1. Pumped, Inc. manufactures exercise equipment and sells it primarily to retailers and fitness centers. They also occasionally sell directly to college and professional sports programs. On November 17, 2003, Pumped received a purchase order from Get Fit!, Inc., a regional fitness center chain, to buy a dozen 8000EZ elliptical cross-training machines for current shipment. Later that same day, Pumped sent Get Fit! an acknowledgement form, confirming the description, quantity, and price of the goods set forth in Get Fit!’s purchase order. Pumped’s acknowledgement included a term requiring that all disputes be subject to binding arbitration. Get Fit!’s purchase order says nothing about dispute resolution. Today is November 25, 2003. Pumped has not yet shipped the machines to Get Fit!

A. Yesterday, Pumped’s sales manager, Anita Byrne, had a phone conversation with a friend in the industry who strongly advised Anita not to do business with Get Fit! “They’re more trouble than they’re worth,” her friend had told her. “They make your life miserable by complaining about problems with the orders that don’t even exist.” Anita wants to know whether it is too late to get Pumped out of this contract. Please explain.

(5 Points) It is probably too late for Anita to avoid this deal. Had Anita been operating under the common law’s “mirror image rule,” there probably would still not be a contract because her acknowledgement form contained an additional term and thus was not a mirror image of the offer. Under § 2-207(1), her acknowledgement was an acceptance “even though it states terms additional to or different from those offered or agreed upon. . .”

Under § 2-207(1), there are only two ways in which an acknowledgement form such as Anita’s would not constitute a valid acceptance, and neither of those seems present here. First, the form would not be an acceptance if it was not a “definite and seasonable expression of acceptance.” That might be the case if the purchase order said “apples” and the acknowledgement form said “oranges,” but any divergence in terms short of that probably would not be enough to prevent the acknowledgement form from being a valid acceptance under § 2-207(1). Alternatively, if the acknowledgement form was not sent until long after the purchase order was received, the late sending of the acknowledgment form would probably not count as a “seasonable” expression of acceptance. Second, if the acknowledgement form was “expressly made conditional on assent to the additional or different terms,” then that would prevent the form from constituting an acceptance. However, the question mentions no such clause in the acknowledgement form.
B. Same facts as subpart “A,” except that Pumped’s acknowledgement includes the following term: “THIS ACCEPTANCE IS EXPRESSLY MADE CONDITIONAL ON BUYER’S ASSENT TO ANY ADDITIONAL OR DIFFERENT TERMS CONTAINED IN THIS FORM.” Before Pumped ships, is there a contract at all?

(5 Points) This represents the second way in which a purported written acceptance might not count as an acceptance under § 2-207(1). Courts tend to be strict about what language qualifies for the “unless” clause of § 2-207(1) (thus preventing the writing from constituting an acceptance), but the language here virtually mirrors the words found in the relevant clause of § 2-207(1). Thus, there should be no contract by the writings at this point and Anita can still avoid this deal unless Get Fit! has otherwise assented to Pumped’s additional term.

C. Same facts as subpart “A,” except that Pumped’s acknowledgement conspicuously states “THIS ACCEPTANCE IS EXPRESSLY MADE CONDITIONAL ON BUYER’S ASSENT TO ANY ADDITIONAL OR DIFFERENT TERMS CONTAINED IN THIS FORM,” Pumped has shipped twelve 8000EZ elliptical cross-training machines to Get Fit!, and Pumped accepted Get Fit!’s payment. Now is there a contract? If so, will disputes be subject to arbitration?

(5 Points) This is an example of where § 2-207(3) fits in: where the parties’ writings fail to establish a contract (due to the “expressly conditional” clause in the acknowledgement form) but the conduct of the parties establishes a contract. Under § 2-207(3), the contract by conduct then consists of those terms on which the written offer and purported acceptance agree, plus UCC gap-fillers. Since the offer and acceptance do not agree on the subject of arbitration, the UCC will “fill” the gap with judicial dispute resolution.

D. Same facts as subpart “A,” except that Pumped’s acknowledgement purported to confirm Get Fit!’s offer to buy a dozen 8100EZ stationary bikes rather than a dozen 8000EZ elliptical cross-trainers. Before Pumped ships, is there a contract at all?

(5 Points) No. This is apples-vs.-oranges. The terms of the offer and acceptance are so fundamentally at odds with one another that it cannot be said that there has been a “definite and seasonable expression of acceptance.” The parties don’t have to agree on much to satisfy Article 2’s formation rules, but they must agree on the subject matter of the contract and the quantity of goods to be bought and sold (subject to the special rules governing output and requirements contracts, see § 2-306). Thus, there is no contract yet under § 2-207(1), and Anita is still free to avoid this deal.
2. F contracts with B to build a new animal hospital. F promises to pay B $400,000 30 days after completion. B fails to start. F hires S to do the job and pays S $500,000. Was B’s promise to build the hospital supported by consideration? Was that consideration “bargained for”? What detriment did F suffer or benefit did B gain? Briefly explain your answers.

(10 Points) Yes. B promised to build the new hospital in exchange for F’s promise to pay B $400,000 for doing so. F’s promise to pay is the consideration supporting B’s promise to perform, and was given in exchange for B’s promise to perform. Moreover, F’s promise to pay, if performed, would itself be consideration for B’s promise to build. Therefore, F’s promise is bargained for consideration. R2 §§ 71(2) & 75. F’s detriment was promising to pay $400,000 that it otherwise could have used for other purposes. B’s benefit was, at a minimum, the expectancy of being paid $400,000 upon completing the project. B may also have planned to use some of the contract funds to buy new equipment. The job may also have improved B’s credit and/or bonding status.

3. M accepts a job in October to start work for law firm B the following August. B promises to pay M $150,000 per year. Before August, and before B had paid M any money, M decides to work elsewhere. Was M’s promise to work for B supported by consideration? Was that consideration “bargained for”? What detriment did B suffer or benefit did M gain? Suppose B paid M a $10,000 “signing bonus”? Briefly explain your answers.

(10 Points) Yes. B promised to pay M $150,000 for one year’s services in exchange for M’s promise to perform those services for the benefit of B and its clients. B’s promise to pay is the consideration supporting M’s promise to perform, and was given in exchange for M’s promise to perform. Moreover, B’s promise to pay, if performed, would itself be consideration for M’s promise to perform. Therefore, M’s promise is bargained for consideration. R2 §§ 71(2) & 75. B’s detriment was promising to pay M $150,000 that it otherwise could have used for other purposes. M’s benefit was, at a minimum, the expectancy of being paid $150,000 for a year’s work, as well as the peace of mind and extra “free” time that come from the conclusion of a job search.

B’s signing bonus would be additional consideration to bind M to perform. To the extent that a court might construe B’s promise to pay M a unilateral one, that B could revoke at any time prior to the start of M’s employment, the signing bonus would make the parties’ promises binding upon B’s tender and M’s acceptance of the bonus. The bonus also adds an immediate benefit to M and an immediate detriment to B to M’s already present expected future benefit and B’s already expected future detriment.
4. On March 1, 2003, Gwyneth and Russell agreed that Gwyneth would pay Russell $100 each for two tickets to the March 15th New York premiere of *The Orange Pumpernickel*. They further agreed that Russell would deliver the tickets to Gwyneth no later than March 14th. The New York premiere of Cameron Ridley’s new movie, *The Orange Pumpernickel*, was scheduled for March 15th at the Radikal City Musik Hall. That same night, the 41st Street Playhouse scheduled the premiere of a stage production of *The Orange Pumpernickel*, directed by David Marmoset.

On March 2nd, Russell purchased two tickets from the 41st Street Playhouse for $75 each. On March 14th, when Russell delivered the tickets to Gwyneth, she refused to pay, claiming that Russell had agreed to sell her tickets to the movie, not the play. Russell did not have any tickets to the movie, and none were commercially available at that late date. Russell tried unsuccessfully to find another buyer for the play tickets and to obtain a refund from the Playhouse. Unable to use them himself, he left the tickets with Gwyneth in case she changed her mind. Gwyneth sued Russell for failing to provide her with the movie tickets. Russell countersued Gwyneth for failing to pay for the tickets he delivered to her.

Assuming that, when they made their contract, Gwyneth knew about the movie, but not about the play, and Russell knew about the play, but not the movie, would Russell have a viable defense to Gwyneth’s suit? Please explain.

(10 Points) As in *Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (Ex. 1864) (per curiam), there was never any “meeting of the minds” between Russell and Gwyneth; therefore, under classical contract theory, no contract was ever formed. Applying the more modern test of R2 § 20(1), “[t]here is no manifestation of mutual assent ... if the parties attach materially different meanings to their manifestations and neither party knows or has reason to know the meaning attached by the other”; therefore, “neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.” Absent mutual assent, there is no contract for Gwyneth to enforce against Russell or vice versa. R2 § 17(1). The difference between this case and *Raffles* is that the thwarted cotton sellers in *Raffles* still had a valuable supply of cotton they could sell to someone else. Russell has two tickets to something that has already occurred. He “wins,” because he does not owe Gwyneth damages. But, it is a pyrrhic victory, because he is still out the cost of the tickets.

What about mistake? R2 § 152(1) provides that, “[w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk under the rule stated in R2 § 154.” Gwyneth was the party most adversely affected by her and Russell’s mutual mistake regarding which *The Orange Pumpernickel* she wanted to attend. If a court enforced the agreement, Russell would be paid, as expected, but Gwyneth would not get what she bargained for. Thus, Gwyneth should be able to avoid the contract under R2 § 154(b). R2 § 154(b) appears to reinforce this result. Russell seems to have impliedly assumed the risk that he would purchase the tickets for the wrong event because he did not bother to ask Gwyneth which *The Orange Pumpernickel* she meant. Given the vast number of performance venues and nightly performances in New York, Russell would not seem to be able to invoke R2 § 152 to relieve himself of liability. If the option to avoid the
contract under R2 § 152 rests solely with Gwyneth, and she refuses to avoid the contract (which, presumably, she would do if she was suing Russell for breach), Russell’s best bet appears to be R2 § 20.

R2 § 153 appears to be even less help to Russell than R2 § 152. (This should not be surprising, as contract law has always been more sympathetic toward mutual mistakes than unilateral ones.) Working our way up from the bottom of R2 § 153, Gwyneth did not have reason to know that Russell meant a different *The Orange Pumpernickel* than she did, nor did she cause the misunderstanding (e.g., by saying “You know, the one with Ford Prefect in it.”), nor would enforcing the contract against Russell be unconscionable. R2 § 153(a)-(b). Because he volunteered to perform a service without finding out everything he needed to know to perform it as Gwyneth desired, it is difficult to imagine that holding Russell to his promise would shock a court’s conscience (assuming the court first found mutual assent – which it should not do, as explained below). With neither R2 § 153(a) nor R2 § 153 (b) seeming to apply, Russell should find no relief in the body of R2 § 153 either.

While Russell’s implied assumption of the risk for purposes of unilateral and mutual mistake precludes him from finding shelter in those defenses, his failure to inquire further which *The Orange Pumpernickel* Gwyneth meant, given that he did not know there was more than one, should not cause mutual assent where it is otherwise lacking.

5. Rising celtic-techno-goth sensation Wallace Williams, having decided it was time to spend some of his hardly earned (that’s a pun, not a typo) riches and wanting to stay on the East Coast, began hunting for housing befitting a music star. After some searching, he found an apartment on the Upper East Side with a nice view of Central Park. Anticipating an increasing flow of income, Wallace was not worried about living beyond his present means. Having agreed with the seller, Sam Sharman, on a price of $2.5 million, Wallace paid $250,000 cash and signed a five-year real estate installment purchase contract for the balance. The contract required Wallace to make 60 principal payments of $37,500 per month, plus interest, upon full satisfaction of which Sharman would deliver title to the apartment, free of any liens or encumbrances (other than those in favor of the apartment building owner or cooperative).

After moving into the apartment, Wallace was awakened one morning by a knock at the door. When he answered the door, he was greeted by an attorney, who introduced himself as a representative of Otis Owen, the owner of the apartment that Wallace was presently occupying. Owen, who had been abroad for several months, was preparing to return to the city, and had sent the attorney to notify Sharman, who was subletting from Owen, that he had fourteen days to vacate the premises. When Wallace told the attorney he must be mistaken because Wallace had purchased the apartment from Sharman, the attorney responded, “I’m sorry, sir, but you’re the one who is mistaken. Mr. Sharman has never owned this apartment, and had no right to sell it to you. You have fourteen days to vacate.” When Wallace received a payment due notice from Sharman a day or two later, he returned it unpaid with a note stating that Wallace would not pay Sharman one cent more and that he would see Sharman in court. Sharman sued Wallace for breach of the
installment purchase contract. Wallace countersued for fraud and conversion, seeking judicial rescission of the installment purchase contract, the return of his $250,000 down payment, and damages to compensate him for the cost of locating and moving into new digs.

Was Wallace obligated to pay Sharman the remainder of the installments as promised, despite the fact that Sharman did not have the right to sell Wallace the apartment? Please explain.

(5 Points) No. Wallace’s obligation to Sharman boils down to whether Sharman could lie about having or being able to convey good title without ever actually saying that he had, or could convey, good title. The Restatement takes the position that Sharman’s non-disclosure of a fact known to him is the equivalent of an affirmative misrepresentation if it concerns a material fact and if disclosing the material fact would correct a mistaken belief Wallace had about a basic assumption on which Wallace was making the contract. See R2 §§ 159, 161-162. Whether or not a buyer of realty will receive clean title to the realty after satisfying the purchase contract is certainly a material fact, and Wallace’s assumption that Sharman had good title to convey was a basic assumption on which Wallace made the contract. As such, Wallace was entitled, inter alia, to avoid his contract with Sharman, cease making payments under the contract, and recover any monies paid to Sharman (although he may owe Owen for the use of the apartment during the time he occupied it).

6. Suppose, instead, that Sharman did have good title or the right to convey good title on Owen’s behalf, and that Wallace has been comfortably ensconced in the apartment since moving in several months ago. Suppose, further, that the contract included a provision for interest on the unpaid balance at 18% per year, and that the maximum interest rate permitted by applicable New York law is 16% per year. Would Wallace have grounds to avoid the contract with Sharman under these circumstances? Please explain.

(5 Points) Yes. The interest rate provided in the contract was usurious – and, therefore, illegal. A contract made illegally, or for an illegal purpose, is void. R2 § 178.

Note: Under applicable New York law, any rate of interest over 16% is usurious, see N.Y. BANKING LAW § 14-a (McKinney 2001), and any loan charging a usurious rate of interest is void, regardless of whether the lender knew or intended that the interest rate was usurious, see, e.g., Babcock v. Berlin, 475 N.Y.S.2d 212 (N.Y. Sup. Ct. 1984). If, however, the 18% were only a “penalty” rate – applicable to past due amounts – and the base rate was less than 16%, the loan would not be usurious. See, e.g., Hicki v. Choice Capital Corp., 694 N.Y.S.2d 750 (N.Y. App. Div. 1999).
7. On July 1, 2003, Ross, a Galveston, Texas-based seafood merchant, mailed Joey, a buyer for several independently-owned grocery stores located in Arkansas and Oklahoma, a written offer to sell up to 1,000 pounds of Ecuadorian pygmy shrimp for $10.00 per pound, shipping and handling included. By the terms of Ross’s offer, Joey had the exclusive right to accept or decline the offer until July 14th at 5:00 p.m. Joey received Ross’s written offer on July 5th at 2:00 p.m. At 3:00 p.m. on July 5th, Joey mailed a letter to Ross stating that he would purchase 500 pounds of Ecuadorian pygmy shrimp for $8.00 per pound, provided that Ross could deliver the shrimp no later than August 1st. Joey properly addressed the letter and affixed adequate postage.

On July 7th, Ross wrote to Joey revoking the offer. Ross promptly placed the letter in the mail, properly addressed, and with adequate postage. Later that same day, Ross sold all 1,000 pounds of shrimp to Rachel for $12.00 per pound.

On July 8th, Joey learned that a hurricane had wiped out a substantial part of the Ecuadorian shrimping fleet and washed tons of pygmy shrimp ashore, where they perished before they could be preserved. Experts predicted that a shortage of Ecuadorian pygmy shrimp was imminent and that the market price would likely increase by more than 100% during the next several weeks. Not knowing whether Ross had already received his July 5th letter (he had not), and having no knowledge of Ross’s transaction with Rachel, Joey immediately faxed a letter to Ross asking him to “disregard my earlier letter” and stating that Joey would purchase 500 pounds of Ecuadorian pygmy shrimp from Ross for $10.00 per pound, provided that Ross deliver the shrimp no later than August 1st.

Ross received Joey’s July 8th fax at noon on July 8th. Ross immediately sent a return fax to Joey informing him that he had revoked his offer and, regretfully, had already sold all 1,000 pounds of Ecuadorian pygmy shrimp to Rachel. Joey received Ross’s July 7th letter at 3:00 p.m. on July 8th. Ross received Joey’s July 5th letter at 4:00 p.m. on July 8th.

A. Did Joey and Ross form a contract, obligating Ross to sell Joey 500 pounds of Ecuadorian pygmy shrimp for delivery by August 1st? Please explain.

(5 Points) It is very easy to get caught up in how the “mailbox rule” works when the offeree first dispatches a counteroffer or rejection and then dispatches an acceptance by a more expeditious means, and whether Ross’s offer was a firm offer that estopped him from revoking his offer before the deadline or before Joey terminated his own power to accept. While you should consider those things, resist the urge to let them obscure the simple truth that Ross offered to sell Joey goods, and Joey’s July 5th letter was a “definite and seasonable expression of acceptance … sent within a reasonable time” after receipt of the offer, and it was not “expressly made conditional on [Ross’s] assent to the additional or different terms” contained in Joey’s acceptance. Therefore, under UCC § 2-207(1), supplemented by the common law “mailbox rule,” Joey accepted Ross’s offer when he properly dispatched his July 5th letter.

A revocation is not effective until the offeree receives it, see R2 § 42, and Joey did not receive Ross’s revocation until after he had accepted Ross’s offer by means of his July 5th letter.
Moreover, Ross’s offer was a firm offer, subject to UCC § 2-205, because (1) he made it in writing, (2) he is a merchant in goods of the kind, and (3) the offer contained language of non-revocability. Joey accepted Ross’s firm offer before Ross was legally entitled to revoke it and before Joey did anything to terminate his own power to accept.

B. Assuming that Joey can prove that he and Ross formed a contract for the purchase and sale, respectively, of 500 pounds of Ecuadorian pygmy shrimp, was that contract subject to a statute of frauds? Please explain.

(0 Points) Ecuadorian pygmy shrimp are goods. See UCC § 2-105. Ross and Joey contracted, respectively, to sell and buy goods. The contract price was $5,000. Therefore, the contract is within the scope of UCC § 2-201 (as well as Revised § 2-201). And, while the pygmy shrimp are Ecuadorian, Ross is not; and Joey’s contract is with Ross, not with some Ecuadorian shrimper. Therefore, the CISG would not apply, because the key to its application is the location of the parties, not the location of the goods. See CISG art. 1(1)(a).

C. Assuming that the contract between Ross and Joey was subject to a statute of frauds, can Joey satisfy the applicable statute of frauds based on the foregoing facts? Please explain.

(0 Points) Yes. The agreement between Joey and Ross, as represented by Ross’s July 1st firm offer and Joey’s July 5th acceptance (and July 8th proposal to modify), satisfies the statute of frauds. The statute of frauds is “in play” because this is a contract for the sale of goods valued at $500 or more. UCC § 2-201. The statute requires a writing signed by the party against whom enforcement is sought, which evidences that a contract has been made, and which states the quantity of goods being bought and sold. UCC § 2-201(1). Here, Joey is trying to enforce the contract against Ross, so he needs a writing Ross signed that evidences the contract Joey is seeking to enforce. Ross’s July 1st firm offer is written and identifies the quantity of goods to be sold. Even if it is not signed in the formal sense of the word (i.e., a signature), it most likely was made on Ross’s letterhead, an invoice with Ross’s name printed on it, or some other document attributing it to Ross. The comments to UCC § 2-201 indicate that any of these would satisfy the “signature” requirement. Moreover, if necessary, Joey can satisfy the statute, under the composite document rule, by using more than one document. Here Ross’s firm offer plus Joey’s written acceptance should leave no doubt as to the terms of the deal or the parties’ intent to enter into an agreement on those terms.

Note: Because we did not discuss statutes of frauds before the due date for the assignment, I did not count your answers to Questions 7.B & 7.C. Had I counted them, they would have been worth 5 points each.