1) Please type the answer to Question 1 below. *(Essay)*

Because this is a construction contract, not a contract for the sale of goods, the Restatements and common law apply.

First, we must determine whether there was a contract between the parties, which requires consideration. According to R2DK §79, consideration is met if there is "a gain, advantage or benefit to the promisor or a loss, disadvantage, or detriment to the promisee," or a "mutuality of exchange." Here, the parties have a clear instance of a bargained-for exchange, since Vader seeks the benefit of installation of E-500 lasers in exchange for the detriment of paying 75,000 intergalactic credits (ics) and Bevel will receive the benefit of those ics in exchange for the work he will perform. Since there is consideration and thus an enforceable promise, Bevel is required to perform the contract as stated.

Unfortunately, Bevel committed a mistake in his bid, which has rendered his performance more difficult. This mistake was unilateral. According to R2DK §153, unilateral mistake makes a contract voidable when he does not bear the risk of the mistake under R2DK §154. Under R2DK §154, a party bears the risk of mistake when a. the risk is allocated to him by the agreement of the parties, or b. he is aware at the time the contract is made that he has only limited knowledge with respect to the facts to which the mistake relates but treats this limited knowledge as sufficient. Here, Bevel clearly made a mistake, but we must determine whether he meets either of the criteria of R2DK §154. The contract is silent with regard to where the risk of an underestimate lies, however, based on the trade practices of the construction industry, the contractor is generally held responsible for the estimates he makes on the costs of supplies and thus, this prong does not exempt Bevel from responsibility. Under the second prong, again, Bevel had limited knowledge, but the facts fail to show whether

Bevel's mistake was due to limited knowledge that he considered sufficient, but a miscalculation evidences a failure of due diligence on his part, which evidences his fault. Thus, Bevel's mistake does not rise to the level that will void his contract on the basis of mistake. At this point, Bevel may have been tempted to raise the defense of impracticability, however, according to R2DK §261, the impracticability was Bevel's fault, and thus, he cannot raise this defense to the issue of his miscalculation.

At times, when a performance is rendered more difficult, the parties may enter into renegotiation to help secure performance. Brian Construction v. Brighenti. This renegotiation, however, must be supported by a new consideration in order to render any concessions enforceable, and moreover, Bevel had no right to demand a modification based on his pre-existing duty to perform the contract to which he was bound. Thus, at this point, any change in the contract would be at Vader's will and for consideration, neither of which was offered or accepted. Instead, in response to Bevel's request, Vader gave a threat. This threat would be improper if it induced any contractual obligation on the part of Bevel based on the defense of duress (R2DK §174). However, even though the threat from Vader might have been viewed as improper, since it threated a crime or tort (R2DK §176(1)(a)), since no manifestation of assent was induced by an improper threat (R2DK §175), no duress exists as a defense to proper performance of Bevel's contractual obligations. Thus, the threat issue is irrelevant to this aspect of the contractual relationship, though it may have some bearing on good faith, discussed below.

A third dispute between Bevel and Vader centers on the issue of impracticability. Even after Bevel's responsibility remained through threat and mistake, his performance was rendered impracticable when the cost of supplies skyrocketed. At that point, R2DK §261, provides that "after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on

which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate to the contrary." Here, the embargo causing supply costs to increase was unforeseen, and thus the contract's price estimate, a basic assumption on which the agreement was made, is rendered impracticable, and thus, Bevel's duty to perform at this point would be discharged. As a note, the degree of impracticability matters; mere inconvenience is insufficient, but must rise to a level sufficient to justify the defense. An increase in the costs, such as the four-fold increase seen by Bevel, rises to this level. [A showing that bankruptcy would result from this increase in cost would aid in this finding.] Vader might argue that Bevel waived his right to assert this defense, by evidencing the fact that he was capable of performing and thus, that it was not impracticable. However, Bevel's continued performance was based on improper threats made by Vader, which means they were performed under duress, and thus indicate no waiver, but coercion. Therefore, Bevel still should have been absolved of contractual responsibility to perform. However, because he rendered full performance, though it may have been faulty, this issue is immaterial.

Bevel's completion of the job mirrors the case Jacob & Youngs v. Kent (JYK), in which a contractor substituted a pipe of equal value, but different in name from that of the contracted material. The home-owner sought replacement of the pipe, but Justice Cardozo held that the replacement was likely made in good faith, and that the only appropriate remedy would not be the cost of completion according to the contract, but rather, the diminution in value, which was minimal at best. Here, we must ask whether the breach caused by exchanging material was material, and additionally, what the appropriate remedy would be. According to Anderson in "A New Look at Material Breach in the Law of Contracts," a material breach is used to protect an interest in future performance, but here, the failure was a violation of an interest in present performance based on nonfeasance (or possibly malfeasance), which Anderson says demands compensatory damages, but not in cancellation of the contract. Thus, Vader has an

interest only in compensatory damages, but may not cancel the contract.

We then must determine what the proper compensatory damages are. The loss in value of performance on a construction contract, under R2DK §348, allows that the damages may be measured based on the diminution in market price of the property caused by the breach or the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss of value to him. Here, the probable cost was incredibly high, more than four times the initial cost expected, however, the fact that the substandard materials resulted in a complete loss (1 billion ics), shows that the value to Vader would have been proportionate to his request. Thus, we are given an option, and should look to JYK, and also Groves v. Wunder and Peevyhouse v. Garland. In both JYK and Peevyhouse, the failure to meet the contract was found not to be in bad faith. As such, the court awarded the diminution in value as the measure of expectancy. In Groves, the breach was based in bad faith, and the court awarded cost of completion damages, which were significantly higher. Here, the fact that Bevel could not afford the more expensive tubes, and that he was under duress from Vader both indicate that his actions were at least not in bad faith. Bevel's later actions, Vader argues, argue that he was acting in bad faith and attempting to sabotage the Death Star, however, given the severity of the other two factors, we find that the diminution in value should be awarded for the breach. As such, Vader's request that Bevel rebuild the lasers is denied, but Bevel will be responsible for the diminution in value. As such, we do not need to discuss the subsequent impossibility of Bevel's performing the modifications, based on the destruction of the Death Star (R2DK §263).

Bevel claims that he should be awarded restitution because the performance he rendered was created under duress, and that therefore Vader was unjustly enriched. Here, "because of their connection with exchanges, [unilateral concessions or promises of extra compensation], in varying degress, participate in the underlying grounds, both "formal" and

"substantive," which justify enforcement of exchanges." (Fuller, Consideration and Form.) Thus, on policy grounds and in the interest of justice, we find that the unspoken unilateral concession to pay for the additional costs on the part of Bevel justifies restitution from Vader for the amount of Bevel's expectancy (in light of his miscalculation, which would have reduced his initial expectancy), and the additional costs he was forced to bear as a result of the embargo (which should have been excused). This holding however, has one last caveat. Bevel's purported breach of the duty of good faith and fair dealing, as required by R2DK §205, may have been the cause of the complete loss of the Death Star. However, the record does not contain sufficient evidence to show that he did, in fact, leak the information. [We note that, because Bevel's award is made in equity, and because a showing of bad faith on his part might mitigate this finding in his favor, our holding is subject to appeal based on a showing of bad faith on Bevel's part.]

Question #1 Final Word Count = 1582

Question #1 Final Character Count = 9679

Question #1 Final Character Count (No Spaces, No Returns) = 8039

2) Please type the answer to Question 2 below. *(Essay)*

The first and central issue to Romeo and Juliet's dispute centers on whether their agreement has sufficient consideration. As required by R2DK §§ 71(1) and (3)(b) and 17(1), a contract requires a bargain, consideration, and in the case at bar, a forebearance applies.

Romeo, the *promisor*, has a bargained-for legal detriment, first, in his agreement to abstain from his legal right to frequent strip clubs and stay out late. Romeo does not have a legal detriment with regard to the use of drugs or the frequenting of prostitutes, however, because his abstention from these activities is not a legal right, and thus cannot be used as consideration for any agreement. He also has a legal detriment in his agreement to pay $100,000 for breach of his agreement to avoid late nights and strippers. However, bargain requires a bargained-for legal **benefit to the *promisor***, and/or a **detriment to the *promisee***. Hamer v. Sidway. In Hamer, an uncle promised a nephew $5,000 if he would abstain from drinking, smoking, and playing cards. The nephew abstained, the uncle died, and the executor of the estate refused to perform. The problem was that there was a clear detriment to the nephew, but the executor argued that there was no benefit to the promisor, the uncle. The court held that consideration only requires benefit to the promisor *or* detriment to the promisee.

Thus, the problem here is that there is a lack of legal detriment on the promisee, Juliet, and a questionable legal benefit to the promisor, Romeo. Juliet argues that the consideration she offered to Romeo was to forgive past indiscretions and remain with him. However, consideration must go beyond mere love and affection R2DK §71, comment a. As Fuller writes in "Consideration and Form," "We may define exchange vaguely as a transaction from which each participant derives a benefit, or, more restrictively, as a transaction in which the motives of the parties are primarily economic rather than sentimental." Thus, it would seem that Romeo's promise stands on shaky grounds. Fuller recommends, and Juliet needs to show at least some nominal consideration to make the promise of a gift binding, in order to show the channeling, evidentiary and cautionary functions, which render a contract enforceable, exist.

Assuming that Romeo's contention that Juliet wanted to tell his employer about his escapades was true, Juliet could claim that her legal detriment was her abstention from telling

Romeo's employers of his off-duty behavior. True, she does have the right to talk to whomever she pleases if her claims are true, but this would evidence bad faith, which the Restatements obligate a person not to engage in (R2DK §205). Thus, assuming Romeo had no legal alternative to prevent Juliet from causing him to lose his job, any consideration that might have been found would be invalid, because Juliet's threat was improper and this constitutes duress (R2DK §176(1)(a) and 175(1)). Additionally, her actions as a ground for inducing Romeo's assent would constitute undue influence, since she would be using her relationship with him and knowledge of his more private or personal habits to dominate him into consenting to a contract. (R2DK §177(1)). Thus, neither claim for Juliet's consideration suffices.

One final possibility for consideration rests in the fact that Romeo might value having someone patrol his behaviors, and thus, he was induced to promise the money in order to gain Juliet's assistance in staying home and free from strippers. This consideration, however, seems rather unlikely, and was not expressed. We therefore will not infer this consideration. This contract therefore lacks consideration, and the agreement is unenforceable as a gift; however, we will assess the remaining claims in order to assure that neither party has questions as regard their rights.

The final issues surround the admissibility of electronic communications, in the form of instant messages to evidence a written contract and the Statute of Frauds. First, the transaction between Romeo and Juliet does not fall under the Statute of Frauds, despite the high amount of money involved, as it is not in a class covered under the UCC (UCC §2-201). It may, however, fall under the Statute of Frauds as a contract made upon the consideration of marriage. R2DK §110 (Note, this may supply consideration in the above analysis, but was not assumed. Please consider it there, as well, as a possibility not proved by the evidence as yet.) Romeo's statements in his instant message that he was "not stupid enough to jeopardize our

future" might indicate his intention to treat marriage as his bargained-for legal benefit (and thus consideration. Should this be the case, the oral contract still might not be enforceable unless a written memorandum signed by Romeo existed to satisfy the Statute of Frauds.

Under R2DK §110(1)(c), a contract made upon the consideration of marriage is subject to the Statute of Frauds, and is thus unenforceable unless there is a written memorandum. Assuming, as stated above, that consideration of marriage induced Romeo's assent, we need to assess whether there was a written memorandum. Here, because the written communication between Romeo and Juliet was electronic, we look to the Uniform Electronic Transactions Act of 1999 for guidance. §9 of the UETA states, "an electronic record or electronic signature is attributable to a person if it was the act of the person." Furthermore, "the effect of an electronic record or electronic signature attributed to a person under subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law." Thus, we may attribute the IM from Romeo to Juliet to him, and must now assess its effectiveness as a written memorandum. A memorandum must reasonaby identify the subject matter of the contract, indicate that a contract was intended between the parties, and state with reasonable certainty the terms of the unperformed promises of the parties. R2DK §131. Here, Romeo's IM states, "A promise is a promise," and "I didn't hold up my end of the bargain." However, these statements fail to express the essential terms of the contract, and therefore do not suffice as a memorandum. Moreover, R2DK §133 states, "*except* in the case of a writing evidencing a contract upon consideration of marriage, the Statute may be satisfied by a signed writing not made as a memorandum of a contract." Thus, even if the IMs did contain the terms, the signed writing might not satisfy the writing requirement of the Statute of Frauds if it was not intended as a memorandum of their agreement.

If, nonetheless, we still found that a contract existed, which on no grounds has it yet

been shown, Romeo's suspicion that Juliet used Mercutio to induce his breach of the conditional promise to not engage in late nights or stripper visits raises the issue of a discharge of his contract duties based again on undue influence, which would excuse his performance. R2DK §208

Finally, despite the fact that Romeo is not liable based on lack of consideration, if not on the Statute of Frauds or the possible undue influence by Mercutio, and we could have found a contract, Romeo's payment to Juliet was subject to the condition precedent that he stay out late or go to a strip club, and his failure would trigger his liability - here, Juliet would have the burden of proving that the condition precedent was triggered, and she has evidence of this through the IM. However, "the doctrine of equitable estoppel, or estoppel in pais, is that a party may be precluded by his acts and conduct from asserting a right to the detriment of another party who, entitled to rely on such conduct, has acted upon it." Clark v. West. Here, we have not so much a reliance on Juliet's act, but on her omission, or refusal to improperly induce Romeo to misbehave. An act in bad faith trying to trigger the condition which would result in her benefit, and would likely trigger the doctrine of equitable estoppel to prevent her recovery. Thus, on all accounts, Romeo's promise was a gratuitous promise, unenforceable on any grounds. Unfortunately, his poor behavior does not entitle his love to recover money in place of lost trust.

Question #2 Final Word Count = 1374

Question #2 Final Character Count = 8412

Question #2 Final Character Count (No Spaces, No Returns) = 6974

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

1) Challenge: **Certainty: The lack of security in contracts based on the absence (or reduction) in the channeling, evidentiary, and cautionary functions**

Based on Fuller's "Consideration and Form," "investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation and out of which a transaction arises - these forces include the habits and conceptions of the transacting parties." The difficulty arises when we take people out of the native context of communication, and create foreign situations in which they are to interact. This leads to two sub-problems: First, whether a party intends to contract in all electronic communication, and second, the problem of misunderstandings that come from an international online community how that can undermine the security of promises.

With regard to the first problem, because all electronic communication serves as "written," per the UETA and Restatements (because it is communication put in symbollic form), the problem of overenforcement may arise. Determining when someone intends to create a contract may become more difficult.

As to the second problem, Farnsworth notes (in a quote of Waismann), "ordinary language simply has not got the "hardness," the logical hardness, to cut axioms in it." The failure of language can often be cured in face-to-face negotiation, or at least that facilitated by multiple means of communication. These difficulties with communication can render online transactions uncertain, and this can be made even more difficult in an online community that may demand immediate transactions and lessened syntax due to the fact that written

communications online are often hurried or abbreviated (as seen in the texting culture of teenagers who are accused of ruining the language).

2) Law's promise: Law may be able to account for the first problem to some degree by finding ways to establish online consideration, and possibly additional assent requirements. More specifically, contract law-makers might codify more strictly those classes of writings that would constitute contracts, if not on the Internet in general, then at least with regard to Second Life. With regard to the second problem, likely law will have less to do with the solution than an evolution of language, and possibly technology, to help produce better understandings between people. Additionally, however, in order to ensure that only the intent of the parties is enforced, the law may require more stringent manifestations of assent and clearer language in order to find agreements binding.

3) The cases involving the Statute of Frauds, namely Boone v. Coe, Riley v. Capital Airlines, and Schwedes v. Romain may have come out differently in Second Life. In each of these cases, the writing requirement may have been assumed based on the data input by the user to command his avatars to engage in certain conduct. Several questions that would alter this analysis would be:

a. whether the action commands to the avatars were seen by the other user as a prompt at the bottom of the screen;

b. how long actions require to take place - is SL approximately real time, or do actions almost instantaneously occur (so that, say, travel that would take 30 days happens in a split second with no time to mitigate);

c. whether any communications, which may have been written but "virtually" intended to be spoken, would be enforceable; and,

d. whether voip (voice-over-Internet-protocol) would be employed so that people could orally "speak" as their avatars.

Assuming that written, but intended-to-be-spoken communications would constitute only oral communications, this might prevent overenforcement of contracts (with the Statute of Frauds), but if not, then we might see a vast increase in the number of losses people would face based on unintended contractual obligations being assumed, since the Restatements allow for writings, not intended to be memoranda of contracts, to be used to satisfy the writing requirement of the Statute of Frauds. The latter two concerns would be addressed by this, and laws could be used to mitigate this concern. In this instance, Riley might have been decided differently, as negotiations that might have filled the gaps would have been made more certain, and could be used to infer a contract where one would not have existed before. Fuller notes that this can be a problem. He states, "Doubt may legitimately be raised, however, whether there will be any place in the future for what may be called the "blanket formality," the formality which, like the seal, suffices to make any kind of promise, not immoral or illegal, enforceable." While he admits that certainty would be nice, he doubts that the evidentiary, channeling, and cautionary functions which are the security for promises will be ensured. Moreover, a person's autonomy may be undermined if he is unable to negotiate freely and make radical changes when necessary.

If actions are seen prior to execution when the commands are given, duties of mitigation might also increase, which would actually do a service to contract law. The farmers in Boone might have been prevented from their ill-advised journey. Miscommunications may ensue from privacy measures in place or not in place. In Schwedes v. Romain, this online community may have actually helped the parties, as the broker engaged in conduct that may have been to deceive. However, one could also find that these parties had a right to engage in private negotiations, and the imposition on their autonomy to change their minds would be unfair. In any case, the communications issues and permanency of the written online world would create novel problems for contract lawyers to address.

Question #3 Final Word Count = 928

Question #3 Final Character Count = 5869

Question #3 Final Character Count (No Spaces, No Returns) = 4896

END OF EXAM