

Contracts

Professor Terry S. Kogan

Fall Semester, 2001

Final Examination

Tuesday, December 11, 2001
8:30 a.m. to 12:15 p.m.

Examination Number: _____

This Final Examination is entirely open book. You may use the casebook, the Rules of Contract Law book, notes, outlines, and/or any other materials. The use of other human beings (or computers) is not permitted.

This examination consists of three questions. The weight of each question and the recommended time allotment for each question are indicated.

If the facts of a question pose a remedy issue, discuss the issue of remedy even if you conclude that the party seeking the remedy may not succeed in establishing a breach of contract or other basis for relief.

You have **three hours and forty-five minutes** to complete this examination. **The first forty-five minutes are to be used exclusively for reading the questions carefully and outlining your answers. Blue Books will not be handed until forty-five minutes into the exam.** (If you are word-processing this exam, **you are not allowed to type during the first forty-five minutes.**) You then will have three hours to write your answers.

Please write on every other line of the Blue Books.

Please put your examination number in the space provided above, on the outside of all Blue Books, and **on all** typewritten pages. **Do not write your name anywhere on this examination.**

You **must** return these examination questions with your answers.

Good Luck.

Question One

[This question will count 37 1/2 % of the total examination grade. You should devote approximately 65 minutes to it.]

INFO, Inc. [hereinafter “INFO”] is a software company located in Boise, Idaho, which produces phone directory databases on CD-ROM disks. The information on each disk is in searchable format and is compiled from over 3000 phone directories. INFO produces two versions of its software. The first version of the software, named “ProPhone,” sells for \$500.00, and is intended for commercial use by manufacturers and retailers who wish to compile lists of potential customers. The second version of the software, named “PhoneHelp,” sells for \$100.00 and is intended for personal use by the general public. The two versions of the program are identical, except for the packaging and the licensing agreement described below. In addition to both software packages being available for purchase in retail computer software stores, the software can be ordered by phoning the company directly at 1-800-INFO-INC.

If INFO had to recover all of its costs and make a profit by charging a single price to commercial users and to the general public, it would have to raise the price of its PhoneHelp software package well above the \$100.00 price, reducing the number of consumers who could take advantage of the software. In order to accomplish the price discrimination, INFO prints in prominent letters on the box containing the less expensive PhoneHelp software the following statement:

Before use, please review the software License Agreement set forth on the enclosed PhoneHelp CD-ROM disk.

When the PhoneHelp CD-ROM disk is placed into the computer, the following immediately appears on the computer screen:

Please read this software License Agreement (“License”) carefully, and then click Agree or Disagree.

By clicking Agree, you are agreeing to be bound by the terms of this License. If you do not agree to the terms of this License, click Disagree and return the software to INFO, Inc. for a full refund.

Permissible Use – This License allows you to install and use PhoneHelp software for NON-COMMERCIAL PURPOSES ONLY. Use of PhoneHelp software for commercial purposes is strictly forbidden and is in violation of this License.

Joe Bloggs [hereinafter “Bloggs”] runs a company known as Database, Inc., which is located in Salt Lake City, Utah. The company compiles and provides sorted databases of potential consumers for use by retail businesses. Bloggs wanted to purchase INFO’s software for use in his business. Though he has not actually seen the software before, he was aware through talking with employees that the cheaper PhoneHelp software is not intended for commercial use. On February 1, 2000, he telephoned INFO’s 1-800 number, and the following conversation ensued:

INFO OPERATOR: May I help you?

BLOGGS: I would like to order your PhoneHelp software.

INFO OPERATOR: That software costs \$100.00, plus shipping and handling, for a total cost of \$110.00.

BLOGGS: That's fine. I'll take it.

INFO OPERATOR: And what is your name and address please?

BLOGGS: My name is Joe Bloggs and my home address is 888 Treelined Ave., Salt Lake City, Utah 84103.

INFO OPERATOR: And how would you like to pay for it?

BLOGGS: You can charge it to my credit card . . . #XXX-XXXX-XXXX.

INFO OPERATOR: Thank you, Mr. Bloggs. The software will be mailed out within two business days.

Bloggs received the PhoneHelp software package at his home, and immediately took it to the Database, Inc. office. When he unwrapped the package, he first noticed the printed language on the outside of the PhoneHelp box concerning the License Agreement. When he placed the PhoneHelp CD-ROM in his computer, he read the licensing restrictions set forth above. Despite these restrictions, he proceeded to use the PhoneHelp software in his business for the next two weeks.

During those two weeks, INFO became aware of Bloggs' using the PhoneHelp software in a commercial business. INFO immediately filed a complaint in federal court seeking to enjoin the continued use of the PhoneHelp software by Database, Inc. and Bloggs.

You are the law clerk for the judge to whom the case has been assigned. You have been asked to write a memorandum of law discussing the substantive merits of INFO's assertion that Database, Inc. and Bloggs are wrongfully using the software.

Question Two

[This question will count 25% of the total examination grade. You should devote approximately 45 minutes to it.]

Donald Snitch [hereinafter "Snitch"] worked as a Legislative Aide to Utah State Senator Cheatham Offen [hereinafter "Senator Offen"]. While serving in that capacity, Snitch became aware that Senator Offen had received a bribe from a construction company to sponsor legislation awarding a major highway construction contract to that company. Snitch himself had actually been considering running in an upcoming election for the very seat held by Senator Offen, but had not discussed his plans with anyone.

On June 10, 2000, Snitch met with Nelda Newsworthy [hereinafter "Newsworthy"], a reporter for the Salt Lake Daily News. The following conversation ensued:

SNITCH: I have some information about some illegal activities of a prominent state senator. If you promise me confidentiality — in other words, that I will be treated as an anonymous source and my name will not appear in any material in connection with this information — then I'll tell you all about this information.

NEWSWORTHY: I give my word that I will keep your identity anonymous.

SNITCH: Good . . . in fact, I will also give you information about an aspiring Legislative Aide who plans to run against the senator for whom he is currently working if you promise not to disclose that information until a formal announcement is made later this summer.

NEWSWORTHY: I promise.

Newsworthy had every intention at the time of making these promises to comply with them. What she did not disclose to Snitch was that promises of confidentiality were subject to approval or revocation by the editors of the Salt Lake Daily News.

Snitch proceeded to tell Newsworthy all that he knew about the bribe received by Senator Offen. He then informed Newsworthy of his own interest in running for Senator's Offen's seat in the next election.

When the reporter informed her editors at the Daily News about the information, they decided that the identity of the informant was highly newsworthy, and in addition, believed that the information was equally important as a story about the political intrigue of an aide "back-stabbing" his boss as it was about bribery of a public official. Accordingly, the editors insisted that the newspaper article not only disclose Snitch's identity, but also disclose his political ambitions.

Within an hour of the newspaper's publication, Senator Offen fired Snitch from his \$45,000/year job. Moreover, Snitch's political future was ruined, and his hope of running for the Utah State Senate went up in flames. (State senators earned an annual salary of \$100,000/year.) Because no other legislator would even consider talking to Snitch, much less hiring him, he was forced to accept a job as a short order cook at the McConnell's fast food restaurant at an annual salary of \$20,000/year.

Snitch comes to the law firm for which you work seeking advice as to whether he can successfully sue the newspaper, and if so, what he stands to recover. The senior partner in the firm has requested that you draft a memorandum discussing any and all claims that Snitch might have, and his likelihood of success with respect to each claim.

Question Three

[This question will count 37 1/2 % of the total examination grade. You should devote approximately 65 minutes to it.]

BrightLight Electric, Inc. [hereinafter "BrightLight"] is an electrical contractor located in Salt Lake City, Utah. Sparky Plugger [hereinafter "Plugger"] is the owner and president of BrightLight. Plugger was interested in bidding on a project at the University of Utah related to rewiring Marriott Library. If awarded the prime contract, BrightLight intended to subcontract out all work related to rewiring the library's telecommunications system.

FastTalk Telecom Co. [hereinafter "FastTalk"] is a telecommunications company located in Salt Lake City, Utah. Sally Cellfone [hereinafter "Cellfone"] is the owner and president of FastTalk.

In January, 1999 Cellfone received the following letter from BrightLight:



BRIGHTLIGHT ELECTRIC, INC.

222 OHM AVE.

SALT LAKE CITY, UTAH 83190

Request for Bids for Project #3445

BrightLight Electric, Inc. is seeking bids from telecommunications subcontractors on a project to rewire the telecommunications system at the University of Utah's Marriott Library, as fully described on the attached Specifications for Project #3445, dated December 15, 1998. Bidders will be permitted to conduct on-site inspections of the facility at a time to be arranged with BrightLight Electric, Inc. and the Office of the Executive Director of Marriott Library. Bids will be due on or before the close of business on January 31, 1999.

Sparky Plugger

Sparky Plugger, President
BrightLight Electric, Inc.
January 2, 1999

Attached to this letter were 15 pages of detailed "Specifications for Project #3445, dated December 15, 1998." After reviewing the Specs, it became clear to Cellfone that

preparing a bid for Project #3445 would take many hours of preparation. In light of this, Cellfone sent the following letter to Plugger:

FastCircuit Telecom, Inc.

456 Chatty Ave.

Salt Lake City, Utah 84999

January 5, 1999

Sparky Plugger, President
BrightLight Electric, Inc.
222 Ohm Ave.
Salt Lake City, Utah 83190

Re: Project #3445

Dear Mr. Plugger:

I have reviewed the "Specifications for Project #3445, dated December 15, 1998" with respect to the above-described project. It is clear that preparation of a bid for this project will entail considerable cost and time.

Accordingly, FastCircuit is willing to bid on this project only if BrightLight assures us that FastCircuit will have the option to accept this telecommunications subcontract in the event that: 1) BrightLight Electric, Inc. is awarded the prime electrical contract by the University of Utah; and 2) FastCircuit is the low bidder on the project.

If this is acceptable to you, please sign below and return a copy of this letter to FastCircuit Telecom, Inc. We will proceed thereafter to prepare a bid for the project.

Sincerely,

Sally Cellfone

Sally Cellfone, President
FastCircuit Telecom, Inc.

On behalf of BrightLight Electric, Inc., I accept the above-described conditions.

Sparky Plugger

Date:

Plugger signed the bottom of this letter, dated it January 10, 1999, and returned it to Cellfone. After spending considerable time preparing its bid, on January 30, 1999

FastCircuit submitted a bid of \$3 million with respect to Project #3445. In fact, this was the lowest bid received by BrightLight.

On March 15, 1999, BrightLight submitted its prime bid to the University of Utah, incorporating the bid submitted by FastCircuit. On April 15, 1999 the University of Utah awarded the prime contract for rewiring Marriott Library to BrightLight.

While preparing to award various subcontracts with respect to the overall rewiring project, Plugger received a telephone call on April 16, 1999 from the president of a newly formed telecommunications company, RapidTalk, Inc., inquiring whether BrightLight had awarded the telecommunications subcontract on the Marriott Library project. Plugger said he had not yet done so, and RapidTalk's president said that he would perform the work for \$2.5 million dollars. On April 20, 1999 BrightLight awarded the telecommunications subcontract to RapidTalk.

Sally Cellfone received a letter from Plugger several days thereafter stating that FastCircuit was not awarded the subcontract. Cellfone is furious and comes to your law firm seeking advice as to what course of action she should take. You have been asked by the partner in charge of the case to draft a memorandum setting forth any and all claims that might be available to FastCircuit, and to assess the likelihood of success of each claim.