

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 12 pm (noon) on Friday, December 8, 2017. You must submit your answers by 3 pm on Monday, December 11, 2017. **If you turn in your answers after 3 pm on December 11, then you will receive an F for your Contracts grade. NO EXCUSES.**

2. **TURNING IN YOUR ANSWER:** Turn in your answer your answer by uploading the file to the registrar's online exam portal using the instructions below.
 - A. Go to the Law Registrar's online exam portal. (<https://www.exam4.com/org/600>)
 - B. Select "Contracts-Russell" under the Available Takehome Exams section (the class will appear in the upper right corner of the webpage – in this section – starting at 12:00 pm December 8.)
 - C. Enter your exam ID and select "Continue"
 - D. Follow the prompts and upload your answers into the online portal by the final deadline.

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. 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 3 pm on Monday, December 11, 2017. 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 3 pm on Monday, December 11, 2017.

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 Contracts-Russell-[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, which is called Newstate, 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.

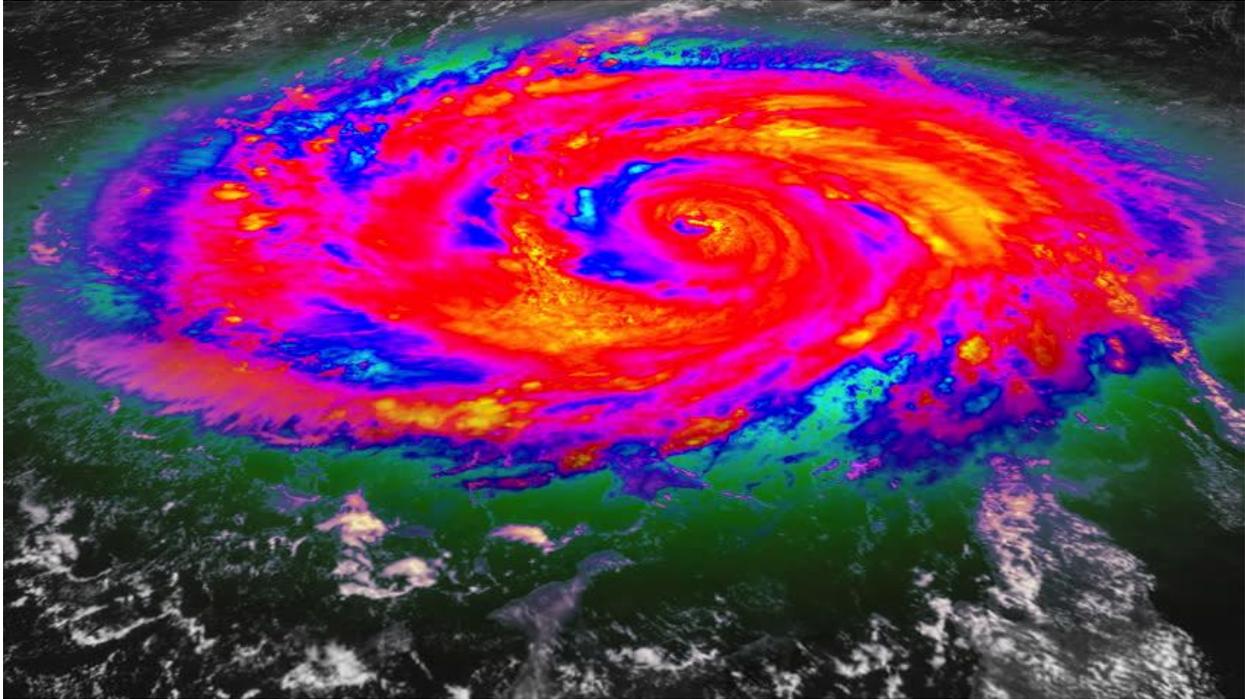
10. **EXPERTISE:** Please note that sometimes House of Russell exams deal with subject matter about which some of you may have expertise or outside knowledge. You have to accept the exam's presentation as true. For example, if there is lava in the exam, the exam indicates that lava is 1,500 degrees Fahrenheit, 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 break.

HURRICANE



Hurricanes are large, swirling storms with winds of 74 miles per hour or higher. The wind is faster than the fastest animal on land: the cheetah. Winds from a hurricane damage buildings and trees and pretty much everything in their path.

Hurricanes form over warm ocean waters. When hurricanes strike land, they push a wall of ocean water ashore when they reach land. This wall of water is called a storm surge. Heavy rain and storm surge from a hurricane cause flooding.

There are five types, or categories, of hurricanes. The scale of categories is called the Saffir-Simpson Hurricane Scale. The categories are based on wind speed.

- **Category 1:** Winds 74-95 mph – faster than a cheetah
- **Category 2:** Winds 96-110 mph – as fast or faster than a baseball pitcher's fastball

- **Category 3:** Winds 111-129 mph – similar to the serving speed of professional tennis players
- **Category 4:** Winds 130-156 mph – faster than the world's fastest rollercoaster
- **Category 5:** Winds more 157 mph – similar to the speed of some high-speed trains

Hurricanes provide all the necessary ingredients to form tornadoes. First, most hurricanes carry with them individual supercells, which are rotating, well-organized thunderstorms. Second, hurricanes bring with them warm, moist air, which acts as their fuel. Finally, hurricanes create wind shear, or an abrupt change in wind speed and direction over a short change in height. These alternating winds can create swirling air, called rolls. These vortices may then be flipped vertically—creating tornadoes. Most hurricanes that make landfall spawn tornadoes.

A. Power

Hurricanes also spawn litigation. The two tornadoes that hit Newstate in the late summer and early fall of this year devastated Newstate, which is the 51st American state. Like Hawai'i, Newstate consists of islands. Newstate is one big island plus four smaller islands that are close to the main island. One can reach Newstate from the mainland only by sea and air. There are no bridges from the mainland U.S.A. to Newstate. Newstate is not close to the mainland nor is it as far as Hawai'i.

Hurricane Karl, a Category 4 storm, hit Newstate first. On August 15, 2017, Karl swept over Newstate with what might be called a glancing blow. The glancing blow killed 12 Newstaters, plunged 1,000,000 of Newstate's 4,000,000 people into darkness, and caused an estimated \$1 billion in damage. Some repair work was underway when Hurricane Llewellyn hit about a month later.

Hurricane Llewellyn really whacked Newstate. Llewellyn was a Category 5 storm when it roared across the main island on September 20. More than 100 people died. Insurance companies have estimated the property damage at \$80 billion or more.

The one-two punch of Hurricane Karl followed by Hurricane Llewellyn devastated Newstate's electrical power grid. A power grid is an interconnected network for delivering electricity from production sources to users. The grid includes generating stations that produce electrical power, transmission lines that carry the electricity from the generating stations to demand centers, and, from there, distribution lines that connect to the individual businesses and homes.

Newstate relies on fossil fuel to produce electrical power, although the Newstate hurricanes have opened a new conversation about adopting solar and wind power. The fossil-fuel power plants generate electricity that is stepped up to a higher voltage—230,000 volts—for connection to the transmission lines. When the power arrives via the transmission lines to a substation, the electric utility companies use transformers to step the power down from a transmission level voltage to a distribution level voltage. Before reaching end users, transformers step the power down again from the distribution voltage to the required service voltage, which is 110 volts in the United States including Newstate.

The two hurricanes wiped out Newstate's power grid. Although the plants for power generation survived largely intact, the storms destroyed the transmission lines, the distribution lines, and most of the lines that connected to end users. The entire power grid was out for the whole island for one full week. With the whole state without electricity, Newstate needed to rebuild the grid.

Newstate officials put out a Request for Proposals, which they published on Newstate web servers that were hosted (and powered) on the mainland. The Newstate RFP asked contractors to bid on the project of rebuilding Newstate's grid. They also published the RFP on PowerGridRFP.com, which utilities, contractors, and all power-grid professionals recognize as the very best place to publish grid-related RFPs in order to generate maximum exposure and interest. Publicity for the RFP was important in order to generate competition but also because Newstate law does not allow the award of a public contract for more than \$100 million unless there are three or more bids submitted for the project. The Newstate legislature passed the law to operate as a check on corruption.

In response to the RFP, Newstate officials were disappointed to receive only two bids. The short time-frame for a response to the proposals may have contributed to the lack of bidding. More important, though, was that the Newstate Power Authority (NPA) was under bankruptcy protection. Newstate, since before becoming a state in 2001, was never very good at managing its government finances and typically ran large budget deficits. The NPA also tended to overspend, which led to the NPA declaring bankruptcy in early 2016. At the time the NPA issued the RFP, the NPA was under the protection of the federal bankruptcy courts. Put differently, bankruptcy protected the NPA from creditors. This does mean that the NPA had no money, but it did not have very much money. The bankruptcy status of the NPA made contractors leery of doing business with the NPA.

One of the two bidders on the Newstate RFP demanded a \$45 million payment upfront. The obvious reason for the demand of cash upfront was the NPA's bankruptcy. The bidding contractor did not wish to put its own time, capital, and assets at risk working for an entity that

might not, after the work was done, actually pay. However, the NPA was not willing to make the \$45 million upfront payment and, frankly, did not have sufficient available funds to do so.

Thus, partly by default, the other bidder on the NPA RFP got the contract. The other bidder was PowerSnap, LLC, which was headquartered in Montana. PowerSnap was a small company headquartered in Wisconsin and with only two permanent employees. Prior to the NPA contract, the largest contract on which PowerSnap had worked was a \$1.8 million transmission line project in Utah.

NPA officials mistakenly though thought that PowerSnap was a larger company than it was. Perhaps the people evaluating the bid were rushed, but no one ever discussed that the company had only two employees. The proposal did not specify that the company had only two employees, and the RFP had not required that bidding companies reveal how many employees the bidder employed.

Nicholas Volt, PowerSnap's CEO, had traveled by boat to Newstate soon after the publication of the RFP. Mr. Volt wanted to have a sense of the situation in Newstate before he bid on the project, rather than send PowerSnap's other employee, he went himself. Being on the ground in Newstate gave him a sense of the enormity of the project.

Mr. Volt let NPA's officials know that he was on the island, and he had a chance to meet with them before signing the contract.

The Newstate Power Authority awarded PowerSnap the contract to rebuild the power grid with a total contract price of \$300 million dollars. Mr. Volt signed the contract by the light of cell phones in an NPA conference room. Mr. Volt had a chance to review the contract, but he was without the assistance of lawyers. He raised a question about one part of the contract, which

appeared to allow the NPA to cancel the contract for any reason. Mr. Volt asked about that, and NPA's executive assured him that the clause meant that cancellation could take place only for a good reason related to non-performance of the contract. Convinced by this representation, Mr. Volt signed the contract for PowerSnap.

Mr. Volt's expectation was a profit of 30 percent of the total amount of the contract. He was thrilled.

Mr. Volt got right to work. After complying with the notice requirements of the contract regarding subcontractors, he hired many, many subcontractors. (See the Appendix at the end of the examination for the NPA-PowerSnap contract.) Mr. Volt had special expertise with supply

chain management, and he was very good at organizing the transportation of workers, equipment, vehicles, and construction



material to Newstate. Mostly, he used cargo planes into Newstate's single useable airport, although he brought a lot of material aboard ships. The initial transportation of workers and the equipment, vehicles, and material needed for the job cost roughly \$40 million.

Housing and feeding the workers was another considerable expense. Through the end of November, when the contract abruptly ended, POWERSNAP had spent \$20 million feeding and housing thousands of workers and about \$30 million on their wages. It was a big operation.

Near the beginning of November, the media began to scrutinize the NPA's contract with PowerSnap. Neither the NPA nor PowerSnap had an effective media relations office. The press emphasized that PowerSnap was just a two-person company with, it seems, more political connections than utility experience. The press cast suspicion on the contract and often characterized it as having been awarded with no bidding process. Reporters emphasized that utilities typically relied on intercompany pacts to rebuild when power grids suffered damage after big storms. In effect, different American utility companies shared resources in order to assist other utility companies. The other utility companies did not do the work for free, but the rates were about 30 percent of the high rates for labor, housing, and food that PowerSnap included in their contract bid.

Given all the pressure and scrutiny, NPA officials pointed to a provision in the contract that allowed the NPA to cancel and, at the beginning of November, announced that they were canceling the contract with PowerSnap effective on the last day of November 2017. Just about two weeks ago, PowerSnap ended work and began transporting their people and equipment back to the mainland. The cost of moving everything back to the mainland they estimate at \$30 million. As of December 1, 2017, 60 percent of Newstate's power grid was restored. PowerSnap has submitted an invoice to the NPA for \$210,000,000.

B. Handbags

The hurricanes disrupted everything. Small businesses, many without any or much insurance, fared particularly badly. One such business is Newstate Specialty Handbags, Inc.

Newstate Specialty Handbags, Inc. makes handbags for Marc Jacobs Carolyn. Only Barneys-New York carries these handbags, which are made from exotic crocodile leather. This elegant bag, which Barneys sells for \$38,000, parades a segmented leather exterior and inside. Separators and extra pockets provide smooth organization and systematic segregation of



contents. There is no shortage of buyers when these handbags become available at Barneys.

Newstate Specialty Handbags (NSH) crafts the handbags from a reptile that lives only in Newstate. The aptly named Newstate Crocodile is rare though not endangered. The only known colony of them lives on Newstate; for unknown reasons, the Newstate Crocodile cannot thrive off the island. And, those that live on the island tend to become handbags.

Marc Jacobs Carolyn (MJC) has been buying handmade bags of differing types from NSH for more than 20 years—since before Newstate became a state. MJC has been buying the bag that they sell for \$38,000 for the past five years. During the summer of 2017—a few months before the storms hit—buyers from MJC visited NSH’s workshop in Newstate. They met with the NSH’s owner and with the three skilled craftspeople who make the handbags. MJC hoped to encourage NSH to make more than the 15 handbags, on average, that they had been supplying every year, but NSH’s owner was not interested. He said, “Look, I don’t want to be burdened by a contract to make more bags. I don’t want to have any sort of written contract get between my artistry and me. I am happy, though” he continued, “to have you buy all the bags we make for \$8,000 each, just as we have done for the past several years.” The MJC buyers were a little exasperated by the NSH boss’s attitude, but they thanked him for showing them the workshop and went back to New York. Before getting on the plane to New York City, the head buyer sent this text to the NSH owner: “Thx for meeting and selling us all your bags!”

Once back in New York, MJC’s head buyer met with buyers from Barneys and also with a bunch of well-dressed lawyers. The lawyers insisted that MJC needed a written contract with Newstate Bags, and provided a ten-page draft that, they insisted, covered the bare minimum. MJC send the contract to NSH, and NSH’s boss marked up the contract with changes and sent it back. New York lawyers accepted some of the changes, made other changes, the contract lengthened, and they sent it back to Newstate. This process continued seven more times. By the time Hurricane Karl hit, the contract had grown to 22 pages. After a tornado that was the spawn of Hurricane Llewellyn sucked the printed document into the sky, no one at NSH ever mentioned

the written contract again. The parties had never executed the contract. A suspicious group, they believed that the use of the written contract had attracted the hurricanes to their island.

Following the hurricanes, NSH could not manufacture anything at all. Their facilities were destroyed. Like everyone else, they had no electricity. They do not anticipate being able to restart production of their handbags before June of 2018 at the very earliest. Nearly their entire bask of crocodiles washed away in the flood never to be seen again. They have only some very young crocodiles that will not be large enough to harvest—that is, killed—for at least a year. They do have an inventory of 12 bags, which they were preparing to ship to MJC just before Karl hit. The bags, however, were soaked, stained, and scuffed after having been hit by hurricanes and tornadoes. No one at NSH thought that MSJ would accept the damaged handbags. Everyone at Newstate Specialty Handbags blames MJC, Barneys, and the New York lawyers for the calamities they have suffered.

Last week, friendly buyers from Hermès, the French fashion giant, visited with NSH. They drank wine together and laughed as best they could at their misfortunes. NSH's boss showed the Hermès buyers the damaged bags that he had intended, before the storms, to ship to MJC. After appropriately expressing regret for the disaster, the Hermès buyers offered NSH's boss 100,000 euros (approximately \$118,000), two Toshiba gas-powered generators, and 250 gallons of gasoline for the 12 bags. NSH accepted. The Hermès buyers, on seeing the scuffed, unique handbags, had known instantly that sympathetic and fashionable Parisians would easily pay at least 50,000 euros for each bag, which they would transform into Hermès handbags and then market as Hurricane Karl-Llewellyn Newstate Crocodile Handbags. After making the deal

to sell these 12 bags, the NSH boss promised that once he had rebuilt the shop and fattened up his crocodiles, he would sell all the bags he produced to Hermès for 8,500 euros per bag.

C. The Mall

Newstate businesses have suffered terribly. Businesses have suffered because the hurricanes and tornadoes damaged the buildings. They have suffered because the lack of electricity makes repairing the businesses difficult or impossible. Businesses have also suffered because hundreds of thousands of Newstaters (as the people who live there call themselves) have left for the mainland. Tourism to the island of Newstate is also way down, further damaging businesses.

The Mall of Newstate—a large, high-end shopping mall—suffered substantial physical damage from the hurricane. The Mall of Newstate opened to much fanfare in early 2015 with two anchor tenants: Saks Fifth Avenue and Nordstrom. Nordstrom and Saks each had more than 100,000 square feet of space in their stores and were the anchor tenants of the mall. In addition to the anchor tenants, there were 45 medium and smallish businesses in the building. As with all malls, the anchor tenants were critically important to the business health of every business in the mall. Big, experienced, successful anchor tenants like Saks and Nordstrom meant that shoppers would come to the mall and bring business to the smaller stores.

Mr. Gene Maller is the CEO of Maller, Inc., which owns the Mall of Newstate. Maller and his attorneys negotiated the contract with Saks Fifth Avenue and its attorneys. The contract, which started in 2015, was for an initial 5-year term through the end of 2019. Maller was very pleased to have Saks as an anchor tenant, because he knew that the high quality and reputation of

the store would be appealing to the sophisticated shoppers of Newstate. He expected, too, that having two high-end tenants like Saks and Nordstrom would lead them to compete with each other, and the customers and other businesses in the mall would benefit. In short, Maller knew that having higher-quality anchor tenants would yield profits for him in the form of higher rents from the anchor tenants but also higher rents from all the other businesses in the mall. This point was so obvious to Maller and his attorneys, that he did not raise the issue during their negotiation of the lease. Indeed, Maller thought it would be crass to point out to Saks that Maller, Inc. would make more money by having Saks as an anchor tenant in the Mall of Newstate.

Maller, Inc. has recently filed a lawsuit against its anchor tenant, Saks Fifth Avenue. Maller alleges that Saks has been dragging its feet in rebuilding its store in the Mall of Newstate, as the following news story explains:

Luxury mall landlord Maller, Inc. filed a lawsuit against its tenant, luxury retailer Saks Fifth Avenue in Newstate, alleging the retailer has dragged its feet in rebuilding its store in the Mall of Newstate after suffering major damage from Hurricanes Karl and Llewellyn. Saks Fifth Avenue said it is in the process of repairing the store and is focused on its staff's well-being.

The mall has two department store anchors, Nordstrom and Saks Fifth Avenue, and under agreements signed with the landlord the retailers are required to rebuild and reopen as quickly as possible, said Gene Maller, chief executive of Maller, Inc.

Executives at Nordstrom have indicated they are proceeding quickly and will open the store as soon as they are able. Given the damage, Maller said he expects it to be well into 2018 before Nordstrom would reopen. But Saks Fifth Avenue hasn't provided a timeline for reopening its 100,000 square-foot store.

“There has been minimal work done to repair Saks Fifth Avenue,” Maller claimed Thursday in a statement. “We would naturally be thrilled to see a meaningful effort to restore the store and resume normal operations.”

“As such, we have filed, as of yesterday, a complaint to compel Saks to properly commence reconstruction of its building and to complete the repair to be ready for re-occupancy as expeditiously as reasonably possible,” Mr. Maller said.

In the legal filing, Maller, Inc. alleged Saks Fifth Avenue hasn’t made an effort to secure its property with temporary repairs to cracks on the roof and other steps to prevent additional mold or water damage. If the department store doesn’t start repairs soon, “it will have a devastating effect on the mall and other tenants who depend on Saks to generate traffic and business for their stores.”

“Our store sustained significant damage from the hurricanes, and we are in the process of repairing and rebuilding the store,” Saks executives said in a statement. “As a company, our focus has always been the safety and well-being of our associates, and this focus remains in the aftermath of this crisis.”

Stores that stay closed for extended periods of time could hurt customers’ overall impression of the property and trigger co-tenancy clauses allowing other tenants to ask for rent relief if anchor stores remain closed for too long. There has been heightened tension among mall landlords and tenants this year, with both sides blaming each other for store closures and lackluster foot traffic.

[End of news story]

Saks claims to have done more to repair the store. Saks says that a few days after the hurricane, it hired a local contractor to repair the roof, which had many tears and cracks and took several attempts to repair. Saks also says that it hired a company to extract water from the store as soon as it was able to get an electric generator and fuel. Saks also claims to have installed partitions within the store in order to isolate areas that carry risk of contamination from mold and fungus. The retailer says that there is a crew of 3-10 people working in the store daily to remove

damaged material and do remediation work. Air samples have shown that fungus and mold continue to spread within the damaged store.

Maller and Saks disagree over the terms of their lease. As noted above, multi-person teams that included legal counsel negotiated the lease. The negotiating teams sent many, many drafts back and forth. A sticking point in the negotiations was the relative responsibility of Saks and Maller to repair damage to the mall and store.

The final draft of the contract, which both parties signed late in 2014, included the following articles.

ARTICLE 1: Destruction and Restoration

Section 1.1 Landlord's Option to Terminate. In the event the Premises or the building of which the Premises constitute a part shall be damaged or destroyed by fire or other casualty to the extent that the cost of repairing or replacing the same will exceed twenty five percent (25%) of the then replacement value thereof, then Landlord may, at its option, within thirty (30) days after the issuance of the proof of loss by the insurance company insuring the building, terminate this Lease upon written notice to Tenant, in which event this Lease shall be deemed terminated.

Section 1.2 Restoration. In the event of any damage or destruction by fire, the elements, or casualty (hereinafter called "Destruction") to all or any part of the leased Premises, Tenant shall commence promptly, and with due diligence continue, to restore same to substantially the same condition as existed immediately preceding the Destruction, except as otherwise provided in this Article. If the Destruction is partial, Tenant shall complete the restoration within ninety (90) days after the Destruction. If the Destruction is total, Tenant shall complete the restoration within one hundred eighty (180) days after the Destruction.

Section 1.3 Termination. In the event this Lease is terminated in the manner set forth above, the rentals, including additional rentals, shall be apportioned to the time of such casualty. In the event this Lease is not terminated, then the rental payable by Tenant shall be equitably abated based on the square footage in the Premises which are usable, until such time as the damage to the Premises has been repaired.

Section 1.4 Damage to the Shopping Center. Notwithstanding that the Premises may not be destroyed or damaged by fire or other risk, in the event that other buildings containing twenty five percent (25%) or more of the ground floor building area of the

Shopping Center shall be damaged or destroyed by fire or other risk, whether or not covered by Landlord's fire and extended coverage insurance, Landlord shall have the election to terminate this Lease or to continue this Lease in full force and effect, and Landlord will notify Tenant of Landlord's election within sixty (60) days after receipt of written notice by Landlord of such other damage or destruction.

ARTICLE 36: Entire Agreement

Section 36.1 Entire Agreement. This instrument constitutes the entire agreement between Landlord and Tenant; no prior written or prior or contemporaneous oral promises or representations shall be binding. The submission of this Lease for examination by Tenant and/or execution thereof by Tenant does not constitute a reservation of or option for the Premises and this Lease shall become effective only upon execution by all parties hereto and delivery of a fully executed counterpart hereof by Landlord to Tenant. This Lease shall not be amended, changed or extended except by written instrument signed by both parties hereto.

Section 36.2 Force Majeure. Excepting rental payments, in the event Landlord or Tenant shall be delayed, hindered in or prevented from the performance of any act required hereunder by reason of strikes, lockouts, labor troubles, inability to procure materials, failure of power, unavailability of any utility service, restrictive governmental laws or regulations, riots, insurrections, the act, the failure to act, or default of another party, war, or other reason beyond Landlord's or Tenant's control (individually "Force Majeure"), then performance of such act shall be excused for the period of the delay, and the period of the performance of any such act shall be extended for a period equivalent to the period of such delay. Within ten (10) days following occurrence of Force Majeure, the party claiming a delay due to such event shall give written notice to the other setting forth a reasonable estimate of such delay; provided that in no event shall any delay in Tenant's opening for business as a result of any such cause or causes be in excess of thirty (30) days. The provisions of this Section shall not affect or apply to any obligation for the payment of money. No problem arising out of or relating to Tenant's computer software, hardware, external interfaces or external computing infra-structure shall be considered an event of Force Majeure or in any other way excuse Tenant from full performance under its Lease with Landlord.

However, Saks's CEO and lawyers do not agree that Article 1 (above) was the text to which they had agreed. The Saks team claims that they had agreed with Maller to the inclusion of different terms concerning the repair of the mall in the event of substantial damage. Indeed, they claim that they had agreed to this language early in the negotiations, and that there was very

little disagreement over these provisions. Later negotiations, the Saks team claims, focused on different issues related to utilities, tax payments, and parking.

The Saks team claims that the version of Article 1 below (titled “Damage or Destruction”) was the text to which both parties had agreed. The Saks team believes that the Maller team substituted a different version of Article 1—the text above that requires the tenant to rebuild quickly—and that the Saks team simply did not notice the change because the provision had been uncontroversial when negotiated. The Saks team has no opinion on whether Maller’s team made the change intentionally or through inadvertence.

The version of Article 1 that the Saks team claims is truly part of the contract is as follows:

Article 1: DAMAGE OR DESTRUCTION.

A. In the event the Premises or the building of which the Premises constitute a part shall be partially damaged or destroyed by fire or other casualty to the extent that the cost of repairing or replacing the same will be equal to or less than twenty five percent (25%) of the then replacement value thereof, or in the event Landlord does not elect to terminate this Lease as provided herein and provided the damage or destruction was not caused by the negligent acts or omissions of Tenant, then Landlord shall repair the damage with reasonable dispatch after notice of such casualty; provided, however, Landlord’s obligation to repair or restore shall be limited to restoring the structural portions of the Premises and shall not include repairs or the restoration of any of Tenant’s fixtures, improvements or other alterations made by Tenant in or upon the Premises; provided, further, however, in the event such damage or destruction occurs during the last year of the term hereof, Landlord shall have the option to terminate this Lease upon written notice to Tenant given at any time before ninety (90) days after the issuance of the proof of loss by the insurance company insuring the building. In the event such repair or restoration cannot be completed within one hundred eighty (180) days from the date of such casualty subject to delays caused by governmental restrictions, strikes, lockouts, shortages of labor or material, acts of God, war or civil commotion, fire, unavoidable casualty, inclement weather or any other cause beyond the control of Landlord and provided the repair or restoration is not caused by the acts or omissions of Tenant and provided Tenant is not in default of this Lease, Tenant may by written notice to Landlord, terminate this Lease and its obligations hereunder. Notwithstanding anything provided herein to the contrary, Landlord’s obligation to repair or rebuild shall be limited to the amount of the fire insurance proceeds received by Landlord (less any costs incurred by

Landlord in collecting the same) in the event of any such casualty. In the event the fire insurance proceeds received by Landlord (less any costs incurred by Landlord in collecting the same) are insufficient to rebuild the Shopping Center and the Premises, to their condition as they existed immediately prior to such casualty, then Landlord shall have the option to terminate the Lease upon notice to Tenant within ninety (90) days after Landlord's receipt of the entire net insurance proceeds payable with respect to such fire or casualty.

B. If, as a result of any Destruction, fifty (50%) percent or more of the total floor area of the Tenant's Building is damaged, destroyed or, in Tenant's reasonable opinion, rendered untenantable when less than three (3) years remain under the term of this Lease [and, if said term shall have been extended, then this provision shall apply only to the last three (3) years of the then existing Renewal Period], Landlord or Tenant may elect to terminate this Lease by giving notice to the other of such election on or before the date which is ninety (90) days after the Destruction, stating the date of termination, which shall be not more than thirty (30) days after the date on which such notice of termination shall have been given, and: (1) upon the date specified in such notice this Lease and the term hereof shall cease and expire: and (2) any fixed annual rent and Charges paid for a period after the date of the Destruction shall be refunded to Tenant upon demand.

C. If, as a result of any Destruction, Tenant loses the use of the whole or any part of the Tenant's Building or the whole or any part of the Common Area, fixed annual rent and Charges shall abate equitably to the extent Tenant is deprived of such use. If by reason of any Destruction Tenant, in its reasonable opinion, determines that to remain open for business is not practicable and Tenant closes the Premises for business, fixed annual rent and Charges shall be abated in full until the condition which caused Tenant to so close shall have been remedied.

YOUR JOB:

Your job is to analyze the contracts issues in the three hurricane-related transactions. Do not analyze intellectual property or torts issues.

First, with the regard to the RFA-PowerSnap contract regarding Newstate's power grid, evaluate PowerSnap's claim for payment and/or damages. Be sure to consult the contract, which is Appendix 1.

Second, Hermès would like to know if its competitor, Marc Jacobs Carolyn (MJC) or Barneys has or in the future may have any sort of contracts-related claim against either Newstate Specialty Handbags or Hermès. If so, what are the risks?

Third, what are the relative contractual rights and remedies available to Maller and Saks with regard to their lease at the Mall of Newstate?

Appendix 1

Contract between Newstate Power Authority and PowerSnap, LLC

ARTICLE 1: Scope of Contract

The Contractor shall provide labor, supervision, tools, and equipment necessary to perform transmission and distribution power grid reconstruction; from 600V to 230KV; aerial and underground; at the Newstate Power Authority, hereafter referred to as NPA power grid.

ARTICLE 2: Definitions

Whenever the words defined in this article or pronouns used instead are mentioned in this Contract, they shall have the meanings here given:

Engineer - shall mean the Transmission and Distribution Director of NPA, acting directly or through his properly authorized representatives.

Contracting Officer - shall mean the Chief of Supply Chain Division and Contracting Officer of NPA, acting directly or through his properly authorized representatives.

Contract - shall mean collectively, all the covenants, terms, and stipulations in these articles of agreement, which constitute an amendment and supersedes to that contract entered into by the parties on September 26, 2017, and in all supplementary documents hereto attached.

Change order - A written agreement between the parties that sets out changes in price, time, or scope of work to the Contract, which has been approved by the appropriate official pursuant to the general authorization for approval.

Contract Release - A purchase order created with reference to this contract, the contract release documentation (order date, quantity, value, number of the contract release order, account number, among others) is included as part of each release.

ARTICLE 3: Consideration

In accordance with the terms and conditions contained herein, NPA agrees to pay and the Contractor accepts that NPA will make payment for the work performed on a Time and Materials basis at the rates set forth in a separate document. As compensation for services rendered under this Contract NPA and the Contractor agree that the total amount to be paid under this Contract shall not exceed \$300,000,000 (the Contract Amount). All payments shall be made after the approval of the Contract Release.

NPA will only pay for Services already rendered before the submitted invoice date. NPA will not be required to make advance payments for any future service to be rendered by Contractor under the Contract, except for those services related to the initial mobilization and final demobilization. Contractor shall submit weekly invoices which will include a description of the services rendered

as per established in the scope of work and the contractor's proposal. Each invoice shall be itemized and must be duly certified by an authorized representative of the Contractor.

NPA will approve invoices within seven (7) calendar days, from time of receipt from contractors' initial submission. NPA will review the invoices and if they are in compliance with the requirements set forth in the Contract, NPA will proceed with payment within three (3) calendar days of the approval of invoice. Payment is due upon approval of a valid invoice. In any event, payment terms to contractor shall not exceed Net 10 Days from date of submission of invoice by contractor to NPA. A finance charge of 1% per month shall be due on payments received after the date due pursuant to the schedule described above.

All invoices have to be sent to the following address:

Newstate Power Authority
180 House of Russell Rd.
Newtown, NS 00023

ARTICLE 4: Commencement and Completion of Work

- 1.) *Inspection and Delivery* - Unless mutually agreed, all works shall be completed as per schedule of proposed progress from the commencement date as established per Contract Release for all work to be performed. The commencement date will be the beginning date stated on the letter of mobilization.
- 2.) *Schedule of Proposed Progress* - Contractor will use commercially reasonable efforts to perform the work in such a manner to meet NPA's scheduling expectations, but NPA waives any claim against Contractor related to delayed completion of the work.
- 3.) *Contract Term* - This Contract shall be in effect for a period of twelve (12) months beginning on the date on which parties sign the Contract (the "Original Term"). NPA may extend the Original Term for additional periods of twelve (12) months by written amendment between the parties.

ARTICLE 5: Suspension of Work

NPA may, at any time, suspend the whole or any portion of the work under this Service Contract Order, by providing Contractor with a written notice stating the reasons for suspension at least five (5) days in advance of the day the suspension shall take effect. The right of NPA to suspend the work shall not be construed as denying the Contractor all actual, reasonable and necessary costs and expenses due to the delays caused by such suspension.

Either Party may suspend the whole or any portion of the work under this Order by reason of the occurrence of a Force Majeure event as described in Article 8 herein.

In case of suspension of the work by NPA for any reason, or in case the work is suspended in whole or in part due to the occurrence of a Force Majeure event, Contractor's obligations shall be

extended for a period of time reasonably necessary to overcome the effects of any such suspension. Contractor will also have the right to claim lost revenue standing time of manpower and equipment, and overhead costs.

If the suspension extends for more than fifteen (15) days, the Contractor shall have the right to an equitable adjustment to the amounts payable to Contractor and the Contract shall be modified in writing accordingly. If a suspension extends beyond thirty (30) days, Contractor has the right to terminate this contract.

ARTICLE 6: Changes and/or Extra Work

NPA may, at any time, by written order, make changes in the Services or work to be performed within the general scope of this Contract. These works assignment shall be agreed between Contractor and NPA. The approval of this extra work is subject to NPA's Project Manager. The Contractor shall work with NPA to supply Emergency Crews for this purpose. Those Crews shall be independent of the Circuit Crews assigned to the scheduled circuit. All contractual specifications shall apply. If such changes cause an increase or decrease in Contractor's cost of, or time required for, performance of any services under this Contract, an equitable adjustment shall be made and this Contract shall be modified in writing accordingly. Provided, however, that no changes shall be made to the scope of the Services that would render the costs incurred in the performance of this Contract unallowable or not allocable under, or outside the scope or not reasonable for the completion of, Federal grant awards from the Federal Emergency Management Agency ("FEMA") or any other U.S. Federal agency.

ARTICLE 7: Payment

Payment shall be Time and Materials at the rates set forth in the attached schedule of rates. Payment for work performed under the Contract shall not exceed the ceiling price specified in the attached schedule of rates. NPA shall have no obligation to pay the Contractor any amounts in excess of the Contract ceiling price. The Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price specified in the attached schedule of rates, unless and until NPA notifies the Contractor in writing that the ceiling price has been increased and specifies in the notice a revised ceiling that shall constitute the ceiling price for performance under this Contract. When and to the extent that the ceiling price set forth in the attached schedule of rates has been increased, any hours expended and material costs incurred by Contractor in excess of the ceiling price before the increase shall be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

ARTICLE 8: Force Majeure

Notwithstanding anything to the contrary herein contained, it is agreed that either party hereto will be relieved of its obligations hereunder in the event and to the extent that performance hereof is delayed or prevented by any cause beyond its control and not caused by the party hereto claiming relief hereunder, including, without limitation, acts of God, industrial disturbances, acts of the public enemy, war, blockages, boycotts, riots, insurrections, epidemics, earthquakes, storms, floods, civil disturbances, lockouts, fires, explosions, interruptions of services due to the

acts or failure to act of any governmental authority, provided that these events, or any other claimed as a Force Majeure event, and/or its effects, are beyond the reasonable control and were not caused by the fault or negligence of the party claiming the Force Majeure event, and that such party, within ten (10) days after the occurrence of the alleged Force Majeure, gives the other party written notice describing the particulars of the occurrence and its estimated duration. The burden of proof as to whether a Force Majeure has occurred shall be on the party claiming the Force Majeure.

ARTICLE 9: Suspension of Payment

If Contractor fails in completing the work, or any separable part thereof, within the timeframe established in Article 4, Commencement and Completion of Work, NPA may, as its option, retain that portion of the payment attributable to the non-conforming work until such service discrepancies have been corrected. In case of delay, the Contractor shall within ten (10) days from the beginning of any such delay notify the Engineer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of facts justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, provided that, no claim made by Contractor against NPA, its agents, contractors, subcontractors, employees, successors, assignees, for any cause whatsoever, during the progress of any portion of the work embraced in the Contract shall relieve any of the parties from the performance of its obligations and of the work under this Contract, which shall not suffer any delay by reason of a claim being ascertained by either Party under this Contract.

ARTICLE 10: Independent Contractor

- 1) NPA and the Contractor agree that Contractor's status hereunder and the status of any agents, employees and subcontractors engaged by the Contractor shall be that of an independent contractor only and not that of an employee, agent, director or officer of NPA nor shall they be considered a public servant of neither NPA nor Newstate. The Contractor recognizes that its personnel shall not be entitled to employment benefits such as vacations, sick leave, retirement benefits and other benefits from NPA because of its condition as an independent contractor. Neither the Contractor nor its personnel shall have any power or right to enter into contracts on behalf of NPA. No provision of this Contract shall be deemed to create an employment relationship between Contractor or his employees and NPA.
- 2) At NPA's request, Contractor will immediately remove from service any employee whose acts or omissions will be a violation of applicable law or constitute a breach of this Contract.
- 3) Contractor represents and warrants that the employees used in the performance of the services hereunder will have the qualifications, skills and experience necessary to perform the services and will have the work records as represented to NPA.

ARTICLE 11: Termination

- 1) Notwithstanding anything to the contrary in this Contract regarding its term, NPA may, at any moment, terminate, cancel or accelerate its expiration, after giving the Contractor not less than thirty (30) days prior notice, for any or no reason, when in NPA's judgment such action responds to its best interest.
- 2) NPA may terminate this Contract (or any portion thereof) for any cause if Contractor (i) becomes insolvent, or (ii) in is material breach of the service obligation, which does not otherwise have a specified contractual remedy, and fails to cure the breach within thirty (30) days of notice from NPA; or fails to commence to cure the material breach and diligently proceed with the cure if it is not possible to cure within thirty (30) days of such notice. If NPA terminates the Contract, NPA shall pay to the Contractor all portions of the work completed and for actual, reasonable, and necessary expenses caused by such termination, which shall apply in the case of Termination by either Party for any reason.
- 3) If this Contract is so terminated, the Contractor shall be compensated for actual, reasonable, and necessary expenses, including reasonable demobilization costs caused by such termination. The exercise of NPA'S right to terminate, cancel or rescind the Contract shall not be understood as a waiver by NPA to any other remedy it may have under this Contract or under the law for delays or breach incurred by the Contractor in the performance of its obligations under the Contract.
- 4) Breach by NPA. Upon written notice to NPA from Contractor stating that NPA is in material breach of the Contract, NPA will immediately remedy such material breach. Where NPA fails to remedy such material breach within ten (10) days or to promptly initiate and continue in good faith to remedy a material breach that cannot be reasonably remedied in ten (10) days, Contractor will have the right to terminate the Contract upon five (5) days' notice to NPA. NPA further agrees that if it commits a substantially similar material breach more than twice in any one (1) month period, regardless of remedy, Contractor will have the right to terminate the Contract upon notice to NPA.

ARTICLE 12: Termination Settlement

- 1) If the Contract is terminated for any reason, the Contractor shall stop work as specified in the termination notice provided by NPA, and shall be prohibited from incurring additional obligations of Contract funds. NPA may allow costs that the Contractor could not reasonably avoid during the termination process to the extent that said costs are determined to be necessary and reasonable.
- 2) In the event of a termination, all work in process, finished or unfinished documents, data, studies, surveys, drawings, maps, models, photographs, reports, property and any other items or deliverables prepared by the Contractor that would be furnished to NPA, Newstate, or the Federal government if the Contract had been fully performed shall, unless otherwise stated in writing by NPA, become NPA's property.

- 3) Following termination, the Contractor shall submit a final termination settlement proposal to NPA in the form and with the certification prescribed by NPA. The Contractor shall submit the final termination settlement proposal promptly, but no later than one year from the effective date of termination, unless extended in writing by NPA upon written request of the Contractor within this one-year period. The Contractor and NPA may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount may not exceed the total Contract price as reduced by (1) the amount of payments previously made and (2) the Contract price of work not terminated. The Contract shall be modified, and the Contractor paid the agreed amount.

ARTICLE 13. Waiver

No waiver of any breach of this Contract shall be held to be a waiver of any other subsequent breach.

ARTICLE 14: Payment to Contractor

Upon completion and acceptance of all work required hereunder, the amount due to the Contractor under this Contract will be paid upon the presentation of a properly executed and duly certified invoice therefore, after the Contractor shall have furnished NPA with a release, if required, or all claims against NPA arising under and by virtue of this Contract, other than such claims if any, as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein; provided that, the amount of such excepted claims is not included in the invoice for final payment.

All invoices submitted by the Contractor shall be subject to NPA's approval before being paid, and its payment shall be done within three (3) days after the date of its approval by NPA.

ARTICLE 15. Change in Law

During the term of this Contract, if there is any change in law, including, but not limited to changes in applicable tax law, which causes an increase in Contractor's costs when supplying the products or services to be acquired by NPA, Contractor and NPA shall use commercially reasonable efforts to resolve the situation, including, but not limited to, revising the applicable rates.

ARTICLE 16: Choice of Law

This Contract shall be governed by and construed in accordance with the laws of Newstate. Also, the contracting parties expressly agree that only the state courts of Newstate will be the courts of competent and exclusive jurisdiction to decide over the judicial controversies that the appearing parties may have among them regarding the terms and conditions of this Contract.

ARTICLE 17: Separability

If a court of competent jurisdiction declares any of the Contract provisions as null or invalid, such holding will not affect the validity and effectiveness of the remaining provisions of the

Contract and the parties agree to comply with their respective obligations under such provisions not included by the judicial declaration.

ARTICLE 18: Discrimination

The Contractor certifies that it is an equal opportunity employer, and does not discriminate by reason of race, color, gender, age, national or social origin, social status, political ideas or affiliation, religion; for being or perceived to be victim or domestic violence, sexual aggression or harassment; for physical or mental disability or veteran status.

ARTICLE 19: Complete Agreement

This document, together with all attachments referenced herein, constitutes the complete Agreement between the parties.

ARTICLE 20. Contract Validity

If one or more clauses of the contract are declared invalid, void, unenforceable or illegal, that shall not affect the validity of the remaining portions of the Contract, which shall remain in full force and effect.

ARTICLE 21. Warranty

Contractor warrants that it shall perform the Services in accordance with the applicable standards of care and diligence at the time of performance of the Services, and which are normally practiced and recognized in performing services of a similar nature (the "Standard"). Should any of the Services provided by Contractor not fulfill the above established Standard, Contractor shall take all necessary corrective measures to rectify such deficient Services, at its own and exclusive cost, whenever such course of action is possible or desirable. The rectification of deficient Services by Contractor shall not be understood as a waiver by NPA to any other remedy it may have under this Contract or under the law or equity for any damages that Contractor's may have caused to it by rendering such deficient Services.

ARTICLE 22: No Obligation by the Federal Government

The Federal Government is not a party to this Contract and is not subject to any obligations or liabilities to NPA, Contractor, or any other party pertaining to any matter resulting from the Contract.

ARTICLE 23: Modifications and Amendments

No amendment to or modification or other alteration of the Contract shall be valid or binding upon the parties unless made in writing, signed by the parties and, if applicable, approved by Newstate.

ARTICLE 24: Assignment

The Contractor shall not assign any interest in this Contract, and shall not transfer any interest in the same (whether by assignment or novation) without prior written approval of NPA.

ARTICLE 25: Subcontracting

The Contractor may not subcontract any of the Services that it has committed to perform or provide pursuant to this Contract without the prior written approval of NPA, which consent can be provided via email. Such approvals shall not be unreasonably withheld. Such consent to subcontract shall not relieve the Contractor of its full responsibilities under this Contract.

Consent to the subcontracting of any part of the services shall not be construed to be an approval of said subcontract or of any of its terms, but shall operate only as an approval of the Contractor's request for the making of a subcontract between the Contractor and its chosen subcontractor. The Contractor shall be responsible for all services performed by the subcontractor and all such services shall conform to the provisions of this Contract.

Article 26. Entire Agreement

The terms and conditions contained herein constitute the entire agreement between NPA and the Contractor with respect to the subject matter of this Contract, and supersede all communications, negotiations, and agreements of the parties, whether written or oral, other than these, made prior to the signing of this Contract.

[Signature page omitted.]

END OF EXAM

MEMORANDUM

To: House of Russell Contracts Students
From: Professor Russell
Re: 2017 Autumn Contract Final (Hurricane)
Date: January 16, 2018

This brief memo includes the strongest student answer to the autumn 2017 Contracts final examination as well as a brief discussion of some of the points that distinguished the strongest answers. Overall, the organization of the answers was very good. Almost no one began with aggravating list of “preliminary matter.” A number of students put their Banner ID (the 87 number) or part of it in their answers; I did not treat this as an Honor Code problem. When applying *Bonebrake* (not Bonebreak), many used the word predominate in place of predominant. One student used the word upmost instead of utmost.

The distribution of grades was as follows:

A	4
A-	7
B+	21
B	18
B-	14
C+	3
C	0
C-	0
D+	0
D	1
D-	0
F	0

MEAN	3.10
MEDIAN	3.00

Newspaper stories about Puerto Rico provide the story for two-thirds of the hurricane exam. The handbags portion of the exam is based loosely upon litigation that a friend of mine is handling regarding litigation between steel companies that for more than 20 years operated on a handshake basis.

Power: Very few students noticed that the contract to rebuild the power grid rested upon illusory consideration if the NPA reserved the right to cancel the contract with PowerSnap for any reason. If, instead, NPA could only cancel for performance-related—that is, objective—reasons, then there is consideration. Getting to this meaning of the cancellation clause required

the solution of the problem of parol evidence, either through a Corbinesque jurisdiction, some kind of misrepresentation or fraud-in-the-inducement claim, or a combination of the two.

The formation of the contract with only two bids violates Newstate law, but PowerSnap should not suffer for this violation.

The best answers dove into the details of the mall lease contracts.

The exam contains sufficient numbers to make good damage calculations. Many students failed to see that the cancellation damages specified in the contract are liquidated damages. Using Articles 11 and 12, the damages for cancellation are \$90 million in costs + \$30 million for demobilization + a reasonable profit, which might be 60% of \$90 million or \$54 million for a total of \$174 million. This figure is not a penalty; indeed, it's a pretty good deal for a tiny company.

Expectation is the expected profit of \$90 million + costs of \$120 million - possible salvage. This is \$210 million – possible salvage. Or, expectation is the contract price minus costs saved as a consequence of the breach, which is \$300 million - \$90 million = \$210 million. A number of students merged the two different formulae, which shows a lack of understanding of the expectation interest.

Reliance is the costs of \$90 plus the \$30 to demobilize or \$120. This would put PowerSnap back to square zero. This may be the least desirable remedy.

Restitution would be the value to NPA of the work done so far. The smallest, but still large figure for this might be 60 % of the \$300 million value of the contract. One clever student suggested using the insurers' estimate of total damages (\$80 billion) in order to construct an estimate of the value of the power grid as a portion of the total value. Done right, this version of restitution could be the most valuable remedy.

Handbags: The handbags problem is an application of Article 2 principles in a very informal business setting. As noted above, the structure of the problem is based upon steel-industry deals that for decades relied upon handshakes; in the real world, it is not just expensive handbag makers who eschew written contracts.

The best student answers identified the contract between NSH and MJC (and also between NSH and Hermès) as outputs contracts. The outputs contract with MJC required good faith in performance, 2-306. Some students found that the contract might be terminated at any time, 2-309(2). The parties formed the contract when the MJC buyer replied by text. After that point, the sending back and forth of drafts of the paper contract amounted to nothing. Just because the parties may execute a later, written contract does not mean that there is no enforceable contract already.

Not sending the hurricane-damage bags to MJC, or at least offering them to MJC, was a breach of the contract with MJC. Neither the hurricanes nor 2-615 provide a way out for NSH.

The damage calculation focused on the replacement of the wholesale bags that NSH provided. Barneys sells the bags at a very high retail price; Hermès intended to sell the bags at an even higher price in Paris. But, for the purpose of cover or market-price calculation of damages, the analysis must focus on the higher price that MJC could or might pay to cover. This is probably roughly the price that Hermès might pay.

However, because the goods were unique goods, MJC (perhaps backed by Barneys) would want to seek specific performance plus replevin. That is, MJC would itself want the bags that NSH had sent to France, so that MJC could then resell them to Barneys, which in turn would offer them for ridiculous prices to Barneys' retail customers. Getting the bags back through replevin might not be possible, but not so much time has passed since Hermès made its deal with NSH.



Noteworthy among defenses was the statute of frauds. Although there was no writing that NSH signed, NSH received the text from the MJC buyer. The text is a writing, and 2-201(2) makes clear that unless NSH objects within ten days, the text satisfies the statute of frauds. Likewise, 2-201(3), which deals with specially manufactured goods, provides another way to satisfy the statute of frauds.

Whether the relationship between NSH and MJC might survive litigation was worth mentioning.

Mall: The mall problem is also based on a lawsuit that the owner of the Mall of Puerto Rico recently filed against Saks Fifth Avenue. The news story by Esther Fung is from the Wall Street Journal.

Parol evidence was also a key to this problem. Saks claims, early on, to have agreed to a provision that was favorable to Saks's interests regarding the rebuilding of the mall after a catastrophe. If the change were intentional—we don't know—an exception to the parol evidence rule might allow evidence of the contrary meaning to come in.

Saks, by failing to read the final contract, might lose. However, some students who had read the notes after *Market Street Associates* (or who remembered our discussion in class) referred to *Henning v. Ahearn* (Casebook, p. 565), which held that “there is not a rule of law that a party must read each and every word of successive drafts of a complex document.”

There was a small *Hadley v. Baxendale* issue in the problem. During negotiation, Maller did not state that his profits relied upon the operation of the anchor tenants. Many students too quickly dismissed consequential damages without noting that that parties to mall leases might all

understand that lost profits to mall landlords arise from breaches by anchor tenants—that is, such damages are ordinary or natural losses that satisfy the first part of the Hadley test.

High-scoring answers displayed deep dives into the text of the mall lease including the two competing sections regarding restoration. Some students noted that Saks seemed to be behaving according to the understanding of the lease that Maller asserted, which undercuts Saks' claim to different text.

In this section, as with the handbags section, the issue of force majeure and impracticability played a role. Without electricity, putting its store back together is a challenge for Saks.

These stories are likely to remain in the news for months and years to come.

Attached is a high-scoring though, as always, imperfect student answer.

CLAIM 1:

1. Applicable Law

Per *Bonebrake*, the contract's predominant thrust is a service because most of the costs are for mobilization and labor for the power grid reconstruction rather than materials—thus governed by common law. The transmission lines, etc. are equivalent to shingles.

2. Enforceability

2.1 Offer and Acceptance

PowerSnap offered to reconstruct a statewide power grid for \$300,000,000.
Newstate/NPA accepted.

2.2 Consideration

Promise (reconstruction of the power grid) for a promise (\$300,000,000 payment).

However, Article 11(1) created an illusory promise because NPA had the option to cancel the contract at any time for any/no reason. Because there is no consideration, there is no contract.

2.3 Promissory Estoppel

Reliance on the deal induced PowerSnap's performance, making the agreement enforceable.

3. Content

Parol Evidence Rule (PER)

PowerSnap will want to include the executive's assertion (if supported) as parol evidence because it restricts the termination clause enough to create consideration, making the contract enforceable. The contract is completely integrated via Article 9. A Willistonian

jurisdiction may admit the contemporaneous assertion if it is clearly intended to clarify, not contradict, the written contract. A Corbinesque jurisdiction will likely admit it in order to determine whether the integration is complete.

Fraud in the Inducement?

If the NPA executive's assertion justifiably induced PowerSnap's assent, the contract could be voidable in whole or in part, regardless of NPA's intent. However, the court might not find misrepresentation/fraud because the assertion was not one of fact, and as a merchant, PowerSnap was not reasonable or justified on relying on it. Additionally, because the representation occurred before signing the contract, NPA had no duty of good faith.

4. Breach?

NPA breached because outside pressure sparked the contract termination, not PowerSnap's poor performance.

5. Damages

PowerSnap should wait until incidental costs actualize to avoid uncertainty limitations while following settlement terms.

5.1 Liquidated Damages

PowerSnap's fair liquidated damages are \$174,000,000 = [costs spent (\$40mill+\$20mill+\$30mill), demobilization expenses(\$30mill), *reasonable* profit (\$54mill (60% of \$90mill profit of work completed))]. (Awarding a larger profit will exceed the limitations set forth in Article 12(3).) NPA will contend that profits and demobilization expenses are not reasonable; however, these liquidated damages are likely less than the expectation damages.

5.2 Expectation

PowerSnap will argue for $\leq \$210,000,000 = [\$90\text{mill (expected profit)} + \$90\text{mill (costs)} + \$30\text{mill (incidental demobilization expenses)} - \text{income from salvageable goods/equipment}]$.

5.3 Reliance

PowerSnap is entitled to \$120mill (\$90mill + \$30mill demobilization) through promissory estoppel to be in as good a position as before contracting.

5.4 Restitution

If the court finds fraud in the inducement, PowerSnap is entitled to \$180mill = $[\$300\text{mill} * 60\% (60\% \text{ completion of contract price})]$. NPA will argue that the value conferred is less than the contract rates. NPA will also be entitled to any benefit conferred to PowerSnap.

5.5 Specific Performance

Courts avoid ordering specific performance on employment contracts, even though reconstructing a statewide power grid is unique.

6. Defenses

6.1 Unconscionability

NPA will argue that the contract was unconscionable because labor, housing, and food costs were 70% higher than other utility company rates. This would likely limit PowerSnap's damages rather than render the entire contract unenforceable.

6.2 Misrepresentation/Fraud

PowerSnap will argue that NPA induced assent to the deal by misrepresenting the termination clause, making the clause or entire contract voidable, and entitling PowerSnap to restitution.

6.3 Illegality

NPA will argue that because only two bids were submitted, the formation of the contract was illegal under Newstate law, making the contract unenforceable. PowerSnap will argue that because NPA had reason to know about the law regardless of potential “mistake,” the contract should be interpreted against NPA because its comparative fault is greater.

6.4 Duress

NPA will argue that the contract is voidable because its citizens were without power, and NPA accepted it under duress.

Conclusion:

If the court allows evidence in to clarify Article 11(1) or void it, then it will likely find that NPA is in breach. While the court may find both merchants at fault regarding illegality, NPA’s comparative fault is greater than PowerSnap and the contract should be enforced. NPA will not likely be awarded the \$210,000,000 it invoiced, but it will recover significant damages notwithstanding its negligent business savvy.

CLAIM 2

1. Applicable Law?

The predominant thrust of the deal regards identified goods (handbags) so Article 2 applies.

2. Enforceability

2.1 Offer and Acceptance

NSH verbally offered to sell all bags it makes to MJC, and MJC accepted by text message. Based on their 20-year course of dealing, this agreement constitutes a deal.

The subsequent contract battle does not void the verbal agreement because its content is unknown, and it was never signed.

That NSH did not want a written contract was not a condition of the deal based on the lack of conditionality of the statement and subsequent contract drafting (assuming good faith).

2.2 Consideration

Promise (sell all the bags produced) for a promise (buy all the bags produced for \$8,000USD/ea).

2.3 Promissory Estoppel

Reliance on the oral contract induced both parties' action. NSH was preparing to ship 12 bags to MJC before Karl hit. Notwithstanding MJC's failure to check on a 20-year business partner after a Class 5 hurricane, MJC's forbearance (not trying to find different vendors) shows its reliance on the deal, in addition to its pursuit of a written contract.

3. Content

Explicit Output Contract

NSH offered to sell MJC all the bags it makes for \$8,000USD/ea. Output contracts require good faith. Based on the contract, exclusive dealing is implied. Given the scarcity of the handbags, MJC/Barneys's exclusive market territory could be global.

Length

NSH did not specify the deal's length. Because of the 20-year course of dealing, assuming that the contract will continue indefinitely until terminated with notice is reasonable.

4. Breach

Assuming that the contract was based on the non-occurrence of hurricanes.

Existing Bags:

Assuming that the 12 bags were not damaged because of NSH's negligence, per §2-613, MJC had a right to demand inspection of the handbags and either accept them or void the contract. NSH's "assumption" that MJC would reject the bags was in bad faith—if Hermès wanted to buy them, likely MJC would too. NSH had an obligation to act in good faith, and selling the bags to Hermès constituted a breach.

Future Bags:

By contracting with Hermès, NSH anticipatorily repudiated and breached its duty of good faith. NSH can retract its repudiation unless MJC/Barneys cancels (unlikely).

Because NSH promised both merchants output contracts, it would be impossible for NSH to fulfill both contracts without breaching the other.

Warranty

While the damaged bags do not conform with past shipments, the express and implied warranty of merchantability is likely a non-issue because the market price increased and the handbags are merchantable. If MJC contests the express warranty after being awarded the existing bags, then it is due perfect tender and the difference in value due to damage (§2-615 will not excuse NSH's performance due to bad faith). This is unadvised.

5. Damages

Assuming NSH/Hermès knows that MJC sells the bags to Barneys which sells them for \$38,000USD/ea. If NSH/Hermès does not know about Barneys's consequential retail sale (unlikely, based on NSH's 20-year course of dealings), then damages regarding it do not apply.

Assuming NSH does not retract its anticipatory repudiation and that MJC and Barneys cannot affect cover.

5.1 Liquidated Damages

N/A

5.2 Expectation Damages

Because they are so unique, the handbags constitute the entire market, and Hermès's respective payments reflect the market price at the time of the breach.

Existing bags:

MJC: Damages = [Market price (\$9,830USD/ea+generator/gasoline value) – contract price (\$8,000USD/ea) + incidental and foreseeable consequential damages – expenses saved]

Barneys: Damages = [Market price (\$59,000USD/ea) – contract price (\$38,000USD/ea) + incidental and foreseeable consequential damages – expenses saved (MJC's wholesale cost, specific display and marketing costs, etc.)]

Future bags:

Because the contract was to continue indefinitely, calculating MJC or Barneys's damages is speculative. Neither is a lost volume seller because of incentives to limit sales à la Michael Jordan.

5.3 Reliance

MJC and Barneys would be entitled to reimbursement of any costs spent in reliance on the delivery of the 12 existing bags and future bags (anticipatory shipping/handling costs, display costs, etc.).

5.4 Restitution

Restitution damages can be claimed via the §1-103 escape hatch. But there is no evidence of unjust enrichment conferred onto NSH or Hermès for the 12 existing or future bags (or vice versa).

5.5 Specific Performance

If the court orders NSH to sell its bags to MJC, then NSH will breach its contracts to Hermès and face damages.

Existing bags:

Because the handbags are unique goods that are impossible to replace, the court will probably order NSH to give MJC an opportunity to inspect and buy the bags.

Future bags:

Because the handbags are unique goods that are difficult (if not impossible) to replace, the court might order NSH to sell the future bags to MJC/Barneys.

6. Defenses

6.1 Statute of Frauds

Because the contract was for goods valued over \$500, the contract is within the Statute of Frauds and requires a writing. Because there is no writing, NSH will argue that there was no contract. MJC will argue that the defense doesn't hold because both parties are merchants, and the text message is an adequate writing that confirms the contract because NSH failed to reply.

6.2 Capacity

While it is unlikely that NSH became incapacitatedly drunk from drinking wine and that Hermès was aware of NSH's intoxication, MJC might argue that the contract with Hermès is voidable.

6.3 Misunderstanding

NSH will argue that NSH and MJC both misunderstood the length of the contract and that the contract was not intended to extend past the delivery of the 12 bags, voiding the contract. Based on prior dealings, this defense is unlikely. If NSH did not intend to continue the deal indefinitely, it had the responsibility to clarify the misunderstanding. Since it did not, the contract will be interpreted against NSH.

NSH might argue that it only promised an average of 15 bags to NSH—not an outputs contract. However, based on their course of dealings, NSH was obligated to clarify the misunderstanding.

6.4 Duress

MJC might argue that the Hermès contract is voidable because NHS contracted out of duress because it so badly needed the generators, gasoline, and \$118,000.

6.5 Impossibility/Impracticability

NSH might argue that future performance was impossible/impractical because their facilities were destroyed and they had no mature crocodiles. However, §2-615 excused them from performance if they acted in good faith.

6.6 Adequate Notice

Because it will be at least six months before NSH can perform, NHS will argue that repudiating now (by contracting with Hermès) is adequate notice to terminate the contract with MJC for future bags. However, because they acted in bad faith, they are still in breach.

Conclusion:

The court will probably order NSH to let MJC inspect and buy the 12 existing bags, and then order reliance damages for the future bags contract. While Hermès will lose the 12 damaged bags, it will gain an exclusive product in the future.

CLAIM 3:

1. Applicable Law?

Because the contract regards the lease of property, common law governs.

2. Enforceability

2.1 Offer and Acceptance

Saks offered to pay the lease in exchange for the space, and Maller accepted the offer.

2.2 Consideration

Promise (Saks would pay the lease) for a promise (Maller would provide mall space).

2.3 Promissory Estoppel

Reliance on the existence of the contract induced both parties to pay the lease and provide mall space for nearly three years.

3. Content

The parties contend the Destruction Clause's content. Evidence of prior agreements is admissible to establish fraud or mistake, regardless of complete integration.

4. Breach?

While Saks's allegation of fraud/mistake could be in bad faith, it is possible that Maller substituted the contract segment. If so, because the segment potentially induced assent, the substitution was material, and the contract is voidable by Saks. If Saks is lying, then it has breached §205 (it has not yet breached Maller's contract, although its lack of assurance of performance and contract conflict could signal repudiation). The court will

decide who is at fault based on additional evidence, and the contract will be interpreted to provide the injured party the benefit of its own understanding and appropriate damages.

5. Damages

Including pre-destruction damages unjustly enriches the injured party. Consequently, calculations only take post-destruction damages into account and assume no pre-destruction debts.

5.1 Liquidated Damages

Maller Contract:

Reimbursable rent is apportioned.

Saks Contract:

If Saks appropriately terminates its lease, Maller must refund any fixed annual rent and charges paid since the destruction. These damages are not punitive.

5.2 Expectation:

Saks's Breach:

Maller is entitled to: [expected profit for remainder Saks's lease – income made from a new anchor tenant + incidental costs (overdue rent, finishing repairs Saks started, finding a new anchor tenant) + consequential damages (losses due to co-tenancy clauses for rent relief, lost profit) – costs saved].

Saks will argue that because Maller did not flip the Hadley Switch regarding co-tenant/profit consequential damages, those damages are not foreseeable and Saks doesn't have to pay them. Maller will argue that as an experienced merchant, Saks would reasonably

know about its importance as an anchor store for the mall generally, and the consequential damages are foreseeable.

Maller's Breach:

Saks is entitled to: [profit Saks would have expected to make if Maller had repaired premises in a timely manner + repair costs incurred due to Maller's breach – costs saved]. This calculation is speculative because of the difficulty of calculating expected profit post-hurricane.

5.3 Reliance

The injured party will receive any money spent in reliance on the contract in order to put the injured party in as good a position had the contract not been made.

5.4 Restitution

Maller and Saks are entitled to benefits conferred upon the other since the destruction. Saks will be reimbursed for the value of the repairs made and any outstanding rent, while Maller will be reimbursed for the value of any benefit it has conferred to Saks.

5.5 Specific Performance

It is unlikely the court would order specific performance. But if it finds that Saks's departure creates incalculable foreseeable consequential damages, it is possible that the court would order Saks to stay at the Mall.

6. Defenses

6.1 Impossibility/Impracticability

The breaching party will argue that repairing/reconstructing is impossible/impracticable even beyond the force majeure clause because the destruction has so limited supplies, power, labor, etc.

6.2 Mitigation

Saks will argue that it has tried to mitigate by engaging in repairs, limiting Maller's damages.

6.3 Unconscionability

The breaching party will argue that requiring prompt reconstruction is unconscionable because unforeseen extremity of the destruction places an undue burden for performance.

6.4 Inadvertence

Maller will argue that its substitution was not in bad faith.

Conclusion:

Based on the evidence, it seems more likely that Saks breached, and the court will award expectation damages to Maller, possibly with consequential damages. However, Maller might want to keep Saks as a tenant due to the terrible market; perhaps in exchange for a lease extension, Maller will not demand damages.

Word Count

2500