Instructions:

You have 4 hours 00 minutes to complete the examination. Watch your time.

The exam consists of three questions. Be sure to number each answer so that your answers correspond to the question and its subparts, if the question has subparts.

Time has been allocated with each question. I believe that I have allocated sufficient time for each question so that you have the time to read each question carefully in order to have a good grasp of the facts, to think about the question to identify the relevant issues, and to organize your answer in your mind. Only after you have done this careful reading, identification of the relevant issues, and mental organization should you begin to write your answer. Take time to read, think, organize.

You may use the statutory supplement. Otherwise the exam is a closed book examination.

You may assume that the Uniform Commercial Code is in effect. The Restatement (2d) of Contracts is not binding in the jurisdiction, but the highest court in the state uses the Restatement 2d as persuasive authority. Thus, Restatement 2d provisions should be discussed, if applicable.

The exam consists of nine pages, including two instruction pages. Please make certain that you have pages 1 through 9 now.

Please remember that this is Contracts. The Chapters we studied this semester were as follows:

Ch. 1– An Introduction to the Study of Contract Law;

Ch. 2– Basis of Contractual Obligation: Mutual Assent and Consideration

Ch. 3– Liability in the Absence of Bargained-for Exchange: Promissory Estoppel and Restitution

Ch. 4– The Statute of Frauds

Ch. 5– The Meaning of the Agreement: Principles of Interpretation and the Parol Evidence Rule
Ch. 6– Supplementing the Agreement: Implied Terms, the Obligation of Good
Faith and Warranties

Ch. 7– Avoiding Enforcement: Incapacity, Bargaining Misconduct, Unconscionability, and Public Policy. [Please note that we skipped the sections on Unconscionability and Public Policy. Hence, this exam does not test about unconscionability and public policy.]

Ch. 8– Justification for Nonperformance: Mistake, Changed Circumstances, and Contractual Modifications

Ch. 9 – SKIPPED and Not Part of the Course or this Examination

Ch. 10– Consequences of Nonperformance: Express Conditions, Material Breach, and Anticipatory Repudiation

Ch. 11 and Ch. 12– Not Part of the Course or this Examination. These Chapters 11 & 12 relate to contractual remedies and the calculation of damages. Not Part of the Course or this Examination.

You should give answers that are Contracts answers based on the material studied.

Good luck.

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Question 1. 70 minutes

Tina Traveler has a ticket on Pony Express Airlines (PEA) to fly from Oklahoma City to Cody, Wyoming on December 20 at 4 p.m. As advised by her travel agent, Tina arrived at the airport two hours early. After clearing security and getting her boarding pass, Tina stops at the Champions Sport Bar to have a vodka sour. Tina feels she deserves the drink after surviving the harrowing experience of law school exams for the first time as a 1L student at OU Law School.

As Tina sits in the waiting lounge at the airport, the gate agent for PEA announces over the P.A. system:

Flight 333 to Cody is overbooked. PEA is offering a $200 voucher redeemable for travel on any PEA flight to the first three passengers who volunteer to give up their seat. The next PEA flight to Cody is leaving at 11 tonight.

Tina did not have any pressing business, and was in a relaxing mood, having just finished an insanely difficult Contracts exam by that renowned holiday Grinch, Professor Kershen, the day before. Tina recalled how the Kershen exam had increased her already elevated stress levels to peaks that made her feel that she would go insane. She was so stressed by her exams that she actually had homicidal thoughts towards her professors. She was still so shaken by the law school exam experience that she could barely think. She wanted time to relax.

So, Tina went up to the attendant and said, "I accept your offer of a $200 travel voucher. Here is my ticket for flight 333." The agent took Tina's ticket, and said she would re-issue her a new ticket for the 11 p.m. flight after flight 333 left. The agent also said that she would also give Tina the travel voucher at that same time.

Tina immediately headed back to the Champions Sports Bar where she was having her third vodka sour of the afternoon when she heard the following announcement. The PEA agent said,

"Flight 333 has been canceled due to a mechanical problem. I apologize for any inconvenience this may cause you. Come to the desk and we will reschedule Flight 333 ticket holders for other flights."

Tina returned from Champions to the agent, and said, "I would like for you to go ahead and issue me a ticket for that 11 o'clock flight now, and give me my $200 travel voucher." The stressed-out agent gruffly replied, "Boy, Ms. Traveler, are you stupid or what. I'm sick of you idiots giving me a hard time. Besides, you're drunk. Look, travel vouchers are only issued if the flight actually takes off and we need the seats. Since 333 was canceled, you do not get the voucher. Here is your rescheduled ticket for the 11 p.m. flight. If you don't like it, I will refund your purchase price and you can go look for another flight, if there are any others to Cody, or look for a train or a bus trip. Have a nice day."
The agent's statement was inadvertently broadcast over the P.A. system, and everyone turned and stared at Tina. Tina was both embarrassed and intimidated. Tina accepted the new ticket for the 11 p.m. flight as a rescheduled arrangement. Tina flew to Cody on the 11 p.m. flight.

When Tina gets back to law school in January, she talks to her Section 3 buddies about what happened to her. She is thinking about suing PEA, and wants to get their opinion about her possible contract claim. Tina would like to get the $200 travel voucher to use for Spring Break.

Tina asks her friends to give their views about the contract issues that her experience with PEA raises. Tina wants to know:
- if she had an enforceable contract for the $200 travel voucher; and
- what responses, including defenses (if any), that PEA would assert to any lawsuit.

If PEA has any defenses, Tina wonders whether she has any responses to the defenses?
Question 2.  85 minutes

[Note: You should read Question 2 and Question 3 together because these two questions are variations on the same fact pattern. You must decide which question best raises certain contract issues and allocate your discussion so that the issues are appropriately allocated to either Question 2 or Question 3. The reason for this allocation (and for reading the two questions together) is so that you reduce repetitiveness of issues and repetitiveness of your discussion in Questions 2 and 3 to a minimum.]

Turner Productions (TP) planned to make a movie of a play entitled "The Man in the Woods." TP made many arrangements in advance, before they got a leading man (i.e., the "man" in the Woods). They arranged for a place where the movie was to be filmed; employed a director, a designer and a stage manager; and so forth. All told, TP incurred or committed about $50,000 in expenses before selecting the leading man.

TP then went looking for a leading man among their stable of movie stars. TP had contracts with three actors that committed TP to paying the actors $200,000 per year if TP did not use the actor in a “leading role” during a particular year during the three-year contract term. Cappy Leonardo was one such leading man to whom TP would owe $200,000 if they did not cast him in a leading role in 2007. “Leading role” is an undefined term in the “pay or play” contract between Mr. Leonardo and TP.

The “pay or play” contract had a clause which stated:

“No verbal agreement with any agent either before or after the execution of this contract shall affect or modify any of the terms or obligations herein contained. This contract shall be conclusively considered as containing and expressing all of the terms and conditions agreed upon by the parties hereto”.

Cappy Leonardo signed the “pay or play” contract with TP in 2006. He signed it after asking his agent, Slim Pickens, if the contract were the usual “pay and play,” receiving an affirmative answer, and reading it quickly and casually. Mr. Leonardo did not pause to question any clause in the “pay or play” contract.

TP cast him in a leading role in a 2006 film but Cappy considered the relationship less than ideal. Cappy had artistic disagreements with the TP director. In his contract with TP, the contract had a clause which required Cappy to accept an offer from TP to be a leading man unless Cappy was “unavailable” by being committed to other acting projects. If Cappy refused a leading role offered by TP when available, Cappy forfeited the $200,000 payment. Other specific terms of employment would be negotiated for each project that TP and Cappy Leonardo did together.

When Mr. Leonardo negotiated the “pay or play” contract with TP, he was excited
because studio executives told him that they would give him roles that focused on him and his talents. As one studio executive said, “We are going to give you roles that will let you carry the movie.” Moreover, TP promised to be flexible with Mr. Leonardo so that Mr. Leonardo could always be involved in projects that advanced his image in a positive manner and that allowed him to choose projects that allowed him to grow as an actor.

TP contacted Cappy Leonardo for the role of the “man” in “The Man in the Woods.” Cappy was favorably inclined to accept the role. He remembered the play, “The Man in the Woods,” as a psychological thriller about a man being lost and afraid in a remote forest – sort of a modern Robinson Caruso. Cappy expressed his interest in accepting the role and suggested that TP, as the studio, get together with his agent, Slim Pickens, to finalize the terms of employment. Mr. Leonardo’s exact words to the TP contact person were, “I am confident that my agent and your casting agent can wrap this deal up quickly. Let’s get them to work. Let’s get it done. We will have a contract in no-time-flat.” To which the TP contact person responded, “I am glad we are going to reach agreement quickly and easily because TP must finish this film on a very tight schedule.”

TP immediately informed the director, designer, stage manager that Cappy Leonardo was the “man” and told them to get to work. TP was on a tight schedule to complete the film in time for a summer 2009 release. The director, designer, and stage manager hired additional people and began assembling the needed production items. Everyone began working earnestly. Within days, TP had incurred $150,000 in expenses to make “The Man in the Woods” with Cappy Leonardo.

TP also had its casting agent, Jerrilynn Famous, promptly contact Slim Pickens, as Leonardo’s agent, to finalize the terms of employment. As Ms. Famous and Mr. Pickens spoke, Slim Pickens began to have second thoughts about the project for the following reasons:

• Ms. Famous said that the script writer had been instructed to change the play so that the “man” in the Woods was chased by a bear. As Ms. Famous put it, “Bears are big for kids going to horror movies in the summer. We have the best trained bear in the world for the role. Absolutely dreadfully ferocious. The bear will be the star of the movie.”

• Ms. Famous also said that the “man” would be mauled and killed as the climax to the movie. She said that TP felt that this would give the movie a kind of “cult classic status” like the “Rocky Horror Show.” Slim Pickens responded, “Mr. Leonardo is reluctant to be cast once again in a role that has his character die. Mr. Leonardo feels that he has died enough in the movies.”

When Slim Pickens reported to Cappy Leonardo what Ms. Famous had told him about the movie, Cappy Leonardo changed his mind about the movie proposal. Mr. Leonardo told Pickens, “My experience in 2006 with TP was not a pleasant one. I think this project, as now described, will be even worse. I don’t want to work on a project that is likely to be an unpleasant experience and a disagreeable working environment. I don’t trust these TP guys anymore.”

Mr. Leonardo also said to Pickens, “I had orally agreed with the Long Beach Playhouse
to star for three months as the narrator in the stage version of the play ‘Our Town.’ I think I will keep that oral commitment and sign a contract with them. Being the lead in a stage play at the Long Beach Playhouse better advances my image and career. Go back to Ms. Famous and tell her that, after checking my commitments carefully, I am not available to make the TP movie.”

Slim Pickens reported to Ms. Famous that Mr. Leonardo would not be able to be the “man” in “The Man in the Woods.” Ms. Famous responded angrily, “TP has already spent a lot of money on this movie. If Mr. Leonardo backs out on the movie, the project will collapse. Well, thank goodness our loss will not be even worse because TP will not have to pay Mr. Leonardo his “pay or play” fee for 2007.”

Several days later, after Slim Pickens and Cappy Leonardo had discussed the above events, they come to you with two questions:

1) Is Mr. Leonardo contractually bound to TP to appear in “The Man in the Woods” movie? What issues?

2) If Mr. Leonard does not appear in “The Man in the Woods”, is Mr. Leonardo entitled to his $200,000 payment for 2007 from TP? What issues?
Question 3. 85 minutes

[NOTE: Consider the following variation on the facts in Question 2. As you consider this variation, focus on new issues raised by the variation. You may also discuss here issues that you discussed in Question 2 if there is a new facet or new application of the issue. You should not repeat in your Question 3 answer, however, discussions properly raised in Question 2.]

The TP contact person and Cappy Leonardo first spoke in August 2007 about the role of the “man” in “The Man in the Woods.” The TP contact person informed Mr. Leonardo that TP wanted a quick decision from him because TP would be on a tight production schedule to complete the film promptly. Leonardo replied by stating, “I accept the role. I have admired the play since I read it in a college literature class. I am certain that the tight production schedule is not a problem.”

Cappy Leonardo did not inform the TP contact person that he was just about to sign a contract with the Long Beach Playhouse to be the lead in the play “Our Town.” Leonardo signed the contract with Long Beach Playhouse with performances to run from September 15 through November 30.

TP immediately informed the director, designer, stage manager that Cappy Leonardo was the “man” and told them to get to work. TP was on a tight schedule to complete the film in time for a summer 2009 release. The director, designer, and stage manager hired additional people and began assembling the needed production items. Everyone began working earnestly because everyone in the industry knows that it takes about two years from filming to release to theaters for audiences. Within days, TP had incurred $150,000 in expenses to make “The Man in the Woods” with Cappy Leonardo. TP also sent a check for $200,000 to Cappy Leonardo as partial payment for his services as the leading man in the film.

In September the TP casting agent, Jerrilynn Famous, contacted Slim Pickens, as agent for Mr. Leonardo, to have Mr. Leonardo sign the employment contract for the specific project of “The Man in the Woods.” The terms of employment for the 2007 film were identical to the terms that Mr. Leonardo had accepted for the 2006 film under his “play or pay” contract.

Mr. Pickens informed Ms. Famous that Mr. Leonardo would be delighted to sign the employment contract and begin work on December 1, as his commitment to Long Beach Playhouse ended November 30. Ms. Famous was surprised that production could not begin before December 1. She insisted that production must begin by October 15. Slim Pickens retorted, “That is the first I have heard of that production schedule.”

On October 1, the TP contact person wrote Slim Pickens as follows:
“TP had a tight production schedule for “The Man in the Woods.” TP must begin by October 15 in order
• to complete the film in accordance with the schedule of film releases in its 2007 business plan that TP has given to investors; and
• to avoid costs incurred from production delays that would occur if production did not begin until December 1.

“As Mr. Leonardo is not available as needed, the deal is off. TP has contracted with another actor to be the “man” in “The Man in the Woods.”

Several weeks later, Turner Productions (TP) filed a lawsuit against Cappy Leonardo alleging breach of contract on “The Man in the Woods” project. Cappy Leonardo is outraged. He believes that TP is in breach, not him.

Write a memo to Cappy Leonardo advising him about the issues relating to relationship he has with Turner Productions (TP).
1) Please type the answer to Question 1 below. (Essay)

Question 1

Does Tina have an enforceable contract against PEA for the $200 travel voucher?

Tina probably has an enforceable contract against PEA. The first element of a contract is an offer. In this case, PEA's announcement that it would offer a travel voucher to the first three passengers who volunteer to give up their seat was an advertisement of sorts. An advertisement would generally not constitute an offer, but in this case the announcement was specific in that it would only aware the travel voucher to the "first three passengers" that volunteered their seats. An offer is a 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. 24). PEA's announcement clearly indicated that a person's assent, if the person was one of the first three people, was invited and would conclude the deal.

The second element of a contract is an acceptance. In this case, Tina clearly manifested her assent to the terms of the offer, even using the express words "I accept". There will likely be no argument that Tina accepted the offer.

The third element of a contract is consideration. Consideration requires a bargained for exchange. In this case, Tina gave up her seat on Flight 333, which was not legally required of her and was thus a detriment. In exchange, the airline offered Tina a seat on another flight and a $200 travel voucher and received Tina's seat on Flight 333, a benefit to the airline. There was clearly consideration for the contract.

The contract was oral and does not fall within the Statute of Frauds because it is not for goods over $500 as required by the UCC and does not meet any of the requirements of Rest. 110. The contract can clearly be performed within one year. As such, no writing is required.

When Tina exchanged her ticket, the flight attendant said that she would reissue the new ticket and give Tina the travel voucher after Flight 333 left. The statement of "after Flight 333" appears to be a condition, however the condition was added after Tina's acceptance. This would be an oral modification of the contract. Such a modification generally requires consideration. In this case, no new consideration was given for the modification. The airline had already promised to give Tina a travel voucher and new ticket and Tina had already promised to give up her seat on Flight 333. However, under the restatement, a modification without consideration is allowed under Rest. 89 if it is fair and equitable in view of the circumstances not anticipated by the parties or to the extent that justice requires enforcement of the modification in view of a material change in reliance on the promise. A court would need to determine whether the adding of a condition that Flight 333 leaves is fair and equitable in view of all the circumstances not anticipated by the parties. This doesn't seem likely because at the time the contract was made, PEA, as an airline, should have been aware of the possibility that Flight 333 would not take off for any number of reasons. Although Tina relied on the promise, it doesn't appear that made a material change in position that would justly require enforcement of the modification. Thus, it does not appear that either element (a) or (c) of Rest. 89 is met (clearly [b] is not met because there is no statutory requirement) and the modification will likely not be allowed.

Given that offer, acceptance and consideration all seem to be clear and there was no formal requirement of writing which has not been satisfied, it is likely that Tina has an enforceable contract against PEA. The only element that seems to be problematic for Tina is the
oral modification, and it appears, as discussed above, that she will prevail.

What are the possible defenses of PEA?

PEA could argue frustration of purpose or impracticability.

Frustration of purpose allows a party to discharge his remaining duties under a contract when a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, unless the circumstances indicate otherwise (Rest. 265). PEA made its offer for the purpose of moving passengers from overbooked Flight 333 to another flight. This purpose was substantially frustrated when Flight 333 was cancelled completely. Clearly, it was no longer overbooked and all passengers had to be moved to other flights. However, this argument will likely not prevail. PEA was the least cost avoider in this situation in that it could have stated that the offer was subject to Flight 333 taking off at the time the offer was made rather than attempting to add such a condition after the offer had been accepted. As an airline, PEA should anticipate that flights may be cancelled and account for such in the making of its offers to passengers. When taking into account these circumstances, it is unlikely that a defense of frustration of purpose will prevail.

Impracticability allows a party's duty to render performance to be discharged when it is made impracticable without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, unless the circumstances indicate otherwise (Rest. 261, emphasis added). In this case, this argument will likely fail. The fact that Flight 333 did not take off appears to be the fault of PEA (evidenced by the mechanical failure). Even if it is determined that the mechanical failure was not PEA's fault, as discussed above, PEA was the least cost avoider and could have easily adjusted its offer to account for the possibility that Flight 333 would not take off. Given these circumstances, the defense of impracticability will likely fail.

PEA's best hope of prevailing would be for the oral modification to be allowed. In the event that it was allowed, the airline's duty to provide Tina with a new ticket and travel voucher was expressly conditioned on the occurrence of the event (Flight 333 taking off). Under Rest. 225, the non-occurrence of the condition would mean that performance of the airlines duty never becomes due unless the condition occurs or is excused. In this case, the circumstances clearly show the condition did not occur and it appears that the condition was not excused. However, even if PEA's oral modification was allowed, Tina could look to part (3) of Rest. 225 states that a non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur. Tina could argue that Flight 333 taking off was a duty of the airline and that because the condition was the airline's duty and did not occur, the airline is in breach.

What are the possible defenses of Tina?

Tina could argue duress and possibly undue influence. She could also argue that she was intoxicated.

Duress requires an improper threat by the defendant, no reasonable alternative available to the plaintiff, and that the defendant took advantage of the situation. If a party's assent is induced by duress, the contract is voidable by the victim (Rest. 175). Factors to determine whether a threat is improper are listed in Rest. 176. In this case, the agent's actions appear to be a breach of the duty of good faith and fair dealing required by Rest. 176. Beyond that factor, the agent's actions do not appear to satisfy any other element of 176. Thus, it is questionable if the
agent's actions will be determined to be an improper threat. Additionally, it could be argued that Tina had reasonable alternatives (i.e. finding another flight, bus, train). Tina would argue that it was late in the day and the chances of finding alternative means of transportation at that point were slim, however, she may not win on this argument because the airline did offer to give her a complete refund if she was not happy with their decision. Lastly, the defendant must have taken advantage of the situation. In this case, PEA took advantage of the fact that Tina needed another way home. While the last element of duress seems to be clearly satisfied, the first two elements, and particularly the second, will probably not be satisfied. Accordingly, Tina's defense of duress would likely not prevail.

Tina could make an argument for undue influence but this argument would be incredibly weak. Undue influence is an unfair persuasion of a party who is under the domination of the person exercising the persuasion (Rest. 177). If assent is induced by such influence, the contract is voidable by the victim. Undue influence is premised on the idea of a relationship between the parties and generally applies to circumstances where the trusted party exerts an influence on the weaker party that approaches the bounds of coercion. It can generally only be applied when there is a particularly weakness of spirit or susceptibility of the victim. In this case, Tina may have had a weakness of spirit (depression from law school exams) but there was no relationship of trust between Tina and the airline. Additionally, the airline had no reason to know of Tina's susceptibility given the circumstances. Accordingly, undue influence would likely fail as a defense.

Tina's strongest argument would be the fact that she was intoxicated. Under Rest. 16, a person's duties under a contract are voidable if the person is intoxicated and the other party knows or has reason to know of the intoxication AND the party is unable to reasonably understand the nature and consequences of his consequences (cognitive test) or he is unable to act in a reasonable manner in relation to the transaction (volitional test). In these circumstances, the PEA agent clearly knew Tina was intoxicated, evidenced by her statement "you're drunk". To win on this argument, Tina would need to prove that she was unable to reasonably understand the nature and consequences of her actions or that she was unable to act in a reasonable manner. The facts are insufficient to conclude whether Tina would be able to prove this or not.

Tina would also need to defend against PEA's attempts to admit the oral modification. If the modification was admitted, Tina could defend using part (3) of Rest. 225 as discussed above. Because the agreement was oral, Tina would not be able to prevent the admission of evidence about the oral modification on the grounds of the parol evidence rule.
1) Please type the answer to Question 1 below. (Essay)

Question 1

The first issue that must be addressed is whether Tina had an enforceable contract with PEA for the travel voucher. This question does not fall within the UCC as it is not likely that a plane ticket will be considered a good. In determining whether Tina has an enforceable contract with PEA it must be decided whether the agreement for the $200 voucher was a new agreement between the parties or whether it was a modification of an existing agreement. If it was a new agreement between the parties we must first determine whether there was a sufficient offer, according to Res (2d) 24, to indicate that either party manifested a willingness to enter into a bargain, that would justify the other party in believing that their acceptance was invited and would conclude it. There are two possible events which could be viewed as offers in this case. The first is when the gate attendant made the announcement over the loud speaker. PEA might argue that this was not an offer, but rather an advertisement, because it was open to anyone who was on the flight and was not specific to Tina. Generally ads are not viewed as offers because they merely manifest a willingness to accept offers, rather than indicating the requisite manifestation of assent to enter into a bargain. However, in this announcement the agent said that "PEA is offering" the voucher. This would likely lead a reasonable person to believe that PEA was actually offering the voucher, rather than expressing a willingness to take offers for it.

If the announcement was considered the offer then Tina's acceptance would be when she went to the counter and said, 'I accept your offer.' This would display on her part the reciprocal manifestation of assent invited by PEA's offer, as described in Res 50. However, if PEA's announcement was not the offer, then when Tina went to the counter she extended an offer by indicating her willingness to enter into the bargain, with the gate attendant rightfully determining that his acceptance would conclude the manner.

In either case a court would likely determine that at this point there was a sufficient manifestation of assent by both parties, with sufficient certainty as to the terms to conclude that there was a contract formed.

In addition, there was suitable consideration, a bargained for promise for a promise. Consideration as described in Res 71 indicates that the promises should be bargained for, which is seen by Tina promising to take a seat on a later flight in return for PEA giving her a voucher for $200. This would likely also satisfy the traditional benefit detriment test, as Tina is foregoing her right to a seat on Flight 333, which could be seen as a detriment.

As stated earlier, it could be argued that under Res 89 the agreement for the voucher could also be seen as a modification of an existing contract between the parties. Tina already had a ticket to fly on Flight 333, and by agreeing to accept the $200 voucher, which would be sufficient consideration to support a modification, she would be modifying PEA's duty under a contract not fully performed. This would be a binding modification because the modification would likely be viewed as fair by a reasonable person and there was sufficient consideration as required for a modification of an contract under common law.
As this point it would likely be determined that wether by bargained for exchange or by modification of an existing agreement Tina and PEA have a contract for the $200 travel voucher, and Tina would likely have a via claim for damages of some sort.

The issue now turns to what possible responses and defenses PEA might have if Tina were to bring such a law suit. Their first argument would likely turn on an implied condition in the agreement for the voucher. When Tina bargained for/accepted the voucher the gate attendant advised her that 'she would re-issue her a new ticket for the 11pm flight after flight 333 left.' PEA would likely argue that this indicated that the leaving of the Flight 333 was a condition upon which the issuing of the voucher was based. This is emphasized when the agent later told Tina that 'travel vouchers are only issued if the flight actually takes off and we need the seats.' PEA would then argue that because the condition that Flight 333 take off never occurred, their duty to issue the voucher never came due, as perscribed under Res 225(1).

PEA might also argue that due to fact that they never needed the three extra seats, because Flight 333 never took off, the purpose for the contract was impracticable, therefore they should not have to perform. They would argue that the taking off of Flight 333 was a basic assumption of the contract, the non-occurance of which caused the agreement for the voucher to be irrelevant.

PEA would likely argue as well that Tina's exchange with the gate attendant after the announcement that Flight 333 was cancelled would amount to a modification of the voucher agreement. They would likely claim that by her accepting the 11pm ticket, and going to sit down, without raising the issue of the voucher again, she in effect waived any rights she had to the voucher.

In light of these possible defenses by PEA, it would also be necessary to determine what possible responses Tina might have. The first would be regarding the condition PEA possibly placed on the agreement that Flight 333 take off. Tina could make two possible arguements in response to PEA's claim. The first is that the condition was never viable as it was never expressly agreed upon by the parties, and therefore it wasn't a satisfactory condition as described in Res 226. She could also argue that PEA never disclosed the condition to her. She could argue that due to a possible relationship of trust between her and PEA, due to the fact that they are a common carrier, she was entitled to know of the condition, as described under Res 161(d). However, this argument would likely fail because a reasonable person would view Tina and PEA as bargaining at arms length, meaning that PEA did not owe her a duty of trust and honesty due to a special relationship. Tina's stronger argument for non-disclosure would be that under Res 161(b) and Res 205 PEA failed to act in good faith by failing to properly inform her of the requirement that PEA was to take off. Such an argument may be viewed favorably by a court.

Tina would then argue that any potential modification for the voucher agreement was invalid for three reasons. The first is that there was not sufficient consideration. There was no new bargained for exchange between the parties, and any preexisting duty that PEA had, issuing a ticket, was not sufficient to satisfy this requirement of modification. In addition she might argue that due to the fact she had been drinking and that the gate attendent knew that she had been drinking the modification should be voidable by her under Res 16. However, he strongest argument on this point would likley be that the modification was entered into under duress. As a
result of the angry manner in which the attendant spoke to her, and the fact that the conversation was broadcast over the intercom, leaving her embarrassed and intimidated, accompanied by the wrongful threat that she could find alternate transportation, resulting in her having no other viable option than to accept the ticket for 11pm. Thus the modification should be voidable by her under Res 175.

Question #1 Final Word Count = 1281
Question #1 Final Character Count = 7521
Question #1 Final Character Count (No Spaces, No Returns) = 6156
Question 1

The first issue that prevents itself to Tina’s claim is whether an offer was made by the gate agent of PEA when she announced the travel voucher over the PA system. Restmt § 24 states that an offer is a manifestation of willingness to enter into a bargain, so made as to justify another in understanding that his assent to that bargain is invited and will conclude it. In this instance, PEA’s announcement would most likely constitute an offer because the gate agent specifically stated they were ‘offering a $200 voucher redeemable for travel on any PEA flight to the first 3 passengers who volunteer to give up their seat.’ PEA would most likely try to defend this position by claiming that the announcement was merely an advertisement which invited offers from possible passengers. However, this claim will likely fail because even if it is construed as an advertisement it would likely be enforceable as an offer because it specifically states the terms and identifies the person to whom the offer can be accepted by in this case, the item offered is a $200 travel voucher and the persons who may accept are the ‘first 3 passengers who volunteer their seat.’

The next issue that Tina must determine to indicate an enforceable contract for the $200 voucher is that there was an acceptance by her. Restmt § 50 states that an acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. The answer to this issue hinges on the understanding the parties to the exchange had about the manifestations. In this instance it seems that the PEA attendant and Tina have different meaning over when a travel voucher may actually be issued. Restmt § 20 states that there is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to the manifestations and (a) neither party knows or has reason to know the meaning attached by the other. In this case, PEA could argue that they had no reason to know that Tina ascribed a separate meaning to when a travel voucher would be issued and assumed that it was common knowledge that vouchers are only issued for flights that take off and of which seats are needed. Thus, Tina’s apparent interpretation that she was entitled to the voucher regardless upon acceptance was null and void. The waiver, Tina could claim per § 50(2)(a) that the manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party. Tina could claim that her meaning of when the voucher could be issued should control the exchange because she did not have knowledge of PEA’s voucher policy, and that PEA most likely knows that passengers, i.e., Tina, believe that when they accept a voucher it is issued immediately.

If the court determines that Tina’s meaning should govern then her acceptance per § 50 was valid when she went to the attendant and said ‘I accept’ and returned her ticker. An acceptance may be given by a return promise or performance and in this instance, Tina gave a return promise when she said she accepted and returned her ticket for flight 333.

Tina must next determine whether or not she gave valid consideration for the PEA’s promise. Restmt § 71 states that to be consideration a return promise must be bargained for and is so § 71(2) if it is sought for by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. In this case, Tina as the promisee might argue that her return promise to give up her seat was bargained for by PEA the promisor in exchange for their
promise of the voucher. Under this argument, Tina can most likely prove valid consideration.

The court will most likely rule that PEA’s announcement constituted an offer which Tina accepted with her return promise to give up her seat. The court will also most likely consider Tina’s return promise adequate consideration because it was bargained for by PEA. Under these facts, Tina will show evidence of a bilateral contract.

The next issue is whether PEA breached the bilateral contract by failing to perform when the gate agent refused Tina her voucher. Restmt § 235 states that when performance of a duty under a contract is due any nonperformance is a breach. Tina will most likely claim that PEA breached its duty of performance, which was giving her the travel voucher, when the gate agent told her that ‘since flight 333 was cancelled, you do not get the voucher.’

However, PEA will most likely raise the defense that the contract was voidable for incapacity because Tina was intoxicated. However, this will fail because only the person who is in fact intoxicated has the voidable rights, and in this case it would be Tina.

PEA could also make an argument that a new offer and acceptance was entered into upon the gate agent and Tina’s second communication exchange, effectively cancelling the original contract. PEA would show an offer was made when the gate agent rescheduled Tina’s ticket for the 11 p.m. flight and Tina accepted by taking the new ticket and learning on the flight Restmt § 22 states that manifestation of assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined. Thus, though Tina and the agent’s offer and acceptance was not clear cut as evidence only by action, the manifestation of assent could have occurred.

Tina’s major defense to this new contact would be duress in that the PEA agent made an improper threat when he/she told Tina that ‘if you don’t like it, I will refund your purchase price and you can go look for another flight.’ Under Restmt § 175(1) if a party’s manifestation of assent is induced by an improper threat by the other party that leaves no reasonable alternative, the contract is voidable by the victim. Tina would argue that the threat is improper per § 176(d) where the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient. She would claim that PEA’s threat is a breach of a duty of fair dealing between airline and passenger not to honor the passenger’s ticket where she has no reasonable alternative. As well, Tina would also have to show that she had no reasonable alternative which may be harder to prove.

In this instance, PEA could show that Tina had other options available by way of other flights, or, bus rides. However, Tina might be able to show that due to time constraints, as the fact scenario indicates her original flight was late afternoon and she waited past then to receive her late 11 p.m. flight ticket, that these ‘reasonable’ alternatives were no longer an option.

The court will most likely determine that Tina’s original contract for the $200 voucher was a valid bilateral contract supported by offer and acceptance and valid consideration. The court will most likely also determine that the ‘new’ contract PEA claims discharged the old one will not be valid because it was entered into under duress. Therefore, Tina will most likely have
an enforceable contact for the $200 voucher.
2) Please type the answer to Question 2 below. (Essay)

Question 2

Is Mr. Leonardo contractually bound to TP to appear in "The Man in the Woods" movie?

The first issue is whether Cappy entered into a contract with TP to appear in "The Man in the Woods". The main issue is whether or not Cappy accepted the offer (offer and consideration are clear from the facts; not discussed herein). When TP's agent contacted Cappy, Cappy stated that he was confident his agent and the casting agent could reach a deal quickly. This was not an express acceptance of the offer. His statement indicates that a written agreement was contemplated. Under Rest. 27, the fact that the parties intend to adopt a written memorial does not prevent a contract from being formed, but provides an exception for circumstances which show that the agreements are preliminary negotiations. Rest. 26 provides that preliminary negotiations mean that a person's 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 made a further manifestation of assent. Here, Cappy would argue that his statement that the parties "will have a contract" indicated that he was not accepting the offer, and thus the agreement was purely preliminary negotiations. Thus, he would argue that no contract was entered into because the agents of the parties failed to reach an agreement. TP would argue that Cappy accepted the offer and the parties' agents were simply memorializing the agreement already reached by Cappy and TP. To make this argument, TP could point to the prior course of dealing between Cappy and TP (the previous leading man contract) and Cappy's actions in accepting that offer. If they were similar to what was done here, TP's argument that Cappy's statements in the conversation constituted an acceptance would be bolstered.

If the court determined that Cappy accepted the offer and a contract existed, Cappy could try argue that the contract is unenforceable due to the Statute of Frauds. The Statute of Frauds clearly applies to the pay or play agreement because it cannot be performed within one year; however, the Statute of Frauds likely would not apply to the contract to perform in the movie. While the offer was made in 2007 and the movie will not be released until 2009, Cappy could perform within one year (i.e. the movie could very well be completed within a year), thus removing the contract from the Statute. If the court determined that contract could not be performed within one year and the Statute of Frauds did apply, the oral contract would be unenforceable. However, an exception to the Statute of Frauds exists for promissory estoppel, discussed below.

If the court determined that Cappy did not accept the offer and thus, no contract existed between Cappy and TP, TP would have a good argument for a claim of promissory estoppel. Promissory estoppel requires that a promise be made that the promissory should reasonably expects to induce action or forbearance on the part of the promisee, such action or forbearance is taken, and injustice can be avoided only by enforcement of the promise (Rest. 90). In this case, Cappy's expressions that the parties would quickly reach a contract will likely be determined to be a promise. TP's actions in expending $150,000 to begin work needed to film the movie on time are actions that Cappy could have reasonably foreseen and expected. Given that Cappy had worked as a leading man with TP before under the pay or play contract, Cappy can reasonably be expected to know that TP would likely take these actions. A court would need to determine that injustice could be avoided only by enforcement of the promise. Cappy could argue that another
leading man could just as easily be cast and TP would not be out any money. This argument is weak because TP is on a tight production schedule and casting a new leading man would take time, and it may well require additional costs be incurred by TP. It seems likely that TP could prevail on a claim for promissory estoppel.

The doctrine of promissory estoppel could also be used to avoid the Statute of Frauds by using Rest. 139. The elements are similar to promissory estoppel under Rest. 90, but 139 provides a list of factors to determine whether injustice can be avoided only by enforcing the promise. In this case, the most important factor would likely be the availability and adequacy of other remedies. TP had deals similar to what it had with Cappy with other leading man actors; accordingly, it is possible that they could employ one of those actors. As discussed above, this may not be a feasible option for TP. The court could also look at the reasonableness of the action or forbearance. This would likely hinge no the good faith duty of Cappy, discussed below.

The pay or play contract signed by Leonardo contained both a no oral modification clause (NOM) and a merger clause. The merger clause means that the court will likely find the agreement to be a completely integrated agreement. A completely integrated agreement is one that is adopted by the parties as a complete and exclusive statement of the terms of the agreement (Rest. 210(1)). The only extrinsic evidence allowed will be evidence which explains the meaning of the agreement. It is unlikely that a court will find the agreement to be partially integrated for several reasons. First, a merger clause was included. Second, the parties were experienced in handling this sort of contract, evidenced by Cappy's hiring of an agent to assist him. Third, the agreement was a standardized agreement for transaction of this type. Under Rest. 211, when a party signs an agreement and has reason to believe like writing are regularly used in similar transactions, he adopts the writing as an integrated agreement with respect to the terms included in the writing. In this case, Cappy asked his agent if the agreement was the usual pay or play agreement and was told it was. As such, Cappy had reason to believe the writing was regularly used and by signing, adopted the agreement as an integrated agreement. This means that he adopted the merger clause, making the agreement completely integrated.

Because the court will likely find that the agreement is completely integrated, the parol evidence rule only allows extrinsic evidence which explains the meaning of the agreement and excludes evidence which supplements or contradicts the terms of the agreement. Thus, the oral promises made by TP to Cappy that Cappy could always be involved in projects that advanced his image in a positive manner probably cannot be admitted. The only way it could be admitted was if it explained an express term of the contract. For example, if the contract stated that Cappy could always be involved in roles that suited his interests as an actor, the oral promise could probably be admitted to explain what was meant by that. Given the subjective nature of such a term, it is unlikely that is was included in the contract. Thus, the oral promises by TP will probably not be admitted because of the parol evidence rule.

The pay or play agreement, as a contract, imposed a duty of good faith and fair dealing on both parties pursuant to Rest. 205. Under the agreement, TP had to offer roles to Cappy in good faith and Cappy had a duty to accept unless he was unavailable. Cappy's unavailability must be in accordance with good faith and fair dealing. Under these facts, Cappy did not formally agree to star in "Our Town" until he had decided that he didn't want to do the movie with TP. It appears that he agreed to take the other part as a way out of his deal with TP. A court will likely look at this act on Cappy's part as a violation of the duty of good faith and fair dealing. Alternatively, a court could determine that Cappy had already agreed to "Our Town" (by his oral agreement) and thus his unavailability was in conformance with the standards of good faith and fair dealing.
If the court found there was a contract between Cappy and TP, Cappy could argue mistake, but would likely fail in this argument. A mistake is a belief that is not in accord with the facts and a mistake of one party make a contract voidable if it was made as to a basic assumption of the contract and has a material effect on the agreed exchange (Rest. 151, 153). Rest. 153 also requires that the contract is not voidable if the party does not bear the risk and the effect of the mistake means that enforcement of the contract would be unconscionable or the other party had reason to know of the mistake. In the circumstances, Cappy would probably lose on a claim of mistake. He could argue that he was mistaken as to the script, a basic assumption on which the contract was founded. However, under Rest. 154, a party bears the risk of mistake when his is aware that he has only limited knowledge with respect to the facts but treats his limited knowledge as sufficient. At the time of the conversation with TP's agent, Cappy knew that he didn't know the details of the script but did not inquire further into it, thus treating his knowledge as sufficient. Cappy was the least cost avoider in that he could have asked to see the script before agreeing to the role. All of this is arguable because the pay or play deal only gives Cappy a right to decline a role offered in good faith by TP if he is unavailable, not because he has creative differences.

If Leonardo does not appear in the movie, is TP contractually bound to pay him the $200,000 required by the pay or play deal?

This issue of good faith is the most relevant to whether or not Cappy will be paid his $200,000 for 2007. As discussed above, the duty of good faith and fair dealing is implied in every contract, so it is implied in the pay or play deal. Good faith is defined as honesty in fact with regard to the transaction under the UCC. While the UCC does not apply to this transaction because it is not for goods, the definition is in line with that of common law.

It appears the studio offered Cappy the role in good faith. It had no reason to believe he would not be happy with a role in which a bear chased him or he died.

The payment of $200,000 would hinge on whether or not Cappy declining the role comported with his required duties of good faith and fair dealing. Cappy could only decline a role if he was unavailable. This means that he must be genuinely unavailable to comport with the standards of good faith. A court would need to determine whether Cappy's unavailability was genuine. It appears from the facts that Cappy did not agree to take the role in "Our Town" until he had decided that he did not want to participate in TP's project. If this is true, the court may find that he violated the duty of good faith and fair dealing and took the role in "Our Town" as a way out of TP's project. However, if Cappy can prove that he had intended all along to accept the role in "Our Town" or that he had accepted it before he turned down the role in TP's project, the court would likely find that he had complied with the requirement of good faith and fair dealing. This will be difficult to prove because it is subjective.

If Cappy is found to have complied with the standards of good faith and fair dealing, TP will be contractually bound to pay him the $200,000, but if he is not in compliance, then he is in breach of the contract and TP is not required to pay him the $200,000.
2) Please type the answer to Question 2 below. (Essay)

Question 2

1) Is Mr. Leo contractually bound to appear in the movie?

Was there a valid contract between Leo and TP that consists of an offer, acceptance, and consideration?

The formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration. 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. When TP called Leo about the role of the "man" in the movie, they made him a valid offer to play the man. An acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. When offered the part of the man in the movie, Leo expressed his interest in accepting the role and said to the studio to get with his agent to finalize the terms of the agreement. Leo's exact words were "I am confident that my agent and your casting agent can wrap this deal up quickly... We will have a contract in no-time-flat." Based on his response, it is doubtful that Leo made an actual acceptance of TP's offer. A 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 made a further manifestation of assent. Leo could argue that by his words, he did not manifest to enter into the agreement with TP, and his words were merely preliminary negotiations. By saying, "We will have a contract in no-time-flat," Leo was indicating that in the future, they would come to an agreement, but for the time being, his manifestation of assent was merely preliminary negotiations. Based on the parties' conduct, Leo has not legally bound himself to appear in the movie.

Could Leo argue that TP's breach of its pay-or-play agreement excuse his obligations?

It is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time. Under their POP agreement, the studio executives promised that they would give him roles that let him carry the movie as well as only placing him in projects that allowed him to advance his image in a positive manner and grow as an actor. Leo could argue that because the Man in the Woods movie they offered him did not let him carry the movie and did not let him advance his career, TP has committed a material breach that would discharge Leo of any duties to appear in the movies. However, whether Leo's duties are discharged or not depend on whether TP's alleged breach was material.

In determining whether a failure to render or to offer performance is material, it is significant to consider the extent to which the injured party will be deprived of the benefit which he reasonably expected, the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances and the extent to which the party failing to perform will suffer forfeiture. Leo would argue that under the facts, TP committed a material breach by not offering him movies that would advance his career and instead, only offered him movies where he would get chased and killed by bears. Leo
will argue that he would suffer forfeiture because of their breach because if they offer him movies that advance his career and he declines to be in the movies, he forfeits the $200,000 payment under the agreement.

TP, of course, will argue that it has not breached the terms of the contract. A breach by non-performance gives rise to a claim for total breach only if it so substantially impairs the value of the contract to the injured party that at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance. TP could argue that even if it did breach the agreement by not offering Leo the roles he wanted to advance his career, it is a partial, and not total, breach of their agreement because it does not substantially impair the value of the contract. TP could offer him leading roles after the Man in the Woods movie as well as into the next year, therefore, the value of the contract was not substantially impaired to either party and it was not a material breach that calls for discharging duties of either parties.

**Could TP argue that Leo should have to be in the movie under the doctrine of promissory estoppel?**

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding is injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. After the conversation with Leo in which he expressed interest in the movie and told TP to get in touch with his agent and that "we will have a contract in no time flat," TP told its employees that Leo was the "man." TP then incurred $150,000 in expenses to make the movie with Leo. TP could claim that Leo made a promise that he should have reasonably expected them to rely on, and they did in fact rely on that promise to their detriment by incurring expenses, Leo should star in the movie.

However, Leo would argue that he never made a promise to TP, he merely expressed an interest in the movie and expressly said to TP, "I am confident that my agent and your casting agent can wrap this deal up quickly... we will have a contract in no time flat." Because of this statement, Leo could argue that he did not reasonably expect the studio to rely on his promise and that a reasonable person would not have relied on what he said to their detriment. Additionally, Leo could argue that enforcement of the promise is not the only way to avoid enforcement. While it is unclear from the facts, it does not expressly state that Leo is the only person who can play the man in the movie. I would have to find out more details about the movie from the studio, but it is a reasonable assumption to think that the man could be played by individuals other than Leo, and that enforcing the agreement between Leo and the studio is not the only way to avoid injustice because they could cast someone else in the movie and not lose the money they had spent assembling the production items.

2) **If he does not appear in the movie, is he entitled to his $200,000 payment from TP?**

Under the original "pay or play" agreement between Leo and TP, he has agreed to accept any offer from TP to be a leading man unless he was "unavailable" by being committed to other acting project. If Leo refused a leading role offered by them when available, he forfeits his payment. TP will argue that it has made an offer of a leading role to Leo, and that because he refused the offer even though he was available, he has breached the pay or play agreement and...
Interpretation of "leading man"

Whether TP has to pay Leo his $200,000 payment or not depends on the parties interpretation of "leading role." Where the parties have attached the same meaning to a promise or agreement or a term thereof; it is interpreted in accordance with that meaning. Where the parties have attached different meanings to a promise or agreement, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

In their pay or play agreement, the parties did not define the term "leading role," and it possible that the parties have attached different meanings. TP will probably argue that leading man means the primary person in the movie that has the most lines and is featured the most. TP could assert that because the part they offered to LEO was the primary character, he has refused the leading role they offered him and he is not entitled to the payment under their pay or play agreement. However, Leo could argue that the part they offered him was not the leading role and therefore, he has not broken the pay or play agreement. During Leo's agent's conversation with Ms. Famous, TP's casting agent, she had stated that they are going to have a bear chase Leo in the woods during the movie and that "The bear will be the star of the movie." Because of this sentence, Leo could argue that the leading role was not offered to him. Rather, the leading was offered to the bear and that in refusing the role offered to him, he has not broken his pay or play agreement.

Although the definition of "leading man" does not appear in the pay or play agreement, TP and Leo could have discussed a definition of leading man before they each signed the formal agreement, but the meaning of leading man may be barred by the parol evidence rule. A binding completely integrated agreement discharges prior agreements to the extent that it is inconsistent with them. An integrated agreement is a writing or writings constituting a final expression of one of more terms of an agreement. Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression. The pay or play agreement between the parties had a clause that stated "No verbal agreement either before or after the execution of this contract shall affect or modify any of the terms of obligations herein contained. This contract shall be conclusively considered as containing and expressing all of the terms and conditions agreed upon by the parties hereto." Although the clause in the agreement does not necessarily prove that the agreement is completely integrated, it lends very strong evidence that the document is indeed on its face completely integrated and any extrinsic evidence would be barred by the parol evidence rule.

However, even though the parties cannot bring any evidence in to contradict the terms of the agreement, the parol evidence rule does not prohibit oral evidence from explaining terms in the agreement. Because the parties included the term "leading man" in their agreement, they will not be prohibited from using oral evidence to define the meaning of "leading man" in court. It possible that either party could use the technical term used in the movie business to uphold their own interpretation of leading man in court. Unless a different intention is manifested, technical terms and words of art are given their technical meaning when used in a transaction within their
technical field. Whether the courts would uphold Leo's or TP's definition of leading man might depend on how the term is used in its technical sense in their trade. A usage of trade in the vocation or trade in which the parties are engaged or a usage of trade in which they know or have reason to know gives meaning to or supplements or qualifies their agreement. If it is found that the part that TP offered Leo is the leading part under standard trade practices, it is not liable to Leo for the $200,000. If however, it is found that the bear is actually the leading man, Leo is still entitled to the payment because he has not rejected a leading role under their pay or play agreement.
2) Please type the answer to Question 2 below. (Essay)

Question 2.

1. Is Mr. Leonardo contractually bound to TP to appear in "The Man in the Woods" movie?

Was there a contract for the movie?

This is slightly different than the offer and acceptance bargain-theory model because offer and acceptance are modified by the terms of the pay or play contract already existing between the parties. Under the traditional view, Section 24 of the Restatement defines an offer as a manifestation of willingness to enter into a bargain which would justify another to understand that assent to the bargain is invited and will conclude it. Apparently TP contacted Leonardo in 2007 for the role of the "man" in the movie. Mr. Leonardo responded that he was confident the agents could work out the deal and stated, "We will have a contract in no-time flat."

Section 26 of the restatement discusses preliminary negotiations as, "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 made a further manifestation of assent." Mr. Leonardo's actions at this point of negotiations fit well within the definition of preliminary negotiations. He explicitly stated there was no contract but expressed his expectation that one would be reached pending approval by the agent and himself. At this point the power of acceptance was still in the hands of Mr. Leonardo as there had been no counteroffer nor an acceptance.

The negotiations fell short of Mr. Leonardo's expectations so under traditional theory when Slim Pickens reported to Ms. Famous that Mr. Leonardo would not be the "man" this constituted a rejection.

Mr. Leonardo was required under the terms of the pay or play agreement to accept an offer for a leading role from TP unless committed to another project. It is possible that Mr. Leonardo's oral agreement with the Long Beach Playhouse was such a commitment under the pay or play agreement. However, Mr. Leonardo will have trouble claiming this because he admitted that he contemplated signing a contract based on the oral commitment. Additionally for the agreement to be relevant and binding there must have been some form of consideration. If the Playhouse paid Mr. Leonardo an advance or a booking fee of some sort this could be a commitment fulfilling the requirements of the pay or play contract. It is doubtful that Mr. Leonardo can discharge his obligations by claiming he had another commitment and he should not as he can more strongly argue that the role in "The Man" was not a leading role. This issue is better discussed in determining if he is still entitled to the $200,000.

Does the studio have a claim for promissory estoppel?

Clearly the studio is upset because they incurred massive costs of $150,000 in earnest expecting that Mr. Leonardo would play the role of "the man". Under Section 90 of the Restatement, "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Promissory estoppel can replace the requirement of consideration in offer and acceptance. Here the studio did commence action based upon the assumption that Mr. Leonardo would play
the role. However, Mr. Leonardo neither made a promise nor could have reasonably expected the studio to take the action. Mr. Leonardo was fortunately very clear that he was only in contemplation of a contract when the agents were sent into negotiations. It is likely that a
promissory estoppel claim by the studio will fail.

Because Mr. Leonardo's rejection of the offer was valid and the studio cannot reasonably pursue a promissory estoppel claim, Mr. Leonardo will likely be free of any contractual obligation for the movie, "The Man in the Woods." He is, however, still bound by the terms of the pay or play contract. Furthermore, the costs incurred in the production expenses will likely not be lost. It is doubtful that many of these expenses were in anticipation of Mr. Leonardo's presence. The studio is the least cost avoider in this case. They can simply replace Mr. Leonardo with another actor and continue production.

2. Is Mr. Leonardo entitled to his $200,000 payment for 2007?

What if the role was not a "leading role" under the pay or play contract?

Additionally, Mr. Leonardo could claim that the studio breached a portion of their duty under the pay or play contract in making this offer. When Mr. Leonardo met with the studio executives in negotiating the pay or play contract, the studio representatives informed him that he would get roles which would let him carry the movie and advance his image in a positive manner. It appears that the offer for "The Man in the Woods" does not meet the representations made by the executives. Mr. Leonardo could claim that the studio breached these terms.

However, the pay or play contract has an explicit clause saying no verbal agreement modifies the terms, and also has an integrated agreement clause. This subjects the document to the parol evidence rule. Section 213 of the Restatement explains the parol evidence rule, 213(2) applies best here, "A binding completely integrated agreement discharges prior agreements to the extent they are within its scope." Also Section 214 prevents using testimony regarding other agreements or outside oral evidence unless in regards to the integration of the document, to clarify ambiguous terms as to the meaning of the document, fraud, or grounds for remedies. Section 214(c) is most beneficial to Mr. Leonardo. Even though the pay or play contract has the clause to invoke the parol evidence rule, the term "Leading role" is undefined in the pay or play contract. Since the pay or play contract required Mr. Leonardo to accept leading roles when available or forfeit his $200,000 payment, definition of leading role is necessary and could be shown by parol evidence.

To do this, the judge would make a determination of whether the parol evidence is valid in clarifying the ambiguous term of "leading role." The executives statements tend to show that a leading role is one in which Mr. Leonardo would carry the movie and would advance his image in a positive manner. Ms. Famous' statements imply the role in "The Man in the woods" would be one where the bear would be the star of the movie with Mr. Leonardo in a secondary role. Furthermore, Ms. Famous' explanation that Mr. Leonardo would die would hardly advance his image in a positive way. In most blockbuster films the hero of the movie survives.

This parol evidence would be relevant because if the offer did not meet the requirements of the term "leading role" in the pay or play contract, then it does not matter if Mr. Leonardo was committed or not, because the $200,000 would not be forfeited because the offer by the studio was insufficient.

Mr. Leonardo has a strong case that this was not a leading role and will likely be entitled to his $200,000 payment. This is a stronger argument than one claiming his rejection was valid by prior commitment because he had no consideration for his commitment to the Playhouse.
Additionally, if he argues the prior commitment route he is admitting that the studio offer was a leading role, which would eliminate this argument. Mr. Leonardo has a strong case that the studio did not share in his good faith negotiations and that this offer was for a lesser role than a leading one and therefore not covered by the clause in the pay or play contract.

Question #2 Final Word Count = 1295
Question #2 Final Character Count = 7699
Question #2 Final Character Count (No Spaces, No Returns) = 6331
3) Please type the answer to Question 3 below. (Essay)

Question 3

A contract exists for Cappy's participation in TP's project because offer, acceptance and consideration are all present. This issue is: who is in breach of the contract?

TP can first point to the fact that, when the role was offered to Cappy with a statement that TP was on a tight production schedule, Cappy did not disclose that he was about to sign a contract to perform in another project that ran through November 30. Rest. 161 provides that non-disclosure of a fact known to a party is equivalent to an assertion that the fact does not exist where the party knows that disclosure is necessary to prevent a previous assertion from being a misrepresentation or from being fraudulent or material or where the party knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which the party is making the contract and non-disclosure amounts to a failure to act in good faith. Cappy could reasonably infer from the conversation with TP's agent that the production was on a tight schedule. Because TP needed an answer immediately, it is also fairly clear that work was intended to begin quickly. If Cappy had disclosed that he was unable to begin work until after November 30, he could have corrected TP's mistake as to a basic assumption of the contract, that the work would begin immediately. Additionally, disclosure by Cappy would have prevented his previous statement that he didn't think the tight production schedule would be a problem from being a misrepresentation. It is likely that a court would find Cappy's failure to inform TP of his acceptance of another project as equivalent to an assertion under Rest. 161. Further, Cappy was clearly the least cost avoider in this situation. By simply stating that he had accepted another offer and providing those dates or by asking the date TP wanted production to start, the entire mess could have been avoided.

Cappy's non-disclosure coupled with his statement that he didn't think the production schedule would be a problem constitute a misrepresentation. A misrepresentation makes a contract voidable when assent is induced by a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying (Rest. 164). To determine if a mispresentation is fraudulent or material, one must look to Rest. 162. In this case, it may be difficult to prove Cappy's non-disclosure was fraudulent because he must intend his assertion to induce the party to manifest his assent. Cappy would need to prove that his non-disclosure was not intended to induce TP's assent to the deal. For a misrepresentation to be material, it must be likely to induce a reasonable person to manifest his assent, or the maker knows that it would be likely to induce the recipient to do so. Cappy's non-disclosure and misrepresentation is arguably material under this analysis. A reasonable person would probably manifest assent based on Cappy's statement that the tight production schedule wouldn't be a problem. Additionally, TP may be able to prove that Cappy knew his non-disclosure and/or mispresentation would induce them to enter into the agreement. If the court determines that the misrepresentation is material, TP may void the contract and all performances due and owing by TP would be dismissed.

If the court determines that there was no misrepresentation or that the misrepresentation was not material or fraudulent, then TP still has a duty to perform under the contract, as does Cappy. In this event, the parties apparently assigned different meanings to the phrase "tight production schedule". An interpretation of what was meant by this phrase would be needed. If Cappy knew or had reason to know that the phrase meant production was to start immediately, then it is interpreted in accordance with that meaning if TP did not know or had no reason to
know what Cappy meant (Rest. 201). In that event, the phrase means that production is to start immediately and Cappy is deemed to have assented to that meaning. Rest. 203 could also be employed to determine what was meant by the phrase. The following can be examined in this case in this order of preference: express terms, course of dealing, usage of trade. The express term of the agreement which was reduced to writing would control. Then, the court could look at the course of dealing between the parties, meaning the conduct of how the previous similar contract was performed or interpreted. The court could then look at usage of trade, meaning look at the reasonable meaning given to the term by others in the trade or industry.

TP will argue that Cappy, through his agent, repudiated the contract when he stated that he had not previously heard of the production schedule. The problem with this argument is the application of Rest. 250, under which a repudiation is a statement indicating that the obligor will commit a breach that would itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach. Pickens' statement that he didn't know about the production schedule does not meet the requirements of a repudiation. It was not a clear statement that Cappy would commit a breach nor did it render Cappy unable or apparently unable to perform. TP will argue that by stating that Cappy would begin work on December 1 because of his commitment to Long Beach Playhouse, Pickens' made a statement that indicated Cappy would commit a breach. This argument will probably fail because the statement is not clear enough to constitute a repudiation; Pickens' never said that Cappy wouldn't perform. In the unlikely event the court found that Cappy repudiated the contract, then TP's letter to Pickens would merely be a confirmation.

If the court determined that Cappy repudiated the contract and was thus in breach, the court would need to determine if a breach was material, by looking at the factors listed in Rest. 241. To determine if the remaining duties of the party not in breach can be discharged, the court would look at the factors in Rest. 242. If the breach was material, TP's remaining duties under the contract would likely be discharged, meaning it would not owe any further payments to Cappy. For a claim of total breach, TP would have to show that the breach so substantially impairs the value of the contract of the injured party at the time of the breach that it is just to allow him to recover damages based on all his remaining rights to performance. In this case, TP may be able to show that because Cappy's performance was the primary thrust of the contract, his non-performance so substantially impaired the value of the contract as to justify a claim for total breach.

If TP thought the statement by Pickens meant that Cappy could not or would not perform, it had several options available for anticipatory repudiation. It could have suspended performance, demanded assurance from Cappy that Cappy would perform as promised, or consider the contract cancelled. The most reasonable approach would have been to demand assurance from Cappy under Rest. 251. If TP demanded assurance, it could suspend performance (meaning withholding any further payments due to Cappy) if reasonable until Cappy provided assurance. It would likely be reasonable in this event to suspend performance because there is a reasonable chance Cappy will not be able to perform under the contract due to his commitment to "Our Town." If Cappy does not provide assurance within a reasonable time (not to exceed 30 days), TP can treat Cappy's failure as a repudiation and may discharge its own remaining duties under the contract. Considering the contract cancelled prior to requesting assurance is a risky move by TP. If they do so, they could be found to be in breach if it is found that Cappy did not repudiate the contract by his agent's statements. The less risky approach is to suspend performance and demand assurance.

In the likely event the court finds that Cappy did not repudiate the contract, then TP's
letter to Pickens repudiated the contract. In this event, Cappy’s duty to perform under the contract would be dismissed and under Rest. 243, Cappy would have a claim for total breach against TP because a breach by non-performance followed by a repudiation gives rise to a claim for damages for total breach. TP could retract the repudiation before Cappy materially changes position in reliance on it or indicates to TP that he considers the repudiation to be final (Rest. 256).
3) Please type the answer to Question 3 below. (Essay)

Question 3: Who is in breach of the agreement, Leo or TP?

Was there a valid contract between Leo and TP that consists of an offer, acceptance, and consideration?

The formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration. 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. When TP called Leo about the role of the "man" in the movie, they made him a valid offer to play the man. An acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offerer. When offered the movie, Leo said, "I accept the role." Because the parties mutually assented to the exchange and offered consideration (a promise for a promise) there is a legally binding contract between Leo (you) and the studio.

Did Leo (you) materially breach the agreement by agreeing to star in the play "Our Town in the Woods, he signed a contract with another company to star in Our Town through November 30. It is unclear from the facts whether or not the agreement entered into between Leo and TP required Leo to be available on October 15 to begin production on the movie. I would have to know more facts about the conversation in which TP offered the role to Leo and Leo accepted the role. If it indeed turns out that when Leo accepted the role, he agreed to be available on Oct 15, he has committed a breach of his agreement. If however, Leo made no commitment to be available starting Oct 15, he has not committed a breach of his agreement if it specified no start date. However, whether this breach releases TP of its duties in the agreement (to cast Leo as the man) would depend on whether or not Leo's breach was material.

Assuming that Leo did breach, is his breach a material one that is enough to release TP of its remaining obligations?

In determining whether a failure to render or to offer performance is material, it is significant to consider the extent to which the injured party will be deprived of the benefit which he reasonably expected, the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances and the extend to which he party failing to perform will suffer forfeiture. In determining the time after which a party's uncured material failure to render or to offer performance discharges the other party's remaining duties to render performance, it is important to take into account the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements and the extent to which the agreement provides for performance without delay. Whether or not TP made known to Leo that immediately performance of the agreement is of the essence would determine whether Leo's breach was a
material one. It is unclear from the facts, so I would have to ask Leo about his conversation with TP and inquire as to whether or not immediate performance was an essential term of the oral agreement they made. The facts tend to indicate that immediate performance was not a condition of the agreement because when told that production must begin by October 15, Leo's agent stated, "That is the first I have heard of that production schedule." If Leo informs me that he never agreed to start performing right away and that TP did not insist that the agreement is contingent upon immediately starting the project it would appear that his breach was not a material one that would release TP of its obligations to Leo.

However, TP will argue that on the phone, when they made the original agreement, Leo stated to them "I am certain that the tight production schedule is not a problem," indicating that he was available immediately. It is unclear from those facts what Leo indicated when he stated that the tight production schedule was not a problem. If by those words Leo indicated that he was agreeing to start production immediately, TP has a valid claim for total breach by Leo.

Could Leo's actions merely constitute anticipatory repudiation that would not release TP of its obligations?

A repudiation is a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach. When Leo's agent stated to Ms. Famous, the TP casting agent, that Leo would be "delighted to sign the employment contract and begin work on December 1," it could interpreted that Leo has not actually breached the agreement, but in fact has only indicated anticipatory repudiation. Because the production date was set to start on Oct 15, Leo could argue that he has not breached the agreement and TP is not discharged of its duties because all he has committed is anticipatory repudiation.

Could TP argue that Leo's anticipatory repudiation was sufficient to discharge it of its duties?

Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance. TP will try to argue that regardless of whether Leo breached their agreement or committed anticipatory repudiation, it is justified in believing that its duties under the original agreement were discharged. TP will assert that because Leo has repudiated his duty to render performance, their duty to render performance was discharged and that by casting another actor to play "the man", they have not committed a breach. This argument, however, will not likely hold up in court because Leo never indicated that he was not going to render performance, he merely indicated that he could not render performance until Dec 1. Because Leo never indicated to TP that he not willing to perform as they had agreed, TP's duties under the agreement were not discharged.

Assuming TP's duties were not discharged under either theory of breach or anticipatory repudiation by Leo, did TP breach the contract by casting another "man"?

In determining whether a failure to render or to offer performance is material, the following circumstances are significant: the extent to which the injured party will be deprived of the benefit which he reasonably expected and the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstance including any reasonable assurances. When agreeing to play the man in the woods, Leo's reasonable expectation of a benefit was the benefits he was to receive from being in the movie, such as
compensation, as well as other benefits such as publicity and advancing his career. In casting
another individual to play the man, Leo is substantially deprived of the benefit, since it seems
implausible that they can cast two individuals to play the man. Furthermore, in their letter to Leo,
TP stated, "As Mr. Leonardo is not available as needed, the deal is off. TP has contracted with
another actor to be the man." In casting another actor to play the man, TP has committed a total
and material breach because they have substantially deprived Leo of the benefit that he
reasonable expected to receive from the agreement.

Based on all the facts, a court would likely conclude that Leo's request to start performance of the
contract Dec 1 did not constitute a material breach of the agreement with TP. Because Leo did
not materially breach, TP was not discharged of all the duties and obligations to Leo under the
contract and committed breach itself when it cast another actor to play the man in the woods.

**Does TP have any defenses to escape its breach?**

Assuming that Leo's unwillingness to start production before Dec 1 only constituted a
partial breach, and TP's later actions of casting another actor as the man was a total breach of
their agreement, does TP have any defenses that would hold up in court?

Depending on how long production for the film was scheduled to last, TP could assert
that the contract between it and Leo falls within the statute of frauds. Where any promise in a
contract cannot be fully performed within a year from the time the contract is made, all promises
int he contract are within the Statute of Frauds until one party to the contract completes its
performance. If TP can produce evidence that production for movies typically extends will
beyond the period of one year or that production for the movie was scheduled to extend beyond a
year, it can establish that the agreement between Leo and TP in the statute of frauds. A contract
within the statute is enforceable if it evidenced by any writing, signed by or on behalf of the party
to be charged. In this instance, a writing was never signed by either Leo or TP with regards to
producing the movie. TP and Leo's agent were in the process of signing the employment contract
for the movie when TP insisted that production begin on October 15. If the parties never signed a
written memorandum regarding the movie production, then TP could argue in court that the
contract is unenforceable by Leo.

Leo could try to argue that performance by TP takes the contract out of the Statute of
Frauds. When one party to a contract has completed his performance, the one-year provision of the
Statute does not prevent enforcement of the promises of other parties. When TP sent a check to
Leo for $200,000 as payment for his services during the film, it rendered partial performance.
Leo could argue that because TP has already rendered performance, the contract is removed from
the Statute and does not prevent enforcement. However, TP will likely counter and argue that it
has not yet completed performance by rendering full payment to Leo, and that the contract is still
unenforceable under the statute.

In addition to its Statute of Frauds defense, TP might try to argue that Leo has breached
his implied obligations of good faith and fair dealing. Every contract imposes upon each party a
duty of good faith and fair dealing in its performance and its enforcement. TP will try to argue
that after agreeing to star in Man in the Woods, Leo agreed with another company to play the
lead in our town when he knew that TP wanted to start and finish production promptly and that
there would have been no conflict had Leo waited until he knew the production schedule to agree
to another production. TP will argue that because Leo did not make a good faith effort to
accommodate their production schedule, he has breached his obligations of good faith and fair
dealing. However, it is unknown whether a court will hold that just because Leo breached his
good faith obligations that TP’s remaining duties in the contract are discharged. Even if TP prevails in proving in a court of law that Leo breached his obligations of good faith and fair dealings, it is unlikely that the court will find that TP’s duties are discharged under the original agreement and it was free to contract with another actor as it wished.

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3) Please type the answer to Question 3 below. *(Essay)*

Question 3.

Issue Presented

What is Cappy Leonardo's legal position in relation to the contract he entered with Turner Productions?

Brief Answer:

Mr. Leonardo likely had a contract with Turner Productions. It is likely that he breached that contract, and the damages will be substantial. A settlement is recommended.

Discussion:

**Was there a contract?**

The first thing to determine is whether a valid contract for Mr. Leonardo's appearance in the role existed. Under the bargain theory of contracting a contract exists if there is a promise for a promise, supported by consideration. In this case Mr. Leonardo did orally accept the role, and received consideration in the form of the $200,000 check from Turner Productions. The movie studio will likely focus closely on this to say there was a valid contract which was breached.

One issue seemingly favorable to Mr. Leonardo is covered by section 110 of the Restatement. The Statute of Frauds covers contracts where performance cannot be completed within one year of the making of the contract. The statute forbids enforcement unless there is a written memorandum of the agreement. This means that oral acceptance and agreement is not sufficient to create contractual obligations for these parties. The contract was discussed in August 2007, performance could not be completed before the release in 2009, and likely would extend obligations of royalties and other terms much further than that. Therefore, strictly speaking, Mr. Leonardo's oral acceptance could not create a contract.

However, the studio has a strong claim for promissory estoppel and for an exception to the statute of frauds based on the theory of promissory estoppel. Section 90 of the restatement describes promissory estoppel, but section 139 is the application of promissory estoppel to the statute of frauds. It says in Sec. 139(1), "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promissee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires." In 139(2) factors are listed in determining whether injustice can be avoided, the most relevant are, 139(2)(c, d, and e). 139(2)(c) looks to the, "Extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms as otherwise established by clear and convincing evidence, 139(2)(d) looks to the reasonableness of the action or forbearance of the person in reliance on the promise, and 139 (2)(e) looks to the extent the action or forbearance was foreseeable by the promisor.

Courts will not allow the statute of frauds to perpetrate a fraud. In this case, Mr. Leonardo was aware that TP would be on a tight schedule. This is troublesome for Mr. Leonardo's position. It was also clear by the forwarding and acceptance of the $200,000 that both parties were in agreement. Mr. Leonardo did not challenge nor question the $200,000 check which TP will use as evidence that corroborates the making and terms of the promise. Additionally they will show that they were reasonable in relying on Mr. Leonardo's commitment,
evidenced by their great expense and payment to Mr. Leonardo. His explicit statement of acceptance, and representation that the tight production schedule would not be a problem support the reasonableness of their reliance. Finally, they can show that not only was their reliance foreseeable, it was expected and accepted because he did not challenge the payment.

Additionally there is an implied obligation of good faith and fair dealing present in all contracts. Mr. Leonardo knew that he was obligated for 3 months to be in the Playhouse production and failed to disclose this information. This supports the exception to the statute of frauds and brings up the issue of misrepresentation and non-disclosure. Section 161(a) of the Restatement says that a non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the case where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material. By not disclosing his prior commitment, it is likely that Mr. Leonardo's statement that the tight schedule would not be a problem is a material misrepresentation.

Section 162(1)(a) says a misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent, and the maker knows or believes that the assertion is not in accord with the facts. Section 162(2) says a misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so. Had Mr. Leonardo disclosed his conflict with a tight production schedule it likely would have made TP rethink their contract. Because the delay costs them a great deal of money it is likely that it was a basic assumption of the agreement. It is at least likely that disclosure of the conflicting commitment would have influenced the agreement of TP. It is possible, though probably less likely, that Mr. Leonardo's assertion that he was certain the tight production schedule would not be a problem was a knowing statement that was not in accord with the facts. This would make the statement fraudulent.

Because of the exceptions to the statute of frauds, the potential fraud by misrepresentation and non-disclosure, and a basis for promissory estoppel; a court will likely hold that a contract did exist between Mr. Leonardo and TP. However, bargaining misconduct is evidenced by the behavior of Mr. Leonardo. Because of this it is likely that TP will be able to avoid enforcement of the contract, and on these grounds their termination of Mr. Leonardo was valid.

**Did Mr. Leonardo breach the contract?**

A full, written contract, with terms was not reached. An oral agreement will likely be enforced by exception to the statute of frauds, but it was clear that conformance to the production schedule was an important part of the agreement to which Mr. Leonardo assented. Because his non-disclosure was a misrepresentation, he likely will be in breach. If the breach was material, TP could have paused performance in their contractual obligation. In this case they would have been required to pursue specific performance requiring Mr. Leonardo to live up to his end of the bargain. However, if Mr. Leonardo's actions reach the level of total breach, the termination by TP was valid and they will have a claim for damages based on the total breach.

Factors for determining whether a material breach has occurred are explained in Restatement Section 241. Courts will likely look to (a) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived, (b) the extent to which the injured party can be adequately compensated for the part of that benefit which he will be deprived, (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture, (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all of the circumstances including any reasonable assurances, and (e) the extent to which the behavior of the party failing to perform or to offer to perform
comports with standards of good faith and fair dealing. Mr. Leonardo's most damaging areas occur with, D and E. It is likely that TP will be deprived of the acting of Mr. Leonardo, they have also endured substantial monetary loss. Because Mr. Leonardo would be in breach of his contract to the Playhouse by conforming to the obligation to TP, it is unlikely that he will cure his failure. No assurances were given by Slim Pickens that he would fix the situation. Furthermore, under 241(e) the problem and the behavior is a result of the non-disclosure, material misrepresentation, and possibly even fraud on the part of Mr. Leonardo so his behavior does not comport with good faith and fair dealing.

Because TP treated their duties and obligations to Mr. Leonardo as discharged they must meet the strict standards that Mr. Leonardo was in total breach of the agreement. Section 242 of the Restatement outlines these requirements. They are all of the requirements in Sec. 241, as well as, "(b) the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements; and (c) the extent to which the agreement provides for performance without delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party's remaining duties unless the circumstances, including the language of the agreement, indicate that performance or an offer to perform by that day is important. It was clear from the beginning of the agreement that the tight schedule was an important factor in the agreement. Additionally, a delay could incur huge costs and make the summer 2009 debut impossible. TP has a strong argument in their termination of Mr. Leonardo based on their business plan and schedule of releases. It is possible that a delay could even put them in breach of other arrangements. While the failure to perform on a day does not automatically discharge duties under total breach, it is clear that performance by October 15 was important which fulfills subsection (c).

The studio might also claim that Mr. Leonardo repudiated the contract which gives rise for damages under a total breach. Mr. Pickens said they needed a starting date of December 1. This was opposed to the tight time schedule Mr. Leonardo agreed to. Furthermore, Ms. Famous insisted that production must begin by October 15. This was also the first time TP was informed of the prior commitment of Mr. Leonardo to the Playhouse. Section 250 of the restatement outlines when a statement or act is a repudiation. It says a statement indicating the obligor will commit a breach is sufficient, or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach. The statement informing Ms. Famous and the act of having the other contract makes it clear that Mr. Leonardo will not be able to fulfill his performance duties to TP. Also, the failure of Slim Pickens to give assurance that they would conform to the tight schedule may be treated as a repudiation under Section 251. All of these factors combined would allow for the anticipatory repudiation sent by TP on October 1.

If the studio was justified in treating Mr. Leonardo's activities as a total breach they may make a claim for damages under Section 243 of the restatement. The breach must be so substantial in impairing the value of the contract to the injured party at the time of the breach that it is just under the circumstances to allow him to recover damages based on all his remaining rights to performance.