Steve “The Preacher” Sowle is the President and CEO of the New Age movement, *The Sowle Train, Your Soul Track to Your Full Potential Now and in the Whatever-After*. Sowle travels the United States in a special train to deliver sermons in which he offers his message of fulfillment now and in the Whatever-After through New Age enlightenment (achieved by reading his books and buying his products).

Christopher “The Sage” Buccafusco owns and operates The Way of Ways, a website devoted to New Age philosophy. On Monday, Buccafusco contacts Sowle to discuss Sowle’s advertising The Sowle Train schedule of sermons on The Way of Ways. Buccafusco concludes their conversation with, “I am sending you our standard advertising agreement. I have signed it. The agreement guarantees that I will put banner advertising for The Sowle Train on my site. It guarantees 100 presentations of your advertisements a day—no more, no less. You pay just $.0.10 a click-through. *All other relevant details are in the agreement.* **Sign and we have a deal!”**

This is an offer.

Sowle responds that he will need some time to think about it. Buccafusco responds, “I understand. To sweeten the package for you, let me offer this. **You come back under contract to the advertising agency, Super Banner Ads,** for the creation of your ads, and I will cut the rate to $0.05 a click-though. I intend to keep the whole offer—the terms in the agreement and the Super Banner Ads price reduction—open until Friday.” Here is my note to that effect.

A second offer (come back under contract to the advertising agency, Super Banner Ads, for the creation of your ads, and I will cut the rate to $0.05 a click-though).

Is it an option contract? NO. “intend” does not create an option contract.

Sowle responds, “Great. I will be back to you by Friday. This advertising will increase attendance at my sermons. There is ample evidence of that, and you know I charge an attendance fee. So bucks for me!”

On the next day, Tuesday, Buccafusco calls Sowle. He says, “Hi, Preacher. The Sage here. I had an idea. Why don’t you sell your books and other products, like your portable Sowle Meter, over The Way of Ways?” Sowle responds, “Truly enlightened! I love it. I will send along a written offer in which you purchase my books for resale on The Way of Ways. I will give you a great rate. Now I have an idea. Why don’t you join me for a month on the Sowle Train? You come along and promote The Way of Ways and the availability of my books on it, and in exchange I will provide accommodation, transport, and food in The Soul Train plus a speaking opportunity during every sermon I give while you are on board.”

Buccafusco responds, “Done. That’s a deal. Preacher, you are one persuasive Sowle.”

The next day Sowle sends the signed written agreement detailing the sale of books to The Way of Ways. Call this the *Train*-*Ways Agreement*.

Buccafusco signs the agreement and adds a note, “Sowle warrants that all products are fit for the purpose for which such products are ordinarily used.” The written agreement Sowle sent conspicuously disclaims any warranty of merchantability. It also contains this clause: “This agreement represents the complete and exclusive statement of the parties’ obligations to each other. Neither party is relying on any representations, oral or written, not contained in this agreement.”

Sowle enters into a contract with Super Banner Ads for the creation of banner advertisements on Wednesday and contacts Buccafusco on Thursday to accept Buccafusco’s offer to provide banner advertising over The Way of Ways at $0.05 a click-through. Before Sowle can accept, however, Buccafusco informs him that he is revoking the offer.

Buccafusco makes a new offer identical to the old one except that the click-through rate is back to $0.10. Sowle protests but finally accepts the new offer.

The Train-Ways agreement specifies that The Sowle Train will deliver on January 16, 2011 1000 copies of *Get On Board! Your Ticket to Enlightenment*, and 1000 copies of *Visions of the Whatever-After: My Personal Story*. At the time he entered the agreement with Buccafusco, Sowle had 1000 copies of each book in a warehouse. However, in December, the fire alarm in the warehouse malfunctioned and reported a non-existent fire. Unfortunately, at the same time, children who had broken into the warehouse set off a smoke bomb. The fire fighters mistook the smoke for a sign of fire, and their attempt to put out the “fire” destroyed 500 copies of *Get on Board!*.

On January 14, Sowle delivers and 1000 copies of *Visions of the Whatever-After: My Personal Story*, 500 copies of *Get on Board!*, and 500 copies *Sowle Train, Soul Train: Tracking Enlightenment*. Buccafusco accepts the copies of *Get on Board!* and *Visions of the Whatever-After* but rejects the copies of *Sowle Train, Soul Train*. Sowle immediately says, “I will get you the additional 500 copies of the first edition of *Get on Board!* by the 16th.”

Sowle manages to locate, purchase, and deliver the copies by the 16th. By the 16th, however, Buccafusco has also purchased 500 copies on his own, and he refuses to accept the delivery of Sowle’s 500 copies of *Get on Board!.*

Sowle sells the 500 copies of *Get on Board!* to The Third I, a bookstore in Santa Monica, California at the same price he was going to charge Buccafusco. There are no more copies of *Get on Board!* available anywhere. It sold out and Sowle is writing a second edition.

For the first two months of the banner advertising contract, Buccafusco fails to deliver 100 presentations of Sowle’s banner advertisements a day. He delivers only 50 a day. After that, he delivers 100 a day.

**Please answer the following questions.**

1. Assume Buccafusco made an offer to Sowle regarding placing banner advertisements on The Way of Ways? Was offer revocable by Buccafusco on Thursday?

2. Assume that when he revoked the offer concerning banner advertising, Buccafusco breached a promise to keep the offer open until Friday. Make the best argument you can that the court should grant specific performance by ordering Buccafusco to reduce the click-through rate to $0.05.

3. Does the Train-Ways agreement contain a warranty of merchantability? **Start your analysis with Sowles’s sending the signed written Train-Ways agreement.** Assume Sowle and Buccafusco are merchants. Assume that any expression of acceptance was definite and seasonable.

Was Sowles’s sending the Sowle signed written Train-Ways agreement an offer? The rule is that Sowle’s sending the agreement is an offer if (1) it is a manifestation of a willingness to enter a bargain, (2) so made as to justify the Buccafusco in thinking his assent will conclude the bargain.

Manifestation: context of the conversation, and the sending the signed detailed (so definite and complete) agreement.

Justified part: (1) and (2).

For (1): signed written agreement detailing the sale of books to The Way of Ways.

For (1) and (2): “On the next day, Tuesday, Buccafusco calls Sowle. He says, “Hi, Preacher. The Sage here. I had an idea. Why don’t you sell your books and other products, like your portable Sowle Meter, over The Way of Ways?” Sowle responds, “Truly enlightened! I love it. I will se a written offer in which you purchase my books for resale on T nd along he Way of Ways. I will give you a great rate. Now I have an idea. Why don’t you join me for a month on the Sowle Train? You come along and promote The Way of Ways and the availability of my books on it, and in exchange I will provide accommodation, transport, and food in The Soul Train plus a speaking opportunity during every sermon I give while you are on board.””

Buccafusco responds, “Done. That’s a deal. Preacher, you are one persuasive Sowle.”

Did Buccafusco accept?

Under UCC 2-207(1), a definite and seasonable expression of acceptance operates as an acceptance even if it contains non-matching terms unless the acceptance is made expressly conditional on the offeror’s assent to the additional terms.

The question states any expression of acceptance is definite and seasonable. Was Buccafusco’s sending back the agreement an expression of acceptance? The question is, was Buccafusco trying to accept Sowle’s offer? Yes with facts. So Buccafusco accepted despite the different term (warranty of merchantability)—unless the acceptance is expressly conditional on Sowle’s assent to the additional term. Was it expressly conditional? Making the acceptance expressly conditional on assent to the different term would require language like this: “my acceptance is expressly conditional on your assent to the assertion of the warranty.” There is no such language. So Buccafusco accepted.

State 2-207(2).

Merchants, so the terms of the acceptance are the terms of the contract unless;

The offeror timely objected to them. Did that happen? No.

Did the offer limit the terms of the contract to the terms of the offer? Nothing in the facts indicates that.

Is the assertion of the warranty of merchantability a material alteration of the contract? A material alteration is a substantial change in the parties’ obligations. A warranty of merchantability is such a change.

So the assertion of the warranty is not part of the contract. Other example of material alteration—arbitration clause.

4. Assume that, prior to executing the Train-Ways agreement, Sowle and Buccafusco enter an oral agreement for Buccafusco to join Sowle on The Sowle Train. *Assume the Train-Ways agreement an enforceable contract and is a complete integration.* Does the parol evidence rule make that oral agreement unenforceable?

5. Assume the Train-Ways agreement is an enforceable contract. Did Buccafusco breach the contract when he refused delivery of the second 500 copies of *Get on Board!*?If so, what are Sowle’s damages? Assume that Buccafusco paid the amount due for 1000 copies of *Visions of the Whatever-After: My Personal Story* and 500 copies of *Get on Board!*. Assume there are no incidental or consequential damages.

6. Assume the agreement to display 100 banner advertisements a day *at a charge of $0.05* a click-through is an enforceable contract, and that Buccafusco breached that contract when he delivered only 50 advertisements a day for two months. What are Sowle’s expectation damages? Sowle has undisputable evidence that, in those two months, he averaged an increase of $50 in attendance fees for each 50 advertisements displayed, and he also has undisputable evidence that additional banner advertising would have increased attendance at approximately the same rate.