

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

- 1. DEADLINE:** This is a 75-hour examination. You may begin the exam at any time after you receive the exam via email around 3 pm on Friday, May 9, 2014. You must submit your answers by 6 pm on Monday, May 12, 2014. **If you turn in your answers after 6 pm on May 12, 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. **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, May 12. Be cautious, for example, about posting anything on Facebook that anyone might think is 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 May 12, 2014.

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 the 51st state of the union apply to all 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. **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, 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.
11. **KEEP A COPY:** You should feel free, of course, to keep a copy of the exam. Please keep your answer also.
12. **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.
13. **GOOD LUCK:** Good luck and have a great summer.

Everyone's Got a Price

Jason Symon (Symon) was the president and owner of two boat dealerships located in Newstate: Newstate Boat and Metro Bayliner. Symon also owned the land upon which the dealerships were located. Although Newstate Boat was historically profitable, Metro Bayliner was less successful. On average, each dealership sold two boats per week, which is pretty good for a boat dealership.

In the latter half of 2013 and first part of 2014, both dealerships were experiencing financial difficulties. Symon hired John J. Broker and Gilligan Brokerage Co. (“Broker”) to serve as his agent and negotiator regarding the possible sale or refinancing of one or both of the boat dealerships. Broker’s contract with Symon required that he use “best efforts to advance the interests of the client Symon.” Symon agreed to pay Broker \$10,000 at the start of the contract plus a commission of five percent of the total amount that Symon would receive under the contract. Symon and Broker signed this contract in November of 2013.

When Symon and Broker signed their November 2013 contract regarding the sale of of the boat dealerships, they met for drinks at the Landmark Hotel. After they both signed the brokerage agreement, Broker asked Symon about Symon’s private collection of 10 antique Model T Fords, which Symon collected as a hobby. Over the years, Broker had often admired the cars. Symon’s 10 Model T’s were from the 1908 to 1925 model years. Symon was very

proud of the cars, but he had been losing interest in his Model T hobby over the previous decade--and Broker sensed an opportunity.

Broker asked Symon to tell him about the cars. Symon told him that all the cars were in mint condition with all original parts. Symon emphasized a point that Broker already understood--many Model T's had remanufactured or after-market parts produced in factories in China's Guanzhou province. Model T's that included Chinese-manufactured parts were regarded as inferior in the antique model car market. In fact, there was a usage in the antique model car market that the adjective "mint" could not be used to describe Model T cars that included Chinese-manufactured parts.

Broker said to Symon: "I'd love to own your collection of Model T's. I can pay you \$250,000." Symon thought for a moment, shook Broker's hand, and then said "Good deal. I'll text you later with details."

Later that evening, Symon texted Broker the following "Congrats on buying my Model Ts for \$250,000. The risk is yours. You send trucks to pick them up." Broker texted back: "So happy! Your cars have a good home with me." A week later, Broker paid a vehicle transport company \$5,000 to send car carriers--the trucks that transport cars on the highway--to pick up the model T's and deliver them to a warehouse for storage. He paid Symon with a certified check for \$250,000. Symons deposited the check the next day.

Boating Finance Corporation (BFC) provided all of the financing for Symon's boat dealerships. BFC was the largest creditor of both dealerships. By early 2014, the dealerships

owed BFC more than \$300,000. As the biggest creditor, BFC had a lot of power over Symon and the dealerships.

In early 2014, Broker began negotiations with John A. Byer (Byer) regarding the sale of Metro Bayliner and the property where the dealership was located. The parties signed buy-sell and real estate contracts for the Metro Bayliner concern on March 14, 2014. They scheduled the closing for April 15, 2014.

Soon after the signing of these documents, Broker asked Symon if he would also be willing to sell Newstate Boat to Byer. (The first negotiation was for the sale of Metro Bayliner only.) Symon considered the possibility and told Broker that he would be willing to sell both dealerships along with the land upon which they were located if he received sufficient personal remuneration. “Everyone’s got a price,” Symon said.

The parties agreed that any successful deal would have to meet two conditions: John A. Byer's total cash contribution would have to be limited to approximately \$300,000, and Symon would have to receive enough personal compensation to make a sale of the historically profitable Newstate Boat worthwhile.

During these negotiations, it became apparent that Byer was unwilling or unable to pay the full purchase price for the dealerships and the land upon which they were located. Byer did not have enough cash. In order to consummate the transaction, Broker suggested to Symon that he ask Byer to reimburse Symon for his interest in the dealerships by paying Symon \$200 per boat sold by both dealerships for a period of seven years commencing on May 1, 2014. In effect, Broker suggested to Symon that he ask Byer to spread out the purchase price in the form of a

commission that would be paid back in future years. Symon liked the idea, and after talking with his attorneys and accountants, agreed to go forward as Broker had suggested.

On March 15, 2014, Byer and Symon agreed that if Symon made the up-front concessions envisioned by Byer regarding the sale price for the real estate and dealership assets, Symon would receive deferred personal compensation through the side agreement, which they called the Service Agreement. Under this agreement, Symon expected to receive an estimated total of \$280,000 during the seven-year period that the Service Agreement would last. For each dealership, Symon expected two boat sales per week or 100 per year. Symon thus expected a total of \$140,000 from each dealership via the Service Agreement. From both dealerships, then, Symon expected to receive a total of \$280,000.

After his lawyers and Byer's lawyers had written a near final draft of the Service Agreement, Symon began preparations to receive payments under the Service Agreement. He selected a corporate name under which he would receive money and perform services under the side deal, and Symon had instructed his lawyer to incorporate under that name in the State of Texas. Symon also asked his attorneys to use the name of the new corporation in the final draft of the Service Agreement.

Subsequently, on March 16, 2014, the parties signed a "Buy-Sell Agreement" and a separate real estate contract for the purchase of Newstate Boat. However, this written, signed agreement did not incorporate the terms of the Service Agreement. Although Byer and Symon's lawyers had reduced the terms of the Service Agreement to a formal, written agreement, the

parties never signed the Service Agreement. Symon regarded the Service Agreement as a crucial part of their deal.

Paragraph 13 of both of the Buy–Sell Agreements (the “Merger Clauses”) for Metro Bayliner and Newstate Boat, which Symon and Byer both signed on March 16, 2014, state:

This Agreement constitutes the entire Agreement between the parties pertaining to the subject matter contained herein, and supersedes all prior agreements, representations and understandings of the parties. No modification or amendment of this Agreement shall be binding unless in writing and signed by the parties.

Anticipating the pending sale of the boat dealerships, BFC insisted that Symon relinquish control over the dealerships on April 3, 2014—earlier than Symon expected. When BFC contacted Symon and insisted that he relinquish control of the dealerships, Symon and Byer had not yet signed the Service Agreement.

BFC wanted to protect its security interests with regard to money that the dealerships owed to BFC. On April 3, 2014, BFC required Symon to execute agreements referred to as “keeper letters.” The “keeper letters” gave BFC significant control over the dealerships. BFC imposed this requirement as consideration for its agreement to pay in excess of \$300,000 in debt that Newstate Boat and Metro Bayliner would owe at the closing of the sale of the dealerships. Symon knew that once he signed these letter, he would no longer be able to file for bankruptcy protection and would therefore have to sell the dealerships.

After hearing from BFC, Symon contacted Byer who assured Symon that the service agreement would be honored before relinquishing control to BFC. Byer said “Don’t worry Symon, I’ve got you covered.”

On April 8 or 9, 2014, Broker and Byer met at the Landmark Hotel to continue to discuss the sale of Symon's dealerships. Symon paid for the meeting rooms, and during the course of the negotiations to sell the dealerships, he paid the Landmark Hotel a total of \$7,500 for conference rooms, catering, drinks, office support, and also entertainment in the form of exotic dancers, escort services, and dealers for card games. During this meeting on April 8 or 9, BFC telephoned Broker on his cell phone and informed Broker that as a condition to its agreement to finance the acquisition of the land and assets of the dealerships by Byer, Symon was not to receive any proceeds from the sale of the dealerships. Broker told Byer this news, and Byer then called Symon on April 8 or 9, 2014, and told him that the service agreement would not be signed. The parties therefore did not execute the Service Agreement at the closing on April 15, 2014.

Byer, Broker, and Seller disagree as to why Byer did not sign the service agreement. Byer contends that BFC refused to approve the sale if the service agreement was executed. Symon, on the other hand, alleges that Broker and Byer encouraged BFC to impose such conditions on the sale. Symon suggests that Broker was interested in sabotaging the service agreement because of a separate dispute between Broker and Symon.

Symon believes that Broker undermined him with regard to the sale of the boat dealerships. Symon believes that when Byer and Broker met at the Landmark Hotel, Broker encouraged BFC to impose the condition that Byer not sign the service agreement. Symon further believes that Broker negotiated a separate commission for himself by which Byer would pay Broker \$50 for each boat that the dealerships sold during the seven years after the sale. That

is, for each boat sold, Byer would pay \$50 to Broker rather than \$200 to Symon--a savings of \$150 per boat.

Symon is pretty certain that Broker's unhappiness with the Model T deal is the reason the Broker has undermined him regarding the sale of the boat dealerships. After Broker took delivery of the Model T's at his warehouse, he waited a few days before trying to drive the cars. Broker found that none of the cars would start. He found a mechanic named Tom Magliozzi, who specialized in Model T's, and arranged for him to inspect the cars on April 3. Magliozzi told him that the cars were in generally good shape but they were show cars rather than cars that could be driven. By this, Magliozzi meant that the Model T's had all of their parts, but even so, the cars were not operational. The cars looked complete but were models rather than actual working cars.

Magliozzi explained that for only \$25,000, he could work on the cars and make them so they would all start and be driveable. He further explained that the cars included many Chinese parts. These parts, he told Broker, were in some respects superior to original equipment but they could not be described as "mint" because they were not original parts. Broker asked what the cost would be to get all the cars into working condition using original equipment so that he could describe the cars as "mint." Magliozzi offered to do the work for \$75,000. Broker already had a buyer who had agreed to buy the 10 Model T's for \$300,000 but only if they were in "mint" condition.

After receiving the news from Magliozzi, Broker again hired the car transport company and returned the vehicles to Symon's property. That was on April 4.

On April 15, Symon proceeded with the sale of the dealerships because, he explains, he had already had turned control over to BFC and thereby eliminated a bankruptcy reorganization alternative that was previously under consideration. Symon did not see any way that he could back out of the Closing. After closing, Symon demanded that the Byer honor the Service Agreement, but so far Byer has refused. This is why Symon needs your help.

Your job is to evaluate the Contracts claims, if any, that Symon has against Byer and Broker. His biggest concern is the sale of the boat dealerships, but of course he needs advice regarding the Model T's as well. Symon believes, also, that he may have a claim against BFC, but you should not analyze that claim, as someone who specializes in secured transactions with handle that matter.

END OF EXAM