

FINAL EXAMINATION**CONTRACTS****HOUSE OF RUSSELL****INSTRUCTIONS:**

1. **DEADLINE:** This is a 75-hour examination. You may begin the exam at any time after 3 pm on Friday, 9 December 2011. You must submit your answers by 6 pm on Monday, 12 December 2011. **if you turn in your answers after 6 pm on 12 December, then you will receive an F for your Contracts grade. NO EXCUSES.**
2. **TURNING IN YOUR ANSWERS:** Turn in your answer by sending the file to registrar@law.du.edu. It's a good idea to send your answer with either a send receipt or a delivery receipt. As well, send yourself a copy of the message that you send to the registrar. This will verify the fact and time of your sending your answer. **DO NOT SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL; YOU VIOLATE THE HONOR CODE IF YOU SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL.** In the subject line of your email, put the following text: "Russell-Contracts-[exam number]" where [exam number] is your exam number. Name the file that contains your answer using the same convention: Russell-Contracts-[exam number]. If you have technical problems turning in your answer, please contact the registrar. If you have additional difficulties, please contact Ms. Diane Bales at dbales@law.du.edu or at 303-871-6580. **Do NOT contact Professor Russell with difficulties related to exam submission.**
3. **OPEN-BOOK:** This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you discuss, show, or distribute this examination or your answers to anyone at all before 6 pm on Monday, 12 December. Be cautious, for example, about posting anything on

Facebook that looks like a request for assistance. Once the exam starts, you may not discuss it with anyone at all before the examination ends at 6 pm on 12 December 2011.

4. **EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. **Do not put your name anywhere on the exam.** You should name the file Russell-Contracts-[Exam Number]
5. **LENGTH:** This examination consists of one question. You may use no more than 2,500 words to answer the question. Reducing your answers to this word limit will be one of the challenges of this examination. **Include the word count at the end of your answer.**
6. **SPACING:** Please double-space your answers. Avoid miniature fonts, okay?
7. **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. Emphasize the issues that are most important. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of law with the facts before you. Avoid wasting time with lengthy and abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that a court would resolve an ambiguous question one way rather than another.
8. **JURISDICTION:** The laws of Newstate, the 51st state of the union, apply to all of the issues in this examination. This state has adopted the Uniform Commercial Code. The 51st state is NOT Colorado.
9. **CONCISION:** Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write and edit your answer. You will earn a

better grade by being thorough and concise. And, of course, well-organized answers will be the best answers that earn the highest grades.

10. **ERRORS:** Sometimes, there are typos or continuity errors in House of Russell exams. (Note that these are different than information gaps, which Professor Russell always includes.) For example, you may meet someone named Helen on one page and two pages later, she may be called Jane. If you spot such errors in the exam, please send a correction to Professor Russell. If the correction is warranted, then Professor Russell will send a note to the entire class using the class listserv. Please note that the cutoff for such corrections will be 10 a.m. on Saturday morning. After that, the exam stands as written.
11. **EXPERTISE:** Please note that sometimes House of Russell exams deal with subject matter about which some of you may have expertise. You have to accept the exam's presentation as true. For example, if there is lava in the exam, and the exam indicates that lava is 1,500 degrees Fahrenheit, but you happen to know that lava is much hotter, then you should put aside your superior knowledge and accept the lava as being the temperature that the exam says it is. Typically, House of Russell exams try to simplify some issues by mashing down the science just a bit.
12. **KEEP A COPY:** You should feel free, of course, to keep a copy of the exam. Please keep your answer also.
13. **CHEATING:** If, in preparing for this examination you have violated the Honor Code, or if, during this examination, you violate the Honor Code, the best course of action is for you to report to the Dean of Students immediately after this examination ends.
14. **GOOD LUCK:** Good luck and have a great break.

“Printing and Folding”

Losing the Venango Daily News contract is what finally pushed Mike Donnelly, president and CEO of the Indiana Printing & Publishing Company to ask his lawyers to sue. Without that contract, Donnelly was not sure that he could keep The Indiana Gazette in business.

Mr. Donnelly is the CEO of the Indiana Printing & Publishing Company, which is located in Indiana County in Newstate. (The company is *not* located in the state of Indiana nor is it located in Indiana County, Pennsylvania.) The Indiana Printing & Publishing Company is the parent company of The Indiana Gazette and several other media related companies based in Newstate.

The Indiana Gazette is the predominant daily newspaper serving Newstate’s Indiana County. The Gazette was first published in 1891 and has remained under the ownership of the Ray and Donnelly families for several generations.

The Gazette’s mission statement appears every day in the paper:

The Gazette wants to be the friend of every man, the promulgator of all that is right, a welcome guest in the home. We want to build up, not tear down; to help, not to hinder; to assist every worthy person in the community without reference to race, religion or politics. Our cause will be the broadening and bettering of the county's interest.

The newspaper owners, managers and employees in every department daily strive to fulfill this mission and to keep The Indiana Gazette the most trusted and reliable general source of news and information in Indiana County.

In addition to publishing and printing The Indiana Gazette, the Indiana Printing & Publishing Company also has a commercial printing division, which has provided printing

service for 104 years to businesses and consumers throughout Newstate, other states, and Washington, D.C. This division of the company is called Gazette Printers. Together, Gazette Printers and The Indiana Gazette form the Indiana Printing & Publishing Corporation.

Gazette Printers provides a spectrum of printing services such as web- and sheet-fed offset printing, variable data printing, digital printing, binding, direct mail services, prepress and graphic design for a variety of corporate, small business, and private customers. Gazette Printers prints things such as fliers, advertising inserts for newspapers, calendars, and, for some customers, daily or weekly newspapers.

The revenue that Gazette Printers generates is crucial to the Indiana Printing & Publishing Company. Without this revenue, the company could not continue to print The Indiana Gazette. If the newspaper operated as a stand-alone business, the newspaper would operate with a small annual loss or perhaps break even. Gazette Printers generates profit by using the presses and other production equipment during time when the equipment is not needed for printing The Indiana Gazette.

Gazette's most important contract was with the Venango Daily News. They have now lost that contract. The Venango Daily News is a daily paper that Gazette Printers printed. The Indiana Gazette is a morning paper, that is, one that is delivered to houses and stores in the morning. The Venango Daily News is an evening paper. The presses run all night to produce The Indiana Gazette. Once the The Indiana Gazette was printed each day, production of the Venango Daily News began. The Venango Daily News was not produced for Sunday delivery. The printing of the two newspapers occupied the presses and related equipment for 16-hour-

stretches every Sunday evening through Saturday evening. During the times that the presses were not busy with the Venango Daily News or The Indiana Gazette, the presses were used for other Gazette Printers jobs.

Mr. Donnelly wanted to increase the printing capacity of Gazette Printers by adding one more printing press to the two presses that he already had. He also wanted to buy a different “folder”—a machine that does just what its name suggests, that is, fold printed pages. Mr. Donnelly already had a folder, but he wanted to remove that one and replace it with a different one. The replacement folder would fold all the printed pages that the three presses produced.

Mr. Donnelly hired a printing equipment expert named Paul Martin as a consultant. Mr. Donnelly paid Mr. Martin a flat fee of \$3,000 to assist with the purchase of refurbished equipment. Mr. Martin contacted Auxiliary Graphic Equipment (AGE), a small business also located in Newstate. AGE’s services include the brokerage, purchasing, rebuilding, and installation of used printing equipment. AGE provides services from single part replacement and refurbishing of complex machinery to complete turnkey installations and relocation of existing equipment.

Here’s an example of what AGE does. Recently, AGE bought a printing press from the Houston Chronicle. The press was one that the Houston Chronicle had been using for ten years. AGE purchased the press from the Chronicle for \$800,000; cleaned, refurbished, and completely rebuilt the press; and then resold the press to the Chicago Sun Times for \$2,500,000 including installation.

Mr. Martin, acting on behalf of the Indiana Printing & Publishing Company, talked with AGE's president Bob Bowers about Indiana Printing & Publishing Company's needs. Mr. Martin explained that the reason for updating the equipment was to make sure that the Indiana Printing & Publishing Company kept the contract for printing the Venango Daily News. Mr. Martin explained to Mr. Bowers that the Venango Daily News paid Indiana Printing & Publishing Company \$100,000 each month to print their paper. Without that revenue, Mr. Martin explained, Indiana Printing & Publishing Company might not stay in business.

There is now a dispute about whether Mr. Martin told Mr. Bowers about the capacity requirements for the printing equipment. Mr. Donnelly made clear to Mr. Martin that the new folder needed to operate at at least 25,000 copies per hour. The folder that the Indiana Printing & Publishing Company was replacing operated at 19,000 copies per hour. The Company needed the additional 6,000 copies per hour in order to meet the demands of the publisher of the Venango Daily News. Mr. Donnelly insists that before signing the contract, Mr. Martin had specifically told Mr. Bowers that the equipment had to operate at 25,000 copies per hour. Mr. Bowers, on the other hand, insists that no one communicated such a requirement to him, although he did hear plenty about the importance of the Venango Daily News contract. Further, Mr. Bowers indicates that the only conversation concerning capacity that he had with Mr. Martin was concerning whether the electric motors had sufficient horsepower to add additional equipment. This was a different specification than copies per hour.

Mr. Martin took the lead in negotiating the contract with Mr. Bowers and AGE. Mr. Martin selected the specific equipment to be installed. He chose the press and also the folder.

He and Mr. Bowers discussed together the installation requirements and the specifications for the work that Mr. Bowers's company would do as part of the refurbishment and installation of the equipment.

The final Purchase Agreement was dated April 26, 2010. The total contract price was \$273,000 to be paid in four separate installments. The contract included the purchase of used equipment, the refurbishing of that equipment, the installation of the refurbished equipment, and the removal of old equipment. If the contract is considered a contract in which the buyer purchased refurbished equipment that AGE was to install, then a majority of the contract price is related to the goods. However, if instead the contract is one for refurbishing and installation of used printing equipment, then a majority of the contract price is related to services. A factfinder will have to decide this issue.

The Purchase Agreement is attached as Exhibit 1.

In advance of the installation of the new equipment, Mr. Donnelly built an extension on his existing print shop and poured a new concrete pad for the printing press that he was adding. The pad cost \$3,000, and the extension to the shop cost \$25,000.

Because he was replacing his existing folder with a different one, Mr. Donnelly needed to do something with the old folder, which was manufactured by DGM. There was no space in his facility to store the DGM folder, plus he wanted to sell the old equipment as he had no use for it.

As part of its business, AGE sometimes sold equipment on consignment. Mr. Donnelly called Mr. Bowers, who agreed to take the old DGM folder on consignment if Mr. Donnelly would pay to ship the folder to AGE's warehouse. Mr. Bowers explained that he would clean up

the DGM folder, advertise it for sale within the printing trade, and rent additional warehouse space to store the folder--the three pieces of which were roughly the size of a Chevrolet Suburban, a minivan, and a smart car. (See picture below.)



If he found a buyer, Mr. Bower explained that he would contact Donnelly and have him sign a purchase agreement to sell the folder to AGE. AGE would then re-sell the property to the new buyer. Unless he had a buyer for consigned goods, Mr. Bowers's practice was never to buy or own the consigned equipment himself because he had no use for it.

With consignment sales, Mr. Bowers made his profit by reselling equipment for a higher price than he paid to the consigner. Rather than taking a percentage of the sale amount, Mr. Bowers made his profit--or at least covered his costs--with the difference between the price the buyer paid and the amount that he paid to whomever had consigned the goods. For example, he might pay the consigner \$50,000 and resell for \$70,000. The \$20,000 difference covered the costs of preparing the equipment for sale, advertising the equipment, and warehouse costs and also left room for a modest profit for handling the sale.

There was no written agreement regarding the consignment of the old folder. A week or so after the shipment of the folder to the AGE warehouse, Mr. Donnelly's Vice President wrote and asked whether there was a written agreement. Mr. Bowers replied by email as follows:

Regarding the folder, there isn't a formal Agreement. We just agreed I would take your folder and re-market it.

You retain title until we sell it and I request a Bill of Sale from you fellows. Until you agree to a price and issue Bill of Sale nothing happens.

We are currently cleaning it and will begin serious marketing shortly. Mike and you will determine ultimate sale price. I will obtain highest offer and present it to you.

The installation of the refurbished press and refurbished folder during August and September of 2010 went reasonably well, at least until Gazette Printers started operating the new equipment. A series of mechanical issues arose, and AGE sent technicians several times to adjust or fix the equipment.

Some of the work that the AGE technicians did was outside the scope of the original contract. Mr. Donnelly and Mr. Bowers agree that the work--which involved maintenance and

adjustment of Gazette Printers' pre-existing, original equipment and training of their personnel-- was not part of the original contract. However, they disagree on the price that Indiana Printing & Publishing Company should pay for the work. Mr. Donnelly believes that he should pay no more than \$15,000 for the work, which included an AGE work crew spending nearly a week adjusting equipment, installing parts, and training employees. Mr. Donnelly settled on this figure because his plant manager talked with the foreman of the AGE crew when he arrived on a Saturday afternoon to begin the additional work. Donnelly's manager insisted that the foreman give him an estimate of what the additional work would cost; the foreman was reluctant to do so, but after much badgering he guessed that the cost would be around \$15,000. Once the on-site work was done, however, AGE invoiced Gazette Printers for \$24,356.78, which was the cost for the crew's time--including overtime--and materials. Mr. Donnelly has not paid the full amount of this invoice.

There are also some issues with regard to the installed equipment. Mr. Donnelly thinks these are big issues; Mr. Bowers thinks they are small warranty issues.

Mr. Donnelly and Gazette Printers remain very upset that the new folder's capacity is only 19,000 copies per hour rather than the 25,000 that they expected or hoped for. Mr. Bowers has explained that the solution to this problem is outside the scope of the contract. Mr. Bowers has also explained that the solution is a fairly simple replacement of some gears, the total cost of which would be about \$700. Mr. Bowers believes that Mr. Donnelly's claim that he lost the Venango Daily News contract because the folder's capacity is too low is a ruse; he thinks they lost the job because Gazette Printers was not competent to handle the job.

In late September, Mr. Donnelly sent via email the following list of mechanical concerns related to the new folder that AGE had installed.

Issues related to the newly installed Goss Urbanite Folder

Quarterfolder fanshaft assembly bearing on the delivery end fell out of the bore. I believe you have that on film. The bearing set screws had come loose allowing the bearing to walk on the shaft. The frame the fanshaft is on also holds one folding roller. The folding roller fell with the fan shaft. This caused the drive gears of the folding rollers to run at a different angle. This is not good for gear life since the machine had ran like that for a while.

Quarterfolder rotary tucker drive gears set disengaged on the run. This caused a quarterfolder jamb. No set screws were found in the miter gear set that separated. The cover was completely removed and no set screws could be found in the two piece cover. The gears have ample wear in them.

The half fold has been a constant problem with holding lap. I inspected what I could without disassembly to avoid any warranty issues. I dial indicated the half fold rotary tucker assemblies and found .010 difference from the A-side to the B-side 180 degrees from one another. A Goss specification sheet is need to see if that is within allowable tolerance from the factory.

The half fold rollers on the 10-Side (Goss Verbiage) of the folder can only be adjust in one direction a minimal amount. It appears that the two piece guard/ cover inside the gear case is limiting the movement. There should be a slotted clearance hole behind the drive gears of the rollers to allow this adjustment. I could not find a Goss part number on the two piece cover to help identify it's origin. To be 100% sure the gears would have to come off and I did not want to affect a warranty.

During a press run when I was not present the collect gear became disengaged. The gear jumped out and then re-engaged its self. It was in a different time position and could not be run. A local press person was brought in and re-timed the folder in collect. He could not find the cause. I too looked and have no answer.

The second set of nip rollers has one problem. The driven solid nip or nip shaft has a .010 run out. With out removal I can not be sure if it is the shaft or the nip. That is a lot of movement for a driven assembly.

The main drive gears in the folder gear case were inspected. I dial indicated them for run out and backlash. The helical main drive gear set has major pitting on the exit side of each tooth. I checked the backlash and had a reading of .006. The gears are marked to be set at .007. It might be best to have a rep from a gear company check them to determine where the pitting is coming from.

The lower RTF roller has a run out of .014 on the operator side. Even an ocular inspection can see the movement. This causes control problems with the trolley wheel that rides in that position.

The upper former has run out in its nip roller assembly. The stationary nip has .008 run out. The moveable side has a run out of .007.

In light of the issues with the installed equipment, Mr. Donnelly refused to make the two final payments on the contract. He also denied that he owed any more than \$15,000 for the additional work that the AGE work crew performed. After these refusals to pay, Mr. Bowers made some inquiries with other contractors and equipment suppliers in the printing business. He claims that he learned that Mr. Donnelly has a pattern or habit of not paying his suppliers and contractors fully. Once Mr. Bowers heard that Mr. Donnelly had something of a reputation for non-payment, Mr. Bowers let Mr. Donnelly know that he would not perform additional work on the contract until the remaining invoices were paid.

As all the issues with the new equipment were brewing, AGE attempted to sell the DGM folder that had been removed from the Gazette Printers plant. In October 2010, AGE negotiated with a possible buyer for the folder using an intermediary, Mr. Dave Moreland of Manugraph DGM USA. Mr. Moreland told Mr. Bowers that there might be a third-party buyer who would pay \$70,000 for the folder.

On October 7, 2010, Mr. Robert Bowers texted Mr. Donnelly that:

I have an offer of \$60,000.00 for your folder. It is the best offer I can get. Let me know asap it is acceptable.

Mr. Donnelly wrote back as follows:

Thanks for the info and effort. Who am I selling our folder to, you or the client? Since we were hoping for \$80,000 I want to be paid up front. If that can happen, I will accept the offer. Thanks.

Mr. Bowers then texted back:

To me. I am preparing an Agreement now. I will send it over later today. I am out until this PM. You get paid upon execution of the contract before it leaves our building.

Mr. Bowers then sent to Mr. Donnelly a form titled "Purchase Agreement." He asked Mr. Donnelly to sign the agreement. This document is included as Exhibit 2. The agreement included a price of \$60,000. Mr. Donnelly signed the contract and sent it back to Mr. Bowers.

After this, the contract dispute over the installation of the printer and folder in the Gazette Printers shop heated up. Mr. Bowers never sent the \$60,000, and he denies that he agreed to purchase the folder, notwithstanding the Purchase Agreement and emails.

In November 2010, during a telephone call held with Mr. Donnelly while Mr. Bowers was in Boston, Mr. Donnelly asked about the DGM folder. Mr. Bowers explained that the sale had fallen through. At that time, Mr. Donnelly did not object that Mr. Bowers had already agreed to purchase the DGM folder. This conversation took place on a speakerphone in the presence of witnesses.

On February 15, 2011, Mr. Bowers wrote to Mr. Mike Donnelly and referred to the Purchase Agreement that Mr. Donnelly had signed in October 2010 as “a fully executed purchase agreement.”

Mr. Bowers claims that he never signed the agreement because the sale fell through. He says that he learned from Mr. Moreland on October 24, 2010 that the third-party buyer was not willing to pay more than \$55,000 for the DGM folder. Mr. Bowers says that the document titled “Purchase Agreement” is unsigned because the deal fell through.

On the other hand, Mr. Donnelly argues that Mr. Bowers entered into an enforceable contract to buy the folder, and that Mr. Bowers probably resold the folder and pocketed the money.

Since October of 2010, AGE has continued to market the folder to potential buyers in the United States, the United Kingdom, and Turkey and has run a print advertisement in an industry publication. The market for newspaper printing equipment is slow.

Your job is to advise Mr. Donnelly. For purposes of this analysis you should treat Mr. Donnelly, the Indiana Printing & Publishing Company, The Indiana Gazette, and Gazette Printers as one entity.

Mr. Donnelly feels that AGE breached the April 26, 2010 contract. Mr. Bowers claims that the remaining issues are small ones that he will take care of under the warranty, but Mr. Donnelly insists that he has not yet accepted the new equipment and the warranties are therefore not yet relevant.

The biggest issue, for Mr. Donnelly, is AGE's liability for the loss of the Venango Daily News contract. Mr. Donnelly also needs advice regarding whether he owes any part of the last two payments or the payment for additional work that the AGE crews performed.

Regarding the DGM folder on consignment with AGE, Mr. Donnelly wants the \$60,000 that AGE agreed to pay as part of the fully executed Purchase Agreement. Mr. Bowers still insists that he never agreed to purchase the DGM folder and now claims that AGE should be able to give back the DGM folder AND recover the \$1,500 cost of cleaning the folder; \$2,000 per month since September 2010 for the warehouse; \$1,000 for advertising.

There may be other contract issues as well. Your job is to advise Mr. Donnelly as to his rights and obligations with regard to AGE and propose a solution.

See also Exhibit 1 and Exhibit 2.

END OF EXAMINATION



Auxiliary Graphic Equipment, Inc.

PURCHASE AGREEMENT Exam Exhibit 1

Agreement dated April 26, 2010 between Auxiliary Graphic Equipment, Inc ("the Seller") and The Indiana Gazette ("the Buyer").

Whereas, the Seller desires to sell, and the Buyer desires to acquire, those assets set forth on Exhibit A attached hereto (the "Equipment"), for the consideration set forth below;

1. (a) **Sale and Transfer of the Equipment.** In reliance on the representations, warranties and covenants contained herein and subject to the terms and conditions hereof, contemporaneously with execution and delivery of the Agreement, the Seller is selling, conveying, transferring and delivering to the Buyer, and the Buyer is purchasing from the Seller, the Equipment. All risk of loss, theft, damage or destruction to the Equipment shall transfer to the Buyer upon loading of the Buyer supplied trucks.

(b) **Consideration for Such Sale and Transfer.** Subject to the terms and conditions of this agreement, and in full consideration of the aforesaid sale, the Buyer shall pay to the Seller the amount of two hundred and seventy three thousand dollars (\$273,000). Payable as follows:

Due with Agreement	\$ 172,000.00
Due upon notification of readiness to ship	\$ 68,250.00
Due upon completion of installation	\$ 9,100.00
Due 30 days after completion of project	\$ 23,650.00

All payments are to be via wire transfer.

\$ 273,000.00 Total

2. **Warranties.** The Seller represents and warrants that it is conveying good and marketable title to the Equipment, free and clear of all claims, liens and encumbrances. All equipment is sold "Rebuilt" with a 12 month warranty. **There are no warranties of merchantability or fitness for a particular purpose.** The Seller shall have no liability to the Buyer or any third parties for any profits or direct, indirect, special or consequential damages of any kind or nature arising out of the Equipment. Buyer covenants that it will take all reasonable and required safety precautions relevant to the equipment and its operation. Buyer agrees to indemnify and hold Auxiliary Graphic Equipment, Inc. harmless from any claims arising out of or related to the equipment or its operation from the date Buyer takes possession of the equipment. It is the responsibility of the Buyer to ascertain the completeness and accuracy of the listed Bill of Material attached as Exhibit "A".

3. **Expenses; Brokers.** The Seller and Buyer each agree to pay its own costs and expenses in connection with transactions contemplated in the agreement, including without limitation its legal and accounting expenses. The Buyer and Seller each covenant to the other that it has not dealt with any third party in such manner as to cause the other to be liable in respect of any broker's or finder's fees.

4. **Notices.** All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given, if delivered in person, telegraphed, or mailed by certified or registered mail, postage prepaid.

If to the Seller, addressed as follows

Robert Bowers
Auxiliary Graphic Equipment, Inc.
755 W. Hwy 105 Ste. 2F
Newstate

If to the Buyer, addressed as Follows:

Michael J Donnelley
Indiana Gazette
899 Water Street
Newstate

Or to such other person at such address as the party to be notified shall have furnished to the other party in writing.

5. **Taxes and Permits** Each party shall pay their own taxes, whether presently or hereafter applicable, assessed or arising out of this transaction, and, without limitation of the foregoing, whether in the nature of an occupation, property, excise, sales or use tax imposed upon each other or the equipment listed on Exhibit "A".

6. **General.** This agreement: (i) shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, nothing in this Agreement, express or implied, being intended to confer upon any other persons any rights or remedies hereunder; (ii) supersedes all prior negotiations, understandings and writings between the parties hereto; and (iii) may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. All covenants, agreements, warranties and representations contained in the Agreement shall survive the Closing. The section and other headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of the Agreement.

7. **REMOVAL AND INSTALLATION** is included in the purchase price. Freight is the responsibility of the Buyer. Removal and installation are the Seller's responsibility. Seller will employ competent and technically qualified personnel, all equipment, tools and necessary materials for the loading, un-loading and installation of the equipment.

The scope of work for the installation is attached as Exhibit "B"

8. **FORCE MAJEURE** Seller shall not be liable for contingencies beyond its control, including by way of illustration and not limitation, labor difficulties, strikes, casualties, accidents, acts of the elements, fire, flood, acts of the public enemy, transportation difficulties, inability to obtain equipment, material or qualified labor, government interference or regulations, irreparable damage to the equipment or unavailability of the equipment for any reason. In the event such an irresolvable contingency should occur prior to the transfer of clear title, all money previously paid to Seller will be refunded to Buyer, without interest, this being the Buyer's sole remedy.

9. **Confidentiality** Except as required by law, Auxiliary Graphic Equipment, Inc. and Indiana Gazette agree to maintain, and to cause their employees and other representatives to maintain, the confidentiality of all terms and conditions of this agreement.

10. **Construction** This Agreement shall be governed and construed in accordance with the laws of the State of Newstate . The parties consent to the jurisdiction of the courts of the State of Newstate for any disputes arising hereunder.

IN WITNESS WHEREOF, parties hereto have duly executed this Agreement the day And year first above the written

Indiana Gazette
Buyer

This 15 day of May ²⁰¹⁰~~2009~~

By Melvin Oy

Title President

Auxiliary Graphic Equipment, Inc.
Seller

This 25th day of May ²⁰¹⁰~~2009~~

By [Signature]

Title President

Exhibit "A"

Bill of Material:

- One (1) Goss Urbanite unit. The unit will be 1200 series. The unit is equipped as follows:
- Continuous feed Micrometric Inker
 - Sock Style Dampener
 - Manual Register
 - Lever Style Ink Fountains with Calibrated Scales
 - Plate lockups
 - T bar Blanket Lockup
 - Pneumatics
 - Motorized Compensator to be supplied with QI motor
 - Standard two high spacers, belt drive, platform, guards, unit top iron, web break detector and web lead rollers as per customer's specification.
- One (1) Goss Urbanite Folder. Identified as U1375
Complete with:
- Half Fold
 - Single Former
 - Tabloid Slitter
 - Chrome Plated Former Board
 - Upper Former
 - Quarter Folder
- One (1) Existing Unit internal Drive line to drive stacked units
- One (1) Urbanite Folder Operators Manual

**All of the above equipment will be Re-built as per the attached Exhibit "C"
Scope of Work**

EXHIBIT "B"

INSTALLATION of NEWSPAPER PRESS and EQUIPMENT

SCOPE OF WORK

Mechanical:

- A. The Machinery will be offloaded from the over-the-road trucks, unpacked and staged in a sheltered protective area supplied by customer to the designated installation site. **AGE** will provide all of its own tools, lifts, and materials for the reinstallation of the Machinery.
- B. **AGE** will re-install the press and equipment per the customer's request for unit layout and folder replacement.
- C. **AGE** will use a transit for establishing a Machinery centerline and layout of floor plan. Floor monuments will be placed on the centerline of press pad and placed on a parallel on operator side of press pad, using precision Optical Equipment, for current and future baseline reference.
- D. **AGE** will supply all rigging equipment such Gantry, Lifts, Chain Falls and other needed equipment for placement of equipment.
- E. **AGE** will also use an optical level for floor height and pre-leveling of shim packs.
- F. The Machinery will be installed on the press foundation according to the customers' specifications and drawings.
- G. **AGE** will also double check the installation of the Machinery using traditional methods. The Machinery will be leveled with a Master Level and traditional tramming methods.
- H. **AGE** will supply and fill in a chart for all level and tram indicator readings.
- I. **AGE** will work with the Customers' mechanical erector or project engineer to assure proper installation that conforms to the manufacturer's standards.
- J. **AGE** will supply and install shims and anchors to secure all of the Machinery.
- K. **AGE** will place skids, crates, debris in a designated site in Customer's plant for disposition by Customer. The cost of disposition of the waste is the Customer's responsibility.
- L. **AGE** will inspect the existing equipment to determine accuracy of line, level and tram. The repairs, if any, would be made on a time and material basis.

Piping:

- A. **AGE** will supply all labor, tools, and materials, and install all HP Air, Fountain Solution, Oil Cooling, LP Air, Oil Piping, and other miscellaneous piping on the Machinery. Ink piping is the responsibility of the purchaser.
- B. Customer will be responsible for the installation of all fire suppression systems and piping.
- C. **AGE** will reuse as much of the original material as possible for the reinstallation except fire suppression.
- D. Since materials will be reused where possible, **AGE** will connect the fountain solution and HP air piping systems to connection point within 10' of the original point of connection used in the original installation. **AGE** will provide a point of connection drawing after final data meeting.

- E. New pipe insulation will be installed on all chilled water pipes as needed. The insulation for the chilled water piping will be 1" fiberglass or equivalent. All fittings will be PVC jacketed and taped. Domestic water pipes will be insulated to prevent sweating.
- F. All piping systems will be filled and checked for leaks.

Electrical:

- A. **AGE** will supply all labor, tools, and materials to electrically reinstall the Machinery. All wires will be re-pulled through the same trough and conduit from the original installation. All enclosures will be securely anchored to the floor.
- B. **AGE** will reuse all electrical material to reinstall the machinery. All machinery to be set in the same relative position as in the original location.
- C. **AGE** will be responsible for the installation of all the Machinery from the load side of the Machinery PDC. The Customer or others will be responsible for providing adequate power to the PDC's and also terminating the power wiring to the line side of the PDC's.
- D. Match marks and wire tags will provide wire labeling for identification of wires and ease of troubleshooting.
- E. All wiring will be bundled and labeled during removal and re-install as such.

EXHIBIT "C"

Urbanite Unit/Folder Rebuild Scope of Work

Completely disassemble units down to the side frames.

Thoroughly clean unit frames and all parts. Identify and catalog parts for repair, replacement, or re-installation.

Inspect all unit frames and frame bores. Re-bore will be quoted as required.

Inspect all cylinder sleeves and replace as required with standard sleeves match-marked to each cylinder bore, or repair as required.

Inspect for run out, size turn and re-plate both the blanket and plate cylinders with stainless steel, or replace with new. Straighten journals as required, and install all new cylinder bearings.

Inspect all plate and lock-up assemblies. Repair or replace as required.

Install all new bearings, bushings seals, gaskets, wipers and belts.

Inspect all ink fountains. Rework or replace components as required.

Inspect water vibrator drums, pan rollers, and dampener rollers. Refurbish, recover, re-plate or replace as required.

Inspect all ink drums. Recover or replace as required.

Inspect the entire unit gear train, to include cylinder main drive gears, ink and water vibrator gears, and unit bushings and linkages. Replace all worn or damaged gears as required. Main drive gears will be quoted as needed.

AGE will perform all normal machining operations. Customer specified upgrades to be done at an approved additional cost and customer must provide all engineering drawings for all modifications.

AGE will supply new standard basic hardware, bolts, nuts, washers, screws, etc. The standard Goss lockups will be utilized.

Inspect impression throw-off assemblies and register assemblies. Rework or replace as required.

Inspect, test and repair as required, all unit control push-buttons, indicator lights, unit push-button stations and re-wire unit.

Inspect, test and replace as required all air, water, grease piping, oil lines, unit piping, manifolds, fittings, pumps, valves, tubing and gauges.

Paint unit and all appropriate parts to their specified color.

Reassemble unit and related parts to original factory specifications, including settings, adjustments and installation not to include rubber rollers.

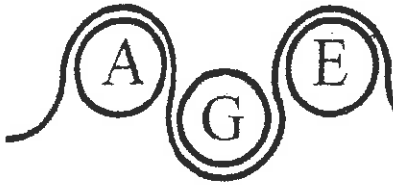
Test all unit functions under electrical power and pneumatic pressures as required. Test-run unit for six to eight hours to perform a heat test on cylinder bearings.

Each printing unit will be inspected mechanically and electrically for form, fit, and function upon completion of remanufacturing.

Upon completion of all testing **AGE** will prepare each unit for shipping using the following guidelines: drain test oil, attach tie downs, attach tag to areas needing lubrication upon start up and attach complete itemized packing list.

The Urbanite Folder will be completely disassembled and inspected to determine each component to be replaced, repaired or re-installed.

This includes the quarter fold section, the half fold section and the former board section. At the completion of the rebuild, the folder will meet or exceed the manufacturer's original tolerances and specifications in regard to fold accuracy and performance.



Auxiliary Graphic Equipment, Inc.

PURCHASE AGREEMENT *Exam Exhibit 2*

Agreement dated October 7, 2010 between The Indiana Gazette ("the Seller") and Auxiliary Graphic Equipment, Inc ("the Buyer").

Whereas, the Seller desires to sell, and the Buyer desires to acquire, those assets set forth on Exhibit A attached hereto (the "Equipment") located at the Auxiliary Graphic Equipment, Inc. LLC premises at 4220 N. Mark Dabbling Blvd. Newstate , for the consideration set forth below;

1. (a) **Sale and Transfer of the Equipment.** In reliance on the representations, warranties and covenants contained herein and subject to the terms and conditions hereof, contemporaneously with execution and delivery of the Agreement, the Seller is selling, conveying, transferring and delivering to the Buyer, and the Buyer is purchasing from the Seller, the Equipment. All risk of loss, theft, damage or destruction to the Equipment shall transfer to the Buyer upon commencement of the equipment removal contracted by the Buyer.

(b) **Consideration for Such Sale and Transfer.** Subject to the terms and conditions of this agreement, and in full consideration of the aforesaid sale, the Buyer shall pay to the Seller the amount of Sixty Thousand Dollars (\$ 60,000). Payable as follows:

Due upon execution of agreement \$ 60,000.00

2. **Warranties.** The Seller represents and warrants that it is conveying good and marketable title to the Equipment, free and clear of all claims, liens and encumbrances. All equipment is sold "as is where is". **There are no warranties of merchantability or fitness for a particular purpose.** The Seller shall have no liability to the Buyer or any third parties for any profits or direct, indirect, special or consequential damages of any kind or nature arising out of the Equipment. Buyer covenants that it will take all reasonable and required safety precautions relevant to the equipment and its operation.

3. **Expenses; Brokers.** The Seller and Buyer each agree to pay its own costs and expenses in connection with transactions contemplated in the agreement, including without limitation its legal and accounting expenses. The Buyer and Seller each covenant to the other that it has not dealt with any third party in such manner as to cause the other to be liable in respect of any broker's or finder's fees.

4. **Notices.** All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given, if delivered in person, telegraphed, or mailed by certified or registered mail, postage prepaid.

If to the Seller, addressed as follows
Michael J Donnelley
Indiana Gazette
899 Water Street
Newstate

If to the Buyer, addressed as Follows:
Robert Bowers
Auxiliary Graphic Equipment, Inc.
755 W Highway 105
Suite 2F
Newstate

Or to such other person at such address as the party to be notified shall have furnished to the other party in writing.

5. Taxes and Permits Each party shall pay their own taxes, whether presently or hereafter applicable, assessed or arising out of this transaction, and, without limitation of the foregoing, whether in the nature of an occupation, property, excise, sales or use tax imposed upon each other or the equipment listed on Exhibit "A".

6. General. This agreement: (i) shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, nothing in this Agreement, express or implied, being intended to confer upon any other persons any rights or remedies hereunder; (ii) supersedes all prior negotiations, understandings and writings between the parties hereto; and (iii) may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. All covenants, agreements, warranties and representations contained in the Agreement shall survive the Closing. The section and other headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of the Agreement.

7. FREIGHT, REMOVAL AND INSTALLATION is not included in the purchase price. Freight, removal and installation are the Buyer's responsibility. Buyer will employ competent and technically qualified personnel for the loading of the equipment. Furthermore, the Buyer will direct said personnel to effect said operations in a manner as to cause no more damage than is reasonably required in the removal of said equipment from where it is now located. Buyer shall not be responsible for any damage which is reasonably required in the removal of said equipment. Seller agrees to make the premises available and accessible for the removal of the equipment. Prior to commencement of these operations, the Buyer will procure and deliver to Seller a certificate of insurance insuring the Buyer or its agent against liability arising from these operations in the amount of at least \$1,000,000.00 each occurrence and \$5,000,000.00 in the aggregate as respects to bodily injury and liability.

8. **FORCE MAJEURE** Seller shall not be liable for contingencies beyond its control, including by way of illustration and not limitation, labor difficulties, strikes, casualties, accidents, acts of the elements, fire, flood, acts of the public enemy, transportation difficulties, inability to obtain equipment, material or qualified labor, government interference or regulations, irreparable damage to the equipment or unavailability of the equipment for any reason. In the event such an irresolvable contingency should occur prior to the transfer of clear title, all money previously paid to Seller will be refunded to Buyer, without interest, this being the Buyer's sole remedy.

9. **Confidentiality** Except as required by law, Auxiliary Graphic Equipment, Inc. and The Indiana Gazette agree to maintain, and to cause their employees and other representatives to maintain, the confidentiality of all terms and conditions of this agreement.

10. **Construction** This Agreement shall be governed and construed in accordance with the laws of the State of Newstate. The parties consent to the jurisdiction of the courts of the State of Newstate for any disputes arising hereunder.

IN WITNESS WHEREOF, parties hereto have duly executed this Agreement the day And year first above the written

The Indiana Gazette
Seller

Auxiliary Graphic Equipment, Inc.
Buyer

This 7th day of October 2010

This 7th day of October 2010

By M. Kelly

By _____

Title President

Title _____

Exhibit "A"

One (1) DGM 850 Folder

Complete with:

- Half fold
- Quarter fold
- Upper former
- All platforms, handrail and support structure

Memorandum

To: Contracts Students--present and future
From: Professor Thomas D. Russell
Date: 12 February 2012
Re: Fall 2011 Contracts Exam



The Fall 2011 Contracts exam was medium hard. As always, the top-scoring students thought hard about the problem, organized their answers well, and knew the law.

The distribution of grades was as follows:

DISTRIBUTION:	
A	4
A-	6
B+	17
B	14
B-	11
C+	1
C	1
C-	1
D+	0
D	0
D-	0
F	0
TOTAL	55
MEAN	3.13
MEDIAN	3

Generally speaking, students demonstrated good knowledge of the law. The students who earned some version of C will not pass the bar if they do not improve their organization and analysis. Everyone with a B- also needs to work a bit harder at clear analysis that keeps the broad picture in mind while digging into the details that really matter.

I asked you to provide advice to Mr. Donnelly. Throwing every possible argument into

the hopper in the hope that one sticks is not meaningful advice. Business people need advice from lawyers that helps them to assess their chance of success.

The heart of the first part of the problem is that the Indiana Gazette has lost a \$100K/month contract with the Venango Daily News. Your job is to tell Donnelly whether he may recover that loss as damages. If he can't, then game over. And the answer is that he cannot.

Donnelly faces three huge obstacles. First, the Parol Evidence issue surrounds whether he can even introduce evidence of the 25,000 copy per hour requirement. Just because the Hadley switch has been flipped does not, of course, mean that this specific requirement was ever part of the deal. If AGE never heard about that requirement--as Bowers says--then they can't enforce it through parol evidence. Whether Bowers heard about this expectation is a fact question.

Second, the contract disclaims consequential damages. Many students failed to even mention the disclaimer, although they did notice the warranty disclaimers. The disclaimer of consequential damages is critical to the content analysis. It's the difference between \$100,000 per month or not.

Third, the Code only allows consequential damages that could not be prevented by "cover or otherwise." 2-715(2)(a) For \$700, Donnelly could have installed a part that would have taken him to 25,000 copies per hour. He refused. That crucial detail needed to be in everyone's analysis of consequential damages. Even if parol evidence shows that AGE knew of the 25,000 per hour and even if there were no disclaimer of consequential damages, the failure of Donnelly to mitigate will keep him from collecting the cost of the Venango contract.

In short, three layers of law keep Donnelly from collecting the greatest part of his purported damages.

Many students treated the extra labor/modification as a separate contract. This made no sense. The original contract called for extra labor on a time & materials basis. Add to that a little modification, and the analysis of the installation issue should include the modification issue.

Too many students thought that Donnelly could still revoke acceptance of the printing equipment or even reject it! Too much time had passed--with Donnelly using the equipment--to allow either possibility. Donnelly's been using the equipment for far too long.

I was generally not delighted with the handling of the folder issue. The analysis needs to treat the consignment deal and the alleged sale of the folder as two separate deals. Central to the alleged analysis of the purported sale of the folder to AGE is the condition precedent to AGE's Purchase Agreement. The consignment deal rested on whether there was a 3d-party buyer. When that condition precedent failed, there was no longer an obligation by AGE to purchase the

folder. Remember that AGE had no reason to buy it.

The folder problem illustrated a problem that recurred through many students' answers. Many failed to apply the law to the facts. In the exchange of emails, I do not believe there really was an acceptance. Likewise, Bowers never signed the contract. 2-202 creates a way to overcome the lack of a signature, but only if there is an underlying deal. The lack of a signature is consistent with AGE's claim that there was no deal.

Attached are two strong students answers. They are especially strong with regard to the first part of the problem. I have also attached my own analysis of the consignment and folder contract issue including, in particular, my discussion of offer and acceptance and the Statute of Frauds.

Answer # 1

Preliminary Matters

- Donnelly and Indiana Publishing entities = "Donnelly."
- Bowers and AGE = "Bowers."
- Analysis and proposed solutions explore claims pertaining to "Rebuilt" equipment including additional service work and consignment sale of DGM folder.
- **Bowers and Donnelly are both "Merchants."** Bowers deals in goods of the kind. By occupation, Donnelly has skill particular to the goods in the transaction. Further, Donnelly retained Martin, a printing equipment expert. (UCC§2-104)

"Rebuilt" Equipment

Recommendation/Conclusions:

Donnelly's case is stronger under the UCC. He should push the agreement toward goods. Bowers's liability for the Venango contract is doubtful. Donnelly may not need to make additional payments to Bowers if there is sufficient value difference between the equipment now and conforming as warranted. Further, the invoice for additional work is potentially not enforceable.

Applicable Law:

Student #

A court could consider the contract price principally related to goods or services. Thrust of agreement is debatable. (Bonebrake) Donnelly should argue the essential purpose is for machinery, goods. The disclaimer of implied warranties may imply Bowers also considers the contract about goods. Bowers will argue value creation through brokerage, refurbishment, and installation services. Example: Bowers purchased equipment for \$800,000, refurbished and installed for \$2,500,000. Court could apply UCC or CL.

Enforceability:

Offer and Acceptance:

Preliminary discussions show willingness to bargain, not an offer. The specific moment of contracting can be unknown. (UCC§2-204/ Restatement§22) Offer and acceptance embodied in the mutually signed purchase agreement. Donnelly offered to pay \$273,000 for rebuilt equipment, installation, and old equipment removal. Bowers accepted and agreed to perform. This formation meets both UCC/CL requirements.

Consideration:

Promise for a promise. Bowers promised to deliver materials and scope of work outlined in purchase agreement. Donnelly promised to pay for it in four installments.

Promissory Estoppel:

Student #

Memorialized consideration appears sound. If not, Bowers could reasonably expect Donnelly to make business and physical plant preparations for the new equipment.

Content of the Deal:

Parol Evidence:

Martin told Bowers about the folder capacity requirements prior to contracting. Bowers denies this. The statement that Donnelly "hoped for" folder capacity at 25,000/hour undermines an express requirement. Additionally, the agreement includes notation of buyer specifications for the press but not folder.

Folder capacity information supplements rather than contradicts content of the purchase agreement. The merger clause states it is a final integration; supersedes all prior negotiations, understandings, and writings, but does not state it is a complete integration. The court determines partial or complete integration. If Newstate is a more Corbinesque than Willistonian jurisdiction, it may consider the integration partial. Triers of fact then determine the credibility of conflicting extrinsic

statements. (UCC§2-202/Restatement§§209,212) Inclusion of the parol evidence is preferable for breach and damage calculation purposes.

Warranties/Remedies:

Created:

UCC: Merchantability. Bowers is a merchant with respect to goods of the kind. Goods should pass without objection in the trade.

UCC/CL: Express warranties. "Rebuilt" equipment with 12 month warranty. Many technical claims that create express warranties. Of note are: replacement of all worn or damaged gears, new screws and other hardware, installation conforming to manufacturer's standards, and folder will meet or exceed original performance specifications. Other warranties include performing to customer provided specifications, type of pipe, fittings etc.

Not Created:

UCC: Martin selected equipment and provided specifications. Donnelly did not rely on Bowers's expertise and no IWFPF resulted.

Disclaimed:

UCC: The third sentence of the “Warranties” section reads, “There are no warranties of merchantability....” The disclaimer is in bold but not set off from the paragraph, in all caps, or an increased font size. If considered conspicuous because of the bold type it is effective. (UCC§2-316)

Limited Remedies:

UCC/CL: The warranty is limited to 12 months and is qualified for “Rebuilt” equipment. The intention of “Rebuilt” is unclear other than to identify the equipment as not “New.” Under the UCC, an express warranty will prevail if the limitation conflicts. The code favors a warranty.

Consequential damages of “any kind or nature” arising out of the equipment are disclaimed. Limitation of commercial consequential damages is allowed.

Payment:

Schedule of payments from Donnelly included:
amounts due with agreement, upon notification of readiness to ship, upon completion of installation, and 30 days after completion of project. Amounts varied by installment.

Student #

Breach:

UCC: Defective folder performance demonstrates a failure under the Implied Warranty of Merchantability, if not disclaimed.

UCC/CL: Folder defects included missing screws, worn gears, and performance likely non-conforming to original manufacturer specifications. This is a breach of express warranty. Inability to meet capacity requirements is also a breach if parol evidence is accepted.

UCC/CL Repudiation: Bowers claimed to learn Donnelly often does not pay his suppliers fully. Rather than request adequate assurances, (UCC§2-609/Restatement§251) Bowers repudiated any additional performance until Donnelly made the balance of payment. This is a breach.

Disputes:

UCC: Bowers will argue the equipment meets required specifications, Donnelly accepted them, and they only require warranty repair. Donnelly should argue the machines are still within a reasonable inspection period given the complexity of installation and have not been accepted or, if available, do not pass without objection in the trade. Alternatively, Donnelly may argue that the recently discovered

performance issues substantially impair the value of the folder and that the repeated unsuccessful warranty repair has failed in its essential purpose as a remedy.

UCC: Bowers will argue the inspection time is not reasonable. (UCC§2-513) Donnelly should counter that the inspection time was reasonable because of the complexity of goods and installation.

UCC/CL: Bowers will argue for more opportunity to cure before revocation of acceptance. Donnelly should counter that Bowers had multiple opportunities to cure and the remedy failed in its essential purpose.

CL: Bowers will argue he has provided substantial performance with only minor warranty issues remaining. He will also argue that Donnelly accepted the folder at its current performance capacity. Donnelly should argue material breach, for the same reasons indicated under UCC, immediately above.

UCC/CL Repudiation: Bowers will claim Donnelly's refusal to make the two final payments of the contract constitutes a breach and he suspended performance until cured. Donnelly should argue that at the time of repudiation, installation was uncompleted due to the continued post start-up issues. Exhibit B included assuring installation conforms to

manufacturer's standards. Donnelly had made all the milestone payments currently due and Bowers anticipatory repudiation of performance is a breach without first requesting adequate assurance of payment.

Remedies/Damages:

UCC: Donnelly should reject the entire delivery for non-conformity identified during the inspection period. (UCC§2-601) Alternatively, Donnelly should revoke acceptance of the lot for failure to seasonably cure the non-conformity. (UCC§2-608)

CL or Repudiation: Donnelly should claim material breach (Restatement§241) or total breach. (UCC§2-610/Restatement§253)

Expectation:

Puts Donnelly in as good a position as if there was no breach. Donnelly would have paid \$304,000 for "Rebuilt" folder and printing press plus, consulting services, concrete pad, and shop expansion. Result: Press, folder with capacity of 19,000 copies/hour (25,000/hour potentially) and continued revenue from Venango contract of \$100,000/month plus income from increased production levels. Donnelly paid \$271,250 (\$240,250 to Bowers, \$28,000 for the pad and expansion, and \$3,000 for consulting services) and has non-conforming equipment. He is entitled to the

value difference between the current equipment and “Rebuilt” equipment that conform to the agreement less the \$32,750 unpaid contract portion. Plus incidental damages necessary to cover, including costs to sell or remove the existing equipment. (Plus \$700 for the upgrade if parol evidence is accepted) Minus costs avoided by not operating the equipment; principally applies if consequential damages are included in the expectation interest; net damage. (Vitex) Subtract any other avoided expenses.

Consequential Damages:

Martin’s communication to Bower that the upgraded equipment was necessary to keep the Venango contract “flipped the Hadley switch” making the potential damage foreseeable. However, the purchase agreement disclaims consequential damages arising out of the equipment. The disclaimer is probably effective. If Donnelly successfully argued consequential damages from the agreement not arising from the equipment, for instance from failure to provide the correct equipment, he could pursue net income from lost business. This is unlikely.

Reliance:

Donnelly should receive expenditures made in reliance on the contract. A refund of the \$240,250 paid to Bowers plus the pad and expansion, \$28,000, less the resale value of the press and folder if not returned to Bowers. Donnelly, can also claim salary/benefits of his employees preparing for install, recruitment costs for new employees to run the equipment, and utilities used in installation. Pre-contract damages may also be available and Donnelly should pursue the \$3,000 in consulting value destroyed by the breach.

Restitution:

To avoid unjust enrichment, Donnelly receives restitution damages of the \$240,250 paid to Bower. Bower receives the "Rebuilt" equipment.

Additional Service Work:

Applicable Law:

The additional work could be a modification to the existing contract or new contract. The agreement does not prohibit oral modification. Under the UCC it would be a modification. Under CL, a modification functions like a new contract.

Offer and Acceptance:

Student #

Unknown if any offer and acceptance took place outside of the provided information. From provided facts, the foreman's \$15,000 estimate is the offer. The offer lacked certainty of terms but Donnelly's manager knew it included additional services and the expectation of additional compensation and did not reject it. (Restatement§69) This conduct is construed as acceptance.

Consideration:

Additional consideration is not required under a UCC modification. Under CL, new consideration is required. There was no additional consideration for the bargain.

Disputes:

UCC: Bowers will argue that "course of performance" establishes a common basis of understanding for the additional services. Specifically, the existing agreement provides for inspection and repair of existing equipment on a time and materials basis. Donnelly and Bowers agree that this additional work is out of scope, however maintenance and adjustment of pre-existing equipment is sufficiently similar to the T&M

services indicated in the contract. Bowers will contend similar treatment is appropriate.

UCC: If UCC applies, course of performance will determine the meaning of the modification and Bowers's argument may prevail. Donnelly should argue that the T&M provision is not subject to the overtime pay included in the invoice.

CL: Under CL, there is no consideration and payment for the additional work is not enforceable. Bowers may argue for enforcement under promissory estoppel, however the assent by inaction would not constitute a promise reasonably expected to induce action.

Defenses:

Mitigation:

Bowers will argue that Donnelly should mitigate by using the concrete pad and expansion for other purposes. Donnelly should counter that the pad will have little utility without the need for another press and expansion now has no commercial benefit to him. Consequential damages are unavailable against Bowers. If the disclaimer of consequential damages failed, Bowers would argue that Donnelly

should have mitigated by paying the \$700 to upgrade the folder to required capacity level and sought new clients.

Quantum Meruit/Quasi-Contract:

CL: If CL applies, Bowers may pursue quantum meruit for work performed. Donnelly should counter the work conferred no benefit due to the breach. Bowers will argue that the work under the additional scope formed a quasi-contract. The existence of the actual agreement including the T&M provision strengthens this argument. Counter by pushing the applicable law toward UCC.

DGM Folder Consignment Sale

Recommendation/Conclusions:

Donnelly should not accept a return of the completed sale. The executed purchase agreement states Bowers agreed to pay his own

Student #

expenses. Bowers is not entitled to claims for warehousing, cleaning, or advertising.

Applicable Law:

The folder is a good. UCC applies. (UCC§2-105) Bowers will argue the thrust of the agreement is marketing services. Donnelly should counter that the agreement is a "Sale or Return." (UCC§2-326(3)) The folder went to Bowers for resale, the arrangement implies return if unsold, Bowers deals in goods of the kind, and the eventual sale will not be under Donnelly's name. Further, this applies even if an agreement to reserve title until resale or words such as "on consignment" are used.

Enforceability:

Offer and Acceptance:

Donnelly called Bowers and offered the consignment. Bowers accepted provided Donnelly shipped the folder to his warehouse. Donnelly complied, creating the "Sale or Return."

Bowers later texted a price inquiry to Donnelly. Donnelly replied with an offer to sell, conditioned on an up-front payment. Bowers's response included payment "upon execution of the contract", constituting an acceptance of both the offer and conditional term, finalizing the sale.

Bowers sent Donnelly a purchase agreement memorializing their conversation that Donnelly signed and returned the same day. No response from Bowers regarding the sale until November. The agreement became effective October 17th. See Statute of Frauds, *infra*.

Consideration:

Donnelly promised to sell the folder to Bowers for \$60,000. Bowers promised to buy it with an up-front payment.

Promissory Estoppel:

Bowers's purchase promise would reasonably induce Donnelly to, at a minimum, forbear seeking an alternative buyer or use for the folder.

Content of the Deal:

Payment:

Bowers agreed to pay Donnelly \$60,000 upon purchase agreement execution.

Warranty:

The equipment is sold "as is" disclaiming all implied warranties. Express warranties include the model number, fold types, former, and platforms.

Student #

Limited Remedies:

The agreement disclaims consequential damages arising out of the equipment.

Breach:

Four months have passed since the effective date of the agreement. Bowers has not paid for the folder. This is a breach.

Remedies / Damages:Expectation:

Donnelly should receive \$60,000 or the folder plus the difference between a resale in good faith and \$60,000. Donnelly should recover any incidental expenses for resale of the folder in addition to interest from the execution date of the agreement. (Restatement §354 via UCC §1-103)
Consequential damages are not available to sellers.

Reliance:

Donnelly should receive the folder in addition to incidental damages including shipping to and from Bowers.

Restitution:

Donnelly should receive the folder. Ideally, Bowers should pay for the return as he would under the "Sale or Return." (UCC§2-327)

Defenses:

Statute of Frauds:

Bowers will argue the agreement is within the Statute of Frauds, text messages do not meet the requirements of the statute, and there is no agreement signed by him. Donnelly should argue the statute is satisfied for the following reasons:

- The text message exchange, preparation of purchase agreement, and subsequent reference to the agreement by Bower as a "fully executed purchase agreement" sufficiently show agreement. (UCC§2-204)
- Text messages should satisfy the writing requirement of the statute. It is unknown if Newstate has adopted UETA and provisions relating to electronic contracts. However, the Newstate court may find UETA and the proposed revised UCC§2-211 persuasive in ruling on validity of electronic communication as a writing.

- Alternatively, the text messages are comparable to an oral agreement, memorialized in the purchase agreement sent by and returned to Bowers the same day. Donnelly and Bowers are both merchants. The written confirmation of agreement was timely, Bowers drafted it and therefore knew its contents, and Bowers did not object within 10 days of receiving it. This satisfies the merchant provision of the statute.

Return:

Bowers will look to return. The “or return” term of a “Sale or Return” is treated as a separate contract within the Statute of Frauds and requires a writing. (UCC§2-326(4)) Bower received and accepted the folder. (UCC§2-201(3)(c)) There is no writing for return.

Word Count: 2,500

Student #

Answer #2

Relevant Entities

- Indiana Printing & Publishing Company (IP&PC)
 - The Indiana Gazette (TIG)
 - Gazette Printers (GP)
 - Venango Daily News (VDN), Client
 - Mike Donnelly, President & CEO
 - Paul Martin, Printing Press Consultant
- Auxiliary Graphic Equipment, Inc. (AGE)
 - Bob Bowers, President

Refurbished Equipment Purchase Agreement

Applicable Law (Bonebrake):

- The fact-finder will determine the predominant thrust of the contract.
 - If the contract is one where the buyer, TIG, purchased refurbished equipment that AGE installed, then goods comprise a majority of the contract price and the Uniform Commercial Code (UCC) applies.
 - If the contract is for refurbishing and installation of used printing equipment, then services comprise a majority of the contract price and the Common Law (CL) applies.
- First the UCC will be analyzed. Then the analysis will focus on the differences found in the CL.

Enforceability:

- **Offer and Acceptance:**
 - Both parties signed the written Purchase Agreement dated April 26, 2010 and began performance, an objective manifestation of their intent to form a contract under both UCC§2-204 and CL (RST§18).
- **Consideration:**

- Promise for a promise.
 - Donnelly promised to pay \$273,000 (four installments).
 - AGE promised to provide used equipment, refurbish equipment, install equipment, and remove old equipment.
- **Promissory Estoppel:**
 - Each party made action inducing promises that the other party reasonably relied upon. (RST§90)

Content of the Deal:

- **Parol Evidence:**
 - The fact-finder's view of the content of the deal will likely hinge on whether the weak version (Corbin) or the strong version (Williston) of the parol evidence rule applies to this dispute. While AGE includes what appears to be a merger clause in 6(ii) of the Purchase Agreement, "This agreement ... supersedes all prior negotiations, understandings and writings between the parties hereto," the clause does not purport that the Purchase Agreement encompasses the entire agreement and therefore the agreement is not an integrated contract. Additionally, AGE drafted the Purchase Agreement and the fact-finder should interpret any ambiguities against the drafter, "the hand that pens the writing may not gag the mouths of assenting parties." A Corbinesque view of parol evidence will favor IP&PC.
 - Under UCC§2-202 terms that do not contradict the written agreement can be added to supplement the writing. Bowers denies Martin, acting as the representative agent for IP&PC, communicated the capacity requirement of 25,000 copies per hour (cph). Donnelly communicated this requirement to Martin. The fact pattern does not include Martin's take and his testimony would be crucial. Either way the written contract does not include any reference to a capacity requirement, therefore the oral evidence would not be contradictory and would supplement the contract. (RST§209)

- **Consequential Damages:**

- UCC: A clause disclaiming seller liability for consequential damages exists in section 2 of the Purchase Agreement which is bad news for IP&PC. UCC§2-719(3) finds clauses excluding consequential damages enforceable where the damage was commercial, like the lost VDN contract. Only hope would be escape hatch. (UCC§1-103)
- CL: Both parties agree Martin communicated to AGE the reason for updating the equipment was to satisfy the VDN contract, sufficiently flipping the Hadley switch for consequential damages. The Corbinesque parol evidence rule does not exclude special communications necessary to establish liability for consequential damages and if the damages are foreseeable an inconspicuous clause excluding liability may not be sufficient to extinguish consequential damages under the CL. This will be a tough case to make.

- **Warranties:**

- UCC: Both the warranty of fitness for a particular purpose and merchantability are conspicuous (1-201(10)) and merchantability is specifically mentioned disclaiming these warranties under 2-316(2). The contract supplies a 12 month warranty on all equipment sold.
- CL: There are no implied warranties for services. (Caveat emptor)

- **Additional Work:**

- Donnelly and Bowers agree that work on the pre-existing equipment and training of IP&PC personnel was outside the scope of the contract. Under Exhibit "B" Mechanical (L), repairs to preexisting equipment would be made on a time and material basis. The scope of work does not discuss training.
 - UCC: Where the parties have omitted a "term" in what would otherwise be a binding agreement the courts may supply the missing element by resorting to trade usage. Although IP&PC probably relied on the estimate to their detriment, trade usage within the industry and previous course of

performance dictate that IP&PC pay the full invoice based on time and material.

- CL: Contracts are modifiable only with additional consideration. The consideration in this case is sufficient.

Breach:

- As explained earlier, whether or not AGE breached will hinge on the courts view of parol evidence, the testimony of Martin, and the applicable law.
 - If the fact-finder, using the Corbinesque version of parol evidence, finds that Martin communicated the folder capacity requirement of 25,000 cph to Bowers, then the requirement becomes a supplementary term to the contract and AGE breached by providing a folder with a capacity of only 19,000 cph.
 - UCC: Perfect tender under 2-601 requires AGE to provide a folder with a capacity of 25,000 cph within the scope of the contract.
 - CL: Because IP&PC needed the additional 6,000 cph in order to meet the demands of VDN, the difference substantially impaired the value of the equipment so any argument of substantial performance by AGE is inapplicable and they must increase the capacity of the folder.
 - If the fact-finder, using the Willistonian version of parol evidence, does not find a communication of the folder capacity then AGE did not breach by providing a folder with capacity of 19,000 cph and IP&PC breached by not making the final two payments.
- **Anticipatory Repudiation:**
 - In late September, less than a month after installment of the equipment, Donnelly sends an email expressing dissatisfaction with the folder to AGE and refuses to make the final two payments. What side of anticipatory repudiation IP&PC falls on depends on whether the court finds AGE breached in their installation of the folder, substantially impairing the contract.

- UCC: If AGE breached then under 2-610 IP&PC can await performance and resort to any remedy for breach. However, if IP&PC awaits performance beyond a commercially reasonable time then they cannot recover damages which should have been avoided.
- On the other hand, if AGE did not breach then IP&PC is breaching by refusing to make the final two payments and 2-610 applies to AGE.
 - Under 2-609, when reasonable grounds for insecurity arise a party can suspend performance. When Bowers learned that Donnelly had a pattern of not paying contractors fully he rightfully notified Donnelly that he would not perform until he received the agreed return.
- CL: Because this contract is an exchange of promises successful repudiation discharges the adverse party's remaining duties to perform.

Damages:

- **Liquidated Damages:** There is no liquidated damages clause.
- **Expectation:** If the court determines that AGE breached the contract then the expectation interest is the difference between what IP&PC expected and what they received. The expectation interest should put IP&PC in as good a position as if the contract was fully performed. Whether or not the court allows consequential damages has an enormous impact on potential damage recoveries for IP&PC. Under UCC§2-717 the buyer can deduct damages from any part of the price still due on the contract.
 - Consequential damages are excluded: The difference between the folder IP&PC received and the folder IP&PC expected (\$700) - final two payments (\$32,750) - payment for additional work (\$24,356.78) + incidentals - expenses saved.
 - IP&PC will end up owing money to AGE.
 - Includes foreseeable consequential damages: Same total as above + consequential damages (\$100,000 per month for every month

since contract was lost and the fair value of any future profits from this contract)

- AGE will owe significant damages to IP&PC
- If it is determined that AGE did not breach because there was no specified capacity requirement then IP&PC will have to make the final two payments on the contract (\$32,750) + payment for additional work (\$24,356.78) + incidentals - expenses saved.
- **Reliance:** The reliance interest puts the parties back at square zero, as if they had never performed at all, and would include any expenditure made in reliance on the contract. IP&PC can claim the \$3,000 spent on the new concrete pad for the additional printing press and the \$25,000 spent on the extension to the shop.
- **Restitution:** Under quantum meruit, to prevent unjust enrichment AGE would return contract price already paid (\$240,250) and IP&PC would return all equipment received.

Defenses:

- **Statute of Limitations:** The action must be brought in a timely matter.
- **Statute of Frauds:** The action is greater than \$500, falling within the statute of frauds. However, there is a written contract signed by both parties.
- **Mitigation /Cover:** After repudiating the goods the buyer is expected to cover or mitigate its losses. Because IP&PC makes no effort to find a replacement folder or allow AGE to cure AGE will likely argue that IP&PC failed to mitigate the damages. IP&PC should argue that AGE should have cured the folder's capacity issue within the scope of the contract. (assuming the capacity requirement is part of the contract)
- **Unconscionability:** If exculpatory consequential damage clause is unconscionable it's invalid.

DGM Folder Consignment Agreement

Applicable Law (Bonebrake):

- The DGM folder is a good; however, the consignment contract can be viewed as a service to sell the good. In this case the folder's value (at least \$55,000) exceeds the services of cleaning (\$1,500), storing (\$2,000 per month), and advertising (\$1,000) the folder so the predominant thrust of the contract is goods and UCC applies.

Enforceability:

- **Offer and Acceptance:** Because it is a "sale or return" contract under UCC§2-326(1)(b) there are two separate offers and acceptances to analyze. (UCC§2-326(4))
 - First, a fact-finder must determine whether there was offer and acceptance to enter into a consignment contract. Bowers email indicates that he offered to take the folder and re-market it. IP&PC sent the folder to Bowers beginning performance and constituting acceptance. (UCC§2-206)
 - Next, the fact-finder must analyze whether there was offer and acceptance for AGE to buy the folder from IP&PC. It appears that AGE offered to buy the folder for \$60,000 in both the text correspondence and by sending the second Purchase Agreement and IP&PC accepted verbally by text message and by signing and returning the contract to AGE. Normally for a contract to be enforceable the person "to be charged" has to sign the contract, meaning the person against whom enforcement of the contract is sought. "Exhibit 2 Purchase Agreement" is not signed by Bowers. Yet, on February 15, 2011, Bowers wrote to Donnelly referring to the Purchase Agreement as "a fully executed purchase agreement," which would indicate that it was signed and recognized by both parties. Since there is no written record for the consignment contract the weight of the "fully executed" Purchase Agreement tips the balance of the scale towards acceptance by AGE.
- **Consideration:**
 - There is a bargained for exchange (consideration) in the consignment contract.
 - AGE promises to clean, store, and advertise the DGM folder.

- IP&PC promises to pay for shipment of the folder and promises to sell the folder for an agreed upon price to AGE if AGE issues a Bill of Sale.
- There is also consideration in the Purchase Agreement for the folder.
 - AGE promises to pay \$60,000.
 - IP&PC promises to transfer title of the folder to AGE.
- **Promissory Estoppel:**
 - IP&PC reasonably relied on AGE's promise to market and sell the folder and buy the folder upon executing a Bill of Sale. IP&PC forfeited the opportunity to sell the folder to other interested parties.

Content of the Deal:

- In assessing the content of the deal the fact-finder will use objective measures of what the parties agreed to. The most objective communications in this fact pattern are the email from Bowers, the texts between Donnelly and Bowers on October 7th, and the "fully executed" Purchase Agreement provided in Exhibit 2.
 - **Email:** The email from Bowers explains the consignment of the folder. Since he says there is no "formal agreement" a court will place more weight towards the written Purchase Agreement. The email does explicitly state that IP&PC retains title until IP&PC agrees to a price and AGE issues a Bill of Sale.
 - **Texts:** The texts make it clear that IP&PC is selling the folder to AGE outright as a cash buyer and not as a commission merchant, which favors enforcing the "Purchase Agreement." Bowers makes it clear that Donnelly will be paid upon execution of the contract.
 - **Purchase Agreement:** The same day as the text correspondence IP&PC receives, signs, and returns the purchase agreement. Once the Purchase Agreement is returned AGE has exclusive control of the folder with power to sell, determine destination, and fix the

future sale price. Even though Exhibit 2 is unsigned by AGE this control over the folder heavily favors AGE's ownership of the folder.

Breach:

- AGE will argue that no breach occurred because they never took title to the folder. IP&PC should be in an advantageous legal position because, as stated above, after IP&PC returns the "fully executed" Purchase Agreement AGE has complete control over the folder. AGE breaches by not paying the \$60,000 dictated by the Purchase Agreement.

Damages:

- **Expectation:** Expectation interest puts IP&PC in as good a position as if the contract was fully performed and should be sought by IP&PC. The market for printing equipment is slow and the contract price of \$60,000 is probably above market price, otherwise AGE would have sold the equipment by now. Under UCC§2-709 IP&PC can claim the contract price + any incidentals damages - costs of storing (\$2,000 per month), cleaning (\$1,500), and advertising (\$1,000) the folder. If the folder can be sold the proceeds go to IP&PC + the difference between the sale price and the contract price + incidentals. (UCC§2-703)
- **Reliance:** Reliance includes the costs IP&PC incurred while relying on the consignment contract. This would include the cost of shipping the folder to AGE.
- **Restitution:** To prevent unjust enrichment of breaching party (AGE) the court may have AGE return the folder - costs that added value to the folder, storing (\$2,000 per month), cleaning, (\$1,500), and advertising (\$1,000) the folder.

Defenses:

- **Statute of Frauds:** An "or return" term is treated as a separate contract for sale within the statute of frauds. (UCC§2-326) The original consignment contract falls within the statute of frauds because the secured party (IP&PC) does not possess the folder. (UCC§2-201) The fact that this consignment contract is not in writing other than an email and text messages would be an issue that would favor IP&PC and the

subsequent Purchase Agreement that falls within the SOF but meets the requirements.

- **Impossibility:** AGE will argue that they tried to sell folder but could not find a suitable buyer. This excuse will not invalidate the Purchase Agreement.

Word Count: 2,500

DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 South Tejon Street Colorado Springs, CO 80903	▲ COURT USE ONLY ▲
Plaintiff(s): Indiana Printing & Publishing Company, a foreign Corporation, d/b/a/ The Indiana Gazette, v. Defendants: Auxiliary Graphic Equipment, Inc., a Colorado corporation, and Robert J. Bowers	Case Number: 2011CV3701 Div.: 2
Counsel for Defendants Auxiliary Graphic Equipment, Inc. and Robert J. Bowers: Thomas D. Russell, Atty. No. 34771 The Law Office of Professor Thomas D. Russell, Ph.D., LLC 7873 E. 8th Pl. Denver, Colorado 80230 Phone Number: 303-856-7531 Fax Number: omitted tdrlaw@comcast.net	
Rule 12(b)(5) Motion to Dismiss for Failure to State a Claim Upon which Relief can be Granted	

Now comes the Defendants Auxiliary Graphic Equipment, Inc. and Mr. Robert J. Bowers, through counsel Professor Thomas D. Russell, Ph.D., and file this Rule 12(b)(5) Motion to Dismiss for Failure to State a Claim Upon which Relief can be Granted.

I. Conferral

Undersigned counsel has conferred with counsel for the Plaintiff The Indiana Gazette. Plaintiff opposes the relief that Defendants seek.

II. Overview

In August or September of 2010, The Indiana Gazette entered into a consignment transaction with Auxiliary Graphic Equipment (AGE). AGE was to try sell a large, industrial piece of printing equipment on behalf of The Indiana Gazette. AGE has had the equipment for a little more than a year and has not yet found a buyer for the equipment. The market for newspaper printing equipment is slow. Because there has been no sale, there has been no unjust enrichment, conversion, civil theft, or fraud.

The equipment is sitting, unsold in AGE's Colorado Springs warehouse.

The Indiana Gazette also alleges that Defendant AGE agreed to purchase the equipment. However, The Indiana Gazette misunderstands the nature of the consignment transaction, which the parties initiated without a written agreement. The Indiana Gazette signed a Purchase Agreement in advance of a potential sale to a third-party that AGE was negotiating. Unfortunately, the price was too high for the buyer, and the potential deal fell through. For this reason, AGE never completed the transaction.

III. Motion

AGE moves the Court to dismiss the complaint. Because the sale never took place, the second, third, fourth, and fifth claims for relief should be dismissed. The defendants have not been unjustly enriched. They have not converted the equipment. They have not committed civil

theft, and they have not committed fraud.

Mr. Bowers is a defendant only in the second through fifth causes of action. Because there was no sale, he should be dismissed entirely as a defendant.

AGE also moves for the dismissal of the first cause of action and therefore the entire complaint. There was no breach of the Purchase Agreement because there was no completed agreement. The finding of a buyer was a condition precedent to the execution of the agreement. When the potential buyer turned away in October 2010 because the price was too high, the transaction ground to a halt.

IV. Applicable Law

This motion to dismiss includes testimony in the form of an affidavit. Rule 12(b) specifies that:

If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

V. Argument

A. No Sale to a Third Party

The third, fourth, and fifth claims for relief rest upon the allegation that AGE sold the DGM folder to a third party. AGE president Robert Bowers testifies in his affidavit that there has been no sale and the DGM folder is sitting in a warehouse in Colorado Springs. (Exhibit 1.) As there has been no sale, there has not been conversion, civil theft, or fraud.

The affidavit includes a picture of the equipment and information showing the date, location, latitude, and longitude of the photo. Counsel for The Indiana Gazette is welcome to visit the warehouse to confirm that the property has not been sold to anyone.

B. No Unjust Enrichment

The second claim for relief claims unjust enrichment. Mr. Bowers testifies in his affidavit that neither AGE nor he has been unjustly enriched. Exhibit 1. The DGM folder is sitting unsold in warehouse. Exhibit 1. AGE rents the warehouse. Rather than enriching AGE, the DGM folder has been costing AGE money in the form of overhead and rent.

C. No Contract for the Sale of the DGM Folder to AGE

Mr. Bowers testifies in his affidavit regarding the agreement between The Indiana Gazette and AGE concerning the DGM folder.

The Indiana Gazette consigned the folder to AGE so that AGE might attempt to resell it. AGE sold printing equipment including a folder to the The Indiana Gazette, which property was installed in the Indiana, Pennsylvania offices of The Indiana Gazette. Following this sale and installation, The Indiana Gazette had no room in its facility for the DGM folder. The Indiana Gazette paid the freight to ship the folder to Colorado so that AGE might store it and attempt to resell it. Exhibit 1.

The parties did not execute a written consignment agreement. The agreement was not a "sale or return" agreement. CRSA § 4-2-326. Mr. Bowers testifies that in September 2010, The Indiana Gazette's Vice Joseph Geary inquired about the terms of the consignment agreement. Exhibit 1. Mr. Bowers testifies that he explained via email that AGE would clean the equipment,

market the equipment, and, if AGE found a buyer for the folder, nothing would happen until The Indiana Gazette agreed to the price and issued a Bill of Sale. Exhibit 1. Mr. Bowers further testifies that AGE employs a standard Bill of Sale form in conjunction with its purchase agreement. Id.

In October 2010, AGE negotiated with a possible buyer for the folder using an intermediary, Mr. Dave Moreland of Manugraph DGM USA. In preparation for a potential sale, Mr. Bowers asked Mr. Donnelly of The Indiana Gazette to sign and return a form titled "Purchase Agreement." Exhibit 1. The agreement included a price of \$60,000.

Mr. Bowers never signed the agreement because the sale fell through. The third-party buyer was not willing to pay more than \$55,000. AGE had asked for \$70,000, which would have yielded AGE a small net profit. Exhibit 1. In November 2010, during a telephone call held with Mr. Donnelly while Mr. Bowers was in Boston, Mr. Donnelly asked about the DGM folder. Mr. Bowers explained that the sale had fallen through. Mr. Donnelly understood this and did not object that Mr. Bowers had already agreed to purchase the DGM folder. Exhibit 1. This conversation took place on a speakerphone in the presence of witnesses.

Finding a buyer and the signing of a Bill of Sale by the seller were conditions precedent to any contract for the sale of the DGM folder. Evidence of conditions precedent is admissible even where there is a final written expression of a purported contract. *Cosper v. Hancock*, 163 Colo. 263, 430 P.2d 80 (Colo. 1967). ("It is now well-settled law that parol evidence may, under such circumstances, be introduced to show that the instrument was not to become a binding obligation until an agreed upon condition occurred.")

Since October of 2010, AGE has continued to market the folder to potential buyers in the United States, the United Kingdom, and Turkey and has run a print advertisement in an industry publication. Exhibit 1. The market for newspaper printing equipment is slow.

Mr. Donnelly testified that on February 15, 2011, he wrote to Mr. Mike Donnelly and referred to the Purchase Agreement that Mr. Donnelly had signed in October 2010 as “a fully executed purchase agreement.” Exhibit 1. Mr. Bowers is not a lawyer. See his Motion to allow Pro Se Representation and Answer in this case. Mr. Bowers never signed the Purchase Agreement. Exhibit 1. C.R.S.A. § § 4-2-201, 4-1-201(37) and Comment 37 to 4-1-201 (“The question always is whether the symbol was executed or adopted by the party with present intention to adopt or accept the writing.”) The Purchase Agreement, signed only by Mr. Donnelly, is not an enforceable contract for the sale of the DGM folder to AGE.

AGE never agreed to purchase the DGM folder. Except to resell it, AGE has no use for the DGM folder. AGE is not in the printing business.

AGE agreed to try to try to resell the DGM folder but AGE never agreed to buy the DGM folder.

VI. Conclusion

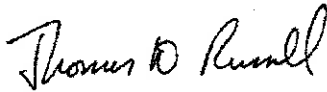
AGE has not sold the folder to a third party, has not been enriched by storing the folder, and never entered into a contract to purchase the folder for itself. And Mr. Bowers should not be a party to his action at all.

Wherefore, AGE and Mr. Robert Bowers ask the Court to dismiss the Complaint for failure to state a claim for which relief can be granted.

DATED this 19th day of September 2011.

Respectfully Submitted,

The Law Office of Professor Thomas D. Russell, Ph.D., LLC

s/ 

*Counsel for Defendants Auxiliary Graphic Equipment, Inc. and
Robert J. Bowers.*

Thomas D. Russell, Atty. No. 34771

7873 E. 8th Pl.

Denver, Colorado 80230

Tel: 303-856-7531

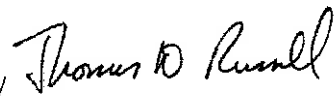
Fax: omitted

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on this day via File and Serve to the following:

Murray Weiner, Esq.
Mulliken Weiner Berg & Jolivet P.C.
Alamo Corporate Center
102 South Tejon Street, Suite 900
Colorado Springs, CO 80903

Richard P. Ranson, Esq.
Jason P. Kane, Esq.
Amanda B. Janulis, Esq.
Ranson & Kane, P.C.
3475 Briargate Blvd., Suite 201
Colorado Springs, CO 80920

s/ 

Thomas D. Russell, Ph.D.

DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 South Tejon Street Colorado Springs, CO 80903	▲ COURT USE ONLY ▲
Plaintiff(s): Indiana Printing & Publishing Company, a foreign Corporation, d/b/a/ The Indiana Gazette, v. Defendants: Auxiliary Graphic Equipment, Inc., a Colorado corporation, and Robert J. Bowers	Case Number: 2011CV3701 Div.: 2
Counsel for Defendants Auxiliary Graphic Equipment, Inc. and Robert J. Bowers: Thomas D. Russell, Atty. No. 34771 The Law Office of Professor Thomas D. Russell, Ph.D., LLC 7873 E. 8th Pl. Denver, Colorado 80230 Phone Number: 303-856-7531 Fax Number: omitted tdrlaw@comcast.net	
Affidavit of Robert Bowers	

STATE OF COLORADO
 COUNTY OF DENVER

I, Robert J. Bowers, being first duly sworn, depose and state as follows:

1. I am over eighteen years of age.

2. I am the president and CEO of Auxiliary Graphic Equipment, Inc. (AGE)
3. In August 2010, The Indiana Gazette consigned a DGM 1035 folder to AGE for resale.
4. During more than a year of efforts to sell the folder, AGE has not been able to find a buyer for the equipment. The market for newspaper printing equipment is slow.
5. The DGM 1035 folder consists of three very large, industrial pieces of machinery and related additional parts. They are red.
6. The DGM folder is sitting in a warehouse located at 4220 N. Mark Dabling Blvd. in Colorado Springs, CO 80907.
7. Below is a picture of the DGM folder taken on September 2, 2011 of the equipment. Today, the equipment is in the same place and same condition.



8. Below is the Extended Photo Information for the photograph above showing that the photo was taken in El Paso County on September 2, 2011.

Extended Photo Info	
Image	
Width:	2,592 pixels
Height:	1,936 pixels
Original Date:	9/2/2011 1:16:03 PM
Digitized Date:	9/2/2011 1:16:03 PM
File	
Name:	IMC_0284.JPG
Size:	2.0 MB
Modified:	9/2/2011 1:16:03 PM
Imported:	9/18/2011 7:00:07 PM
Location	
GPS Latitude:	38.892833° N
GPS Longitude:	104.82617° W
GPS Altitude:	1860.00 m
Place:	Colorado Springs El Paso Colorado United States
Camera	
Maker:	Apple
Model:	iPhone 4
Software:	4.2.8
Exposure	

9. The Indiana Gazette consigned the DGM folder to AGE following AGE's sale and installation of printing equipment and a folder at The Indiana Gazette's place of business in Indiana, Pennsylvania. The Indiana Gazette had no room to store the DGM folder. The Indiana Gazette paid the freight costs to ship the consigned equipment to Colorado.

10. There was no written agreement concerning the consignment of the DGM folder. On September 8, 2010, Mr. Joseph L. Geary, the Vice President and General Manager of The Indiana Printing and Publishing Company d/b/a/ The Indiana Gazette emailed me regarding he DGM folder as follows:

Bob,

I don't recall nor have any record of a written document regarding our agreement for you removing our DGM 1035 folder, shipping it to your plant and re-selling it for us. Can you please send me what you and Mike agreed to regarding the terms? You and I discussed a starting price of \$90,000.00 leaving room for negotiation with the buyer.

Thanks,
Joe

11. On the same day, I replied to Mr. Geary's email as follows:

Joe,

Regarding the folder, there isn't a formal Agreement. We just agreed I would take your folder and re-market it.

You retain title until we sell it and I request a Bill of Sale from you fellows.

Until you agree to a price and issue B of S


nothing happens. We are currently cleaning it and will begin serious marketing shortly. Mike and you will determine ultimate sale price.

I will obtain highest offer and present it to you.

12. In October of 2010, I communicated with Mr. Dave Moreland of Manugraph DGM USA concerning a possible third-party buyer whom I hoped would pay \$70,000 for the folder. In order to prepare for the possibility of a sale to this buyer, I sent a document titled "Purchase Agreement" to Mike Donnelly, President of The Indiana Gazette, for his signature. The document was dated October 7, 2010 and included the amount of \$60,000 as the price of the equipment. I never signed the agreement, because I learned on October 24, 2010 that the third-party buyer was not willing to pay more than \$55,000 for the DGM folder.

13. If the third-party buyer had agreed to the purchase price of \$70,000, then I would have asked The Indiana Gazette to execute a Bill of Sale; I would have signed the Purchase Agreement; and I would have transferred the DGM folder to the buyer. AGE's gross profit on the folder would have been \$10,000 from which would be deducted AGE's expenses of cleaning, marketing, and storage.

14. As indicated in my September 8, 2010 email to Mr. Geary, AGE employs a standard Bill of Sale form in conjunction with AGE's purchase agreement. The Bill of Sale form is a separate form that always refers to the terms of the Purchase Agreement. Because there was no buyer for the folder, AGE never sent this form to The Indiana Gazette, and Mr. Donnelly never signed a Bill of Sale.
15. On February 15, 2011, I wrote an email to Mr. Mike Donnelly in which I referred to the Purchase Agreement that he had signed in October 2010 as "a fully executed purchase agreement." That agreement is fully executed on his part. I have never signed the agreement.
16. In November of 2010, I held a conference call on a speakerphone with Mr. Mike Donnelly, president of The Indiana Gazette. I was in Boston at the time, Mr. Frank Barrile was with me. Mr. Donnelly asked about the DGM folder, and I answered that we had not yet sold the folder. Mr. Donnelly understood and did not object to this report.
17. In December 2010, I confirmed with Mr. Moreland that the potential buyer for the DGM folder was gone for good. Mr. Moreland indicated that our price was "just out of reach."
18. Since October of 2010, AGE has continued to market the DGM folder to potential buyers in the United States, Turkey, and the United Kingdom. In February of 2011, AGE ran the following print advertisement for the DGM folder in a *Newspapers & Technology* publication:

<p>FOR IMMEDIATE SALE</p> <ul style="list-style-type: none"> • Barstrom labelers • Goss low profile digital injectors • Goss Magnum 4 high towers 21" c/o • Martin EC splicers • Headliner offset spare parts • Goss C-700 80,000 cph quarter folders • DGM 1035 folder with quarter fold, crosshead perf, upper former 22 3/4" c/o • Goss Imperial and Sovereign folders 22" c/o • Goss Metrocolor/ Newsliner 4/4 tower • Goss keyless spare parts • Enkle autoweb pasters 	 <p>Auxiliary Graphic Equipment, Inc.</p>  <p>skylinegraphicservices.com auxiliarygraphicequipment.com</p> <p>755 WEST HIGHWAY 105, SUITE 2F PALMER LAKE, COLORADO 80133</p> <p>719-481-9983 TELEPHONE 719-481-2232 FAX</p>
---	--

19. Despite best efforts to do so, AGE has not yet been able to sell the DGM folder. AGE has not been unjustly enriched nor benefited by having this unsold equipment in its warehouse. AGE has not sold the equipment to a third-party.

20. I personally have not been benefited or enriched by having DGM folder stored in a warehouse. I have not sold this equipment to a third party. I have not sold the equipment for more than \$60,000 nor for any sum.

Further the affiant sayeth not,

Robert J. Bowers
President and CEO
Auxiliary Graphic Equipment Inc.

Subscribed and sworn to before me by Robert J. Bowers this 13th day of September,

Notary Public: _____

My Commission Expires:

DISTRICT COURT, EL PASO COUNTY, COLORADO Court Address: 270 South Tejon Street Colorado Springs, CO 80903	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Plaintiff(s): Indiana Printing & Publishing Company, a foreign Corporation, d/b/a/ The Indiana Gazette, v. Defendants: Auxiliary Graphic Equipment, Inc., a Colorado corporation, and Robert J. Bowers	<p style="text-align: center;">Case Number: 2011CV3701</p> <p style="text-align: center;">Div.: 15</p>
Counsel for Defendants Auxiliary Graphic Equipment, Inc. and Robert J. Bowers: Thomas D. Russell, Atty. No. 34771 The Law Office of Professor Thomas D. Russell, Ph.D., LLC 7873 E. 8th Pl. Denver, Colorado 80230 Phone Number: 303-856-7531 Fax Number: omitted tdrlaw@comcast.net	
<p style="text-align: center;">Defendant AGE's Reply to The Indiana Gazette's Response to AGE's Rule 12(b)(5) Motion to Dismiss for Failure to State a Claim Upon which Relief can be Granted</p>	

Now come the Defendants Auxiliary Graphic Equipment, Inc. ("AGE") and Mr. Robert J. Bowers, through counsel Professor Thomas D. Russell, Ph.D., and file this reply to The Indiana Gazette's Response to AGE's Rule 12(b)(5) Motion to Dismiss for Failure to State a Claim Upon which Relief can be Granted.

II. Plaintiff has produced no evidence showing the existence of a contract

B. Statute of Frauds

The alleged contract is for the sale of goods for more than \$500. As such the purported contract is within the statute of frauds of Article 2 of the UCC, which requires a signed writing. CRSA § 4-2-201 states that “a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.”

Plaintiff seeks enforcement against AGE, but the document titled “Purchase Agreement” is unsigned by AGE. Exhibit C. See, also, Plaintiff’s Exhibit 1, ¶ 12. CRSA § 4-1-201(37). There is a blank spot where the signature would be if someone from AGE had signed it. Plaintiff has no evidence of a contract that AGE signed. Only Plaintiff signed the document.

As a matter of law, this document is not evidence that there was an enforceable contract. Indeed, it’s just the opposite: evidence that there was no contract. Seen even in the light most favorable to the Plaintiff, the writing that they have produced does not satisfy the Statute of Frauds.

C. Offer and Acceptance

The interpretation of a contract is a matter of law to be decided by the Court. *Ad Two, Inc. v. City & County of Denver*, 9 P.3d 373 (Colo. 2000). As Justice Erickson made clear for the Colorado Supreme Court in 1978, “Where the evidence of agreement consists of documents, as in this case, the law is clear that the determination of their effect is a matter of law.” *Radiology Professional Corp. v. Trinidad Area Health Ass’n, Inc.*, 195 Colo. 253, 256 (Colo. 1978) citing

makes clear that he has not accepted an offer. He writes that "If that can happen, I will accept the offer. Thanks." With his return offer, Mr. Donnelly did not accept an offer; he made a counteroffer.

The email reply by Mr. Bowers does not accept Mr. Donnelly's counteroffer. Mr. Bowers's email appears to clarify the offer that Mr. Donnelly had already rejected. Mr. Bowers email also states that he is "preparing an Agreement." Mr. Bowers's email does not show agreement between the Plaintiff and Defendant.

Mr. Bowers's email also states a condition precedent to any obligation to pay. He writes that "You get paid upon execution of the contract before it leaves our building." As Mr. Bowers testified in his affidavit, the consignment transaction was structured so that if Mr. Bowers found a buyer for the folder, he would execute a Bill of Sale and Purchase Agreement between AGE and the Gazette. AGE would then sell the folder to the buyer. Plaintiff's Exhibit 1, ¶ 12-14. His email makes clear that the seller was to be paid only after there was an agreement with a buyer and before the folder left the warehouse. As his uncontroverted testimony makes clear, the potential deal with a third-party buyer fell through. Mr. Bowers testified that he "had communicated with Mr. Dave Moreland of Manugraph DGM USA concerning a possible third-party buyer whom I hoped would pay \$70,000 for the folder." He later learned that the potential buyer would not pay more than \$55,000. Plaintiff's Exhibit 1, ¶ ¶ 12, 17.

The evidence that the Plaintiff has produced in response to the motion for summary judgment is entirely consistent with Mr. Bowers's testimony that there was no agreement for him to buy the folder. He testified that "In order to prepare for the possibility of a sale to this buyer, I

Even in the light most favorable to the Plaintiff, there is no interpretation of the written documents that shows as a matter of law the formation of a contract for the sale of the folder to AGE.

III. Plaintiff has produced no evidence the AGE sold the folder to a third-party

Mr. Bowers has produced time-stamped, longitude & latitude stamped photos that show that the folder is sitting in a warehouse in Colorado Springs. Plaintiff's Exhibit 1, ¶¶ 7-8. He has testified that the folder has not been sold to a third-party. Plaintiff's Exhibit 1, ¶¶ 19, 20. The Plaintiff's third, fourth, and fifth cause of action rest upon the claim that the goods have been sold to a third-party. As the Plaintiff has not produced any evidence to support these causes of action, the Court must dismiss these causes of action.

IV. Plaintiff has produced no evidence of unjust enrichment.

Plaintiff's second count alleges unjust enrichment. Plaintiff has produced no evidence at all to support this claim. Again, the folder is sitting in a warehouse. As Mr. Bowers testified, AGE has not benefited in any way from having the folder. In fact, just the opposite has occurred as AGE has incurred the cost of storing the folder. Plaintiff's Exhibit 1, ¶¶ 19, 20. AGE has not used the folder and has no use for the folder. AGE has not sold the folder and used the proceeds to benefit itself.

The Court must dismiss the Plaintiff's second cause of action.

V. Plaintiff has produced no evidence that Mr. Bowers should be a party.

Plaintiff has produced no evidence that supports naming Mr. Bowers, the president and CEO of AGE, as a defendant. Plaintiff has not produced evidence that a contract was formed, let

affidavit stating the basis for the request. Without such an affidavit, the Court is without the discretion to defer ruling on AGE's motion for summary judgment. As Judge Tursi explained for the Colorado Court of Appeals in 1996:

We have located no Colorado authority addressing the issue whether a trial court may defer ruling on a motion for summary judgment pursuant to C.R.C.P. 56(f), absent the filing of a timely affidavit in support of such relief. However, numerous federal decisions construing substantially similar Fed.R.Civ.P. 56(f) have held that such an affidavit is mandatory. See Weir v. Anaconda Co., 773 F.2d 1073 (10th Cir.1985) (Fed.R.Civ.P. 56(f) makes it possible for a party to avoid summary judgment by filing an affidavit explaining why it cannot present specific facts in response to the motion and only upon the filing of such an affidavit does the trial court have discretion to delay ruling on the motion to permit additional discovery); Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir.1992), (argument of counsel does not provide a substitute for the affidavit required by Fed.R.Civ.P. 56(f)); see also Paddington Partners v. Bouchard, 34 F.3d 1132 (2nd Cir.1994) (reference to Fed.R.Civ.P. 56(f) in memorandum of law opposing summary judgment and need for additional discovery is not adequate substitute for affidavit specified by rule). We conclude that this principle is applicable under C.R.C.P. 56(f).

Here, although plaintiff noted C.R.C.P. 56(f) in her brief opposing the summary judgment motion, it is undisputed that she failed to submit an affidavit as required under the rule. Accordingly, the trial court was without discretion under C.R.C.P. 56(f) to defer ruling on defendant's summary judgment motion based upon a claimed need for additional discovery. See Weir v. Anaconda Co., supra; Paddington Partners v. Bouchard, supra; see also Radich v. Goode, 886 F.2d 1391 (3rd Cir.1989) (counsel's unverified assertion in memorandum opposing summary judgment does not comply with Fed.R.Civ.P. 56(f) and results in a waiver).

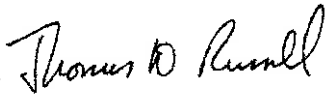
Card v. Blakeslee, 937 P.2d 846, 848-9 (Colo.App., 1996.) (emphasis supplied). Here, just as in *Card v. Blakeslee* as quoted above, the Plaintiff referred to Rule 56(f) in its brief opposing the motion for summary judgment, but Plaintiff failed to submit the required affidavit. For this reason, too, the Court must deny Plaintiff's request for a "continuance."

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on this day via File and Serve to the following:

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s/ 
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