 1 letter was not an acceptance, but rather set the stage for further view and negotiation.

An offeree's power of acceptance may be terminated by revocation by the offeror, if it is received before the acceptance is dispatched (Rest. (2d) §36 and "Mailbox Rule"). The power of acceptance in the offeree "is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract" (Rest. (2d) §42). Although Empire intended to dispatch its acceptance on February 11th, Empire received Vegas' revocation first. Vegas will argue that its revocation was admissible because Empire had not

yet sent its acceptance. Empire could potentially argue that the telephone call by Vegas was not a reasonable means of revocation under the circumstances. Because all of the company's previous correspondence was in writing, Empire could argue that the telephoning revocation was not a reasonable medium of revocation. Drawing an analogy to Rest. (2d) §65, dealing with the reasonableness of the medium of acceptance, Empire would argue that just as the acceptance is only reasonable if it "is the one used by the offeror or one customary in similar transactions at the time and place of the offer is received" the revocation should receive the same treatment. Empire will argue that because the offeror never previously, in either correspondence or the offer, communicated by telephone, the revocation by telephone was not a reasonable means of acceptance and was therefore not effective. However, because this argument is drawn on analogy rather than precedent, the court will likely find the revocation was effective.

### **I. Remedies?**

If the court found there was an acceptance before the revocation, and Vegas was therefore in breach, Empire would be entitled to certain legal remedies. Because Empire was able to hire another contractor to do the work, Reno, they were able to mitigate their damages. Empire would be entitled to their expectation interest which is \$1 million, the difference between what they contracted Vegas to pay and what they are going to have to pay another contractor to do the same work. Empire will argue that they are entitled to consequential damages in the form of lost profits due to the delay of construction—it will take Reno 90 days more than Empire contracted for with Vegas. Vegas will argue these lost profits are not recoverable because they are uncertain and unforeseeable. The rule of *Hadley v. Baxendale*, codified in Rest. (2d) §351, holds that a defendant is only liable for foreseeable damages at the time of the contract unless fair and reasonably foreseeable circumstances, "special

circumstances," were expressed when the contract was formed. Vegas will argue that it was not foreseeable at the time of contracting that its breach would lead to a 90-day delay resulting in lost profits. In addition, it will argue that Empire did not inform Vegas of any "special circumstances" during formation. If the court applied the "tacit agreement test" of *Morrow v. Hot Springs*, it would be even more difficult for Empire to recover this loss because under this test a plaintiff must prove the defendant tacitly agreed to assume the responsibility for the consequential damages. Because Empire will not be able to show that they made their special circumstances known at the time of contracting, they cannot recover lost profits. In addition, the profits are an uncertain amount. In *Chicago Club Coliseum v. Dempsey*, the court concluded that when profits cannot be determined (they are uncertain), the plaintiff cannot be rewarded speculative lost profits. Empire will attempt to be reimbursed for \$75,000 for the amount of money they spent inspecting Vegas' plans in reliance on the contract. However, Vegas will argue that because Empire used these plans in their contract with Reno, and would've therefore had to inspect them regardless, they avoided this additional harm and are not entitled to recover it. Likely, Empire would only be allowed to recover \$1M under the expectation interest.

A party in breach is entitled to restitution "for any benefit conferred by way or part performance or reliance in excess of the loss he caused by the breach" (Rest. (2d) §374). Even if Vegas is found to be the breaching party, it may be entitled to restitution to off-set the amount it owes Empire. Vegas spent \$500,000 on the plans, which Empire subsequently handed over to Reno to use in construction of the casino. As John Wade, in "Restitution for Benefits Conferred Without Request," explains, to recover in restitution one must show that the other party has been enriched unjustly. Wade holds that one who confers a benefit upon another, without any intent to act gratuitously, is entitled to restitution if he gives the other party an opportunity to decline the benefit. If Empire had returned the construction plans, it would

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not have been unjustly enriched. However, by choosing not to do so, Vegas is entitled to an off-set of Empire's expectation damages in the amount of \$500,000. Empire will argue this amount is not recoverable because it was spent before a contract was ever formed, and would have gone un-recovered if Empire had chosen another bid over Vegas'. In "The Phantom Reliance Interest in Contract Damages, Michael Kelly argues that pre-contract expenditures can be recovered if a zero-profit is assumed. Because Vegas spent this money in reliance on the contract, even though it was before it was formed, it is recoverable because it expected to break even. However, Empire will likely prevail in arguing that this turns the \$500,000 from a restitution interest into a reliance interest, and Vegas is not entitled to recover the reliance interest because they breached the contract. The court would likely find that because Empire used the contract plans in their subsequent venture with Reno, thus saving that contract an additional \$500,000 in planning, Vegas is entitled to this restitution for unjust enrichment.

Specific performance is not available in service contracts because it is void against public policy. In *The Case of Mary Clark*, the court found specific performance of service contracts unlawful for several reasons. First, they would produce a state of servitude as degrading as slavery. In addition, if the court enforced specific performance it would undermine the nature of service contracts—either putting an end to them or forcing one party to be humiliated to the other (*Mary Clark*, p.201). Because this is a service contract, specific performance is not an available remedy.

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Question #2 Final Word Count = 1633

Question #2 Final Character Count = 10014

Question #2 Final Character Count (No Spaces, No Returns) = 8364

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3)

There are several issues concerning Brutus's rights against Cincinattus--whether there was an offer, an option contract, acceptance and revocation. In addition, another issue will be Brutus's legal and equitable remedies against Cincinattus if there is found to be an enforceable contract.

**Was there an offer?**

For the law to find an enforceable contract there must first be an offer."An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it" (Rest. (2d) §18). To determine whether there is an offer the court will use the reasoning from *Embry v. Hargadine, McKittrick Dry Goods Co.*, "the *Embry* test." This test is an objective test with a subjective twist, to determine whether the offeree was reasonable in believing the offeror's words construed an offer. First, the court looks at whether a reasonable person would view the offeror's words to construe an offer. If this is the case, the court then determines whether a reasonable person in the offeree's position would consider this an offer. If so, then unless the offeree knew or had reason to know the subjective intent of the offeror, that s/he did not intend to make an offer, there is a contract. The last prong of this test is exemplified in *Lucy v. Zehmer*. Brutus will argue that a reasonable person, as well as a reasonable person in his position, would consider Cincinnatus' written offer, using the very word "offers," to be an offer. The document was certain in both price and quantity of land--giving both reasonably certain terms for determining the existence of a breach and allocating an appropriate remedy, as required by Rest. (2d) §

33. Brutus will also argue that he did not know or have reason to know that Cincinnatus did not intend to enter into a contract. Cincinnatus will have a difficult time arguing that he did not intend, on August 9th, to make an offer. His objective manifestation of intent, combined with the lack of subjective knowledge held by Brutus, evidence that the August 9th document was a letter.

**Was there an irrevocable, reasonably certain offer?**

An offer is revocable until the offeree accepts the offer by any reasonable means under the circumstances (Rest. (2d) §35), unless the offer becomes a binding contract via consideration. The memorandum on August 11th, executed by Cincinnatus, offered to "keep the offer open" for a reasonable amount of time. Because this is involving a sale of land, not goods, the offeree must give the offeror some consideration in exchange for the promise to keep the land open for sale to the offeree exclusively. Unlike in *Dickinson v. Dodds*, where the defendant was able to revoke his offer prior to the plaintiff's acceptance because "there was no consideration given for the undertaking or promise" to keep the property unsold until a specific date, it was a "mere *nudum pactum*", Brutus will argue that he did give consideration for the option contract (*Dickinson*, p. 317). Cincinnatus made the option contract contingent on Brutus's actions. He promised to keep the land open for sale only if Brutus spent his time and money making the 100-mile trip to Farmland. Cincinnatus will argue this was no consideration and he did not mean to form an option contract. If the court finds this was an option contract, Cincinnatus' rejection will be ineffective because "the power of acceptance under an option contract is not terminated... by revocation" (Rest. (2d) §37).

However, Cincinnatus will further argue that even if there was consideration, this offer only offered to keep the land open for "awhile," which is not a reasonably certain amount of time. For an offer to be reasonably certain, there must exist a basis for determining the

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existence of a breach. If one or more terms of a proposed bargain are left open or are uncertain, that may be evidence that a "manifestation of intention is not intended to be understood as an offer" (Rest. (2d) §33(2-3)). Cincinnatus will argue that by leaving open the date, and thereby making it impossible to determine when a breach occurred just as in *White v. Corlies & Tiff*, the memorandum on August 11th was not intended to be an offer. Brutus will argue that, using the *Embry* test, a reasonable third person, as well as a reasonable person in his position, would have considered this an offer.

If the court found this was an irrevocable offer, and was found to be reasonably certain, then at no point could Cincinnatus have revoked the offer. If this is the case, Brutus, who accepted the offer, will be entitled to specific performance because "where land or any estate or interest in land is the subject-matter of the agreement, the jurisdiction to enforce specific performance is undisputed, and does not depend upon the inadequacy of the legal remedy in the particular case" (*Loveless v. Diehl*, quoting *Dollar v. Knight*, p.186). However, most likely, the court would find this was not an option contract, and therefore Cincinnatus was free to revoke the offer.

### **Was there indirect communication of revocation?**

The manifestation of mutual assent is complete, with acceptance, once the acceptance is "put out of the offeree's possession" (Rest. (2d) §63, "Mailbox Rule"). However, with a revocable offer, if the offeree receives notice that the offer has been revoked, he can no longer accept the offer. Notification can be indirect, rather than a direct notification, and therefore "an offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with intention to enter into the proposal contract and the offeree acquires reliable information to that effect" (Rest. (2d) §43). In *Dickinson v. Dodds*, the plaintiff had heard that Dodds had sold the land to a third party and attempted to accept after that point.

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The court held that while usually "a man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed," in this case the plaintiff knew that the defendant no longer wanted to sell the land, "as plainly and clearly" as if he had told him himself (*Dickinson*, p.317). Brutus will distinguish his case from that of the plaintiff in *Dickinson*, in that he did not have reliable information that Cincinnatus had changed his mind and sold the property; rather, he only heard that he "probably wouldn't be interested in selling it now." For an indirect revocation to be effective, it must be reliable and definite. Even if Cincinnatus's brother was a reliable source, the fact that he probably wouldn't want to sell the property does not show that Brutus had notification of Cincinnatus' definite action to not sell the land. Cincinnatus will argue that because Brutus had knowledge of Cincinnatus' intention to not adhere to the offer before he accepted, the revocation was effective as indirect. Most likely the court would find that because this information was not definite, it was not an effective revocation of the original offer.

**Was there acceptance before revocation?**

Acceptance is effective upon dispatch, as long as the offer has not yet been revoked. Assuming the court found the indirect communication of revocation ineffective, the court would then determine whether Brutus accepted the offer. He mailed the letter on August 15th, which is well before the revocation received on August 17th. His acceptance was timely, assuming it adhered to the common law mirror image rule. While Brutus' acceptance did not expressly change or add terms, it did leave one of the original terms out, that the payment was to be made in "cash." If the court found that his acceptance was conditioned upon this omission, then just as in *Ardente v. Horan*, the court would find the acceptance was not acceptable. Brutus will argue that he did not condition his acceptance upon this term. Cincinnatus will argue the converse-- that because Brutus altered the offer, his acceptance did not mirror the

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offer, there was no acceptance—it was a counter-offer instead. The courts would likely find this to be a counter-offer, and because Cincinnatus never accepted the counter-offer there was no contract.

### **Remedies?**

If, however, the court determined this was a reasonable acceptance, not a counter-offer, because it was sent before the revocation was received on August 17th, Brutus would be entitled to damages for the property. Because the dispute is over land, which is inherently unique, specific performance is the default remedy. Brutus, will be entitled to specific performance because "where land or any estate or interest in land is the subject-matter of the agreement, the jurisdiction to enforce specific performance is undisputed, and does not depend upon the inadequacy of the legal remedy in the particular case" (*Loveless v. Diehl*, quoting *Dollar v. Knight*, p.186). Brutus is entitled to specific performance, thereby forcing Cincinnatus to sell him the land at \$8 an acre.

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Question #3 Final Word Count = 1485

Question #3 Final Character Count = 9019

Question #3 Final Character Count (No Spaces, No Returns) = 7508