

Exercise 31-2**Aircraft Purchase Agreement**

Follow the instructions in the memorandum that follows:

Memorandum

To: D. Fender
From: H. Flighty
Date: October 10, 20X2
Re: Purchase of the Icarus I-800

As you know, I have not finalized my deal with Rob Robertson. I think that deal will fall through. If it does, I suspect my entire net worth will be at risk as I have yet to find financing to consummate the I-800 purchase from Samson's company.

Last evening, Sam called and asked why my lawyers hadn't sent out a draft agreement. I told him that I would see what was holding you up. Obviously, what was holding you up was that I hadn't asked you to draft the rest of the agreement. Now, however, we must go forward.

Please do not reinvent the wheel on this transaction. I have attached to this memo as **Exhibit A** a document that combines

- (a) the draft I gave you that had the preamble, recitals, words of agreement, and definitions (the First Draft); and
- (b) representations and warranties, covenants, and conditions from an Asset Purchase Agreement that a friend of mine used in another transaction. I have also attached a photo of the I-800 and some marketing literature. I thought you might be interested to see what I'm buying.

To complete the draft for my review, please do the following:

- (i) Redraft Exhibit A to take into account our previous discussion of the First Draft. If we didn't discuss something but it needs revision, do it.
- (ii) Insert the action sections that you previously worked on, making any necessary revisions.
- (iii) Redraft the remaining provisions of Exhibit A to reflect our deal. They will probably need a fair amount of revision. Do not use any supplementary sources other than those distributed to you in that drafting course you took at law school.

In order to save money, do not draft provisions other than the ones I've specifically asked for or those that are required because of the cascade effect.

In your redraft, please take into account the following:

1. In our discussions, Sam advised me that Wings is not in default under the Pilot Agreement, but that it is in default under the Maintenance Agreement. The default has given rise to a \$250,000 lien against the I-800 in favor of Greasemonkeys, Inc. I told Sam that I considered this lien material. Sam specifically stated that no other liens had been filed against the Aircraft — material or otherwise. He then promised me that between now and the Closing, the Greasemonkeys' lien would be removed. Obviously, this point needs to be covered wherever appropriate in the Aircraft Purchase Agreement. If that lien is not removed by Closing, I

would like the right not to close as well as the right to sue for damages. I think the Purchase Offer also had a provision about liens.

2. Delete in whole or in part any representation and warranty, covenant, or condition that is inapposite, or change it to fit the facts as I have described them to you. One thing I am certain of is that I cannot represent and warrant that I have financing now. I doubt that Sam will go for it, but try drafting a financing out.

As I'm sure you know, a financing out provides a buyer with a walk-away right if it is unable to obtain financing. Sellers generally dislike financing outs, fearing that they transform an obligation to purchase into an option to purchase. Specifically, they worry that a buyer may decide it dislikes a deal and then try to get out of it by claiming it could not obtain any financing or could not obtain financing on commercially reasonable terms. If that happens, a seller could end up losing other sale opportunities, while tied up for months in a contract with the buyer. If you can think of a way to demonstrate that my interest is real, something that might make the financing out more tolerable to Sam, please add it to the draft. Whatever it is, it must be something that is not too hard to do.

3. Do not delete from your agreement Sections 7.4 and 7.5 and Sections 8.4 and 8.5. (You may redraft, but you may not delete.)
4. As far as I know, Wings' only asset is the I-800. Please make sure that the contract reflects this. I want it explicitly covered because if Wings does own any spare parts or anything else related to the Aircraft, I want them to be part of this deal. I'm certainly paying enough.
5. My recollection is that I inappropriately included at least one substantive provision in the definitions article of the Aircraft Purchase Agreement. Please move it to the appropriate section in the body of the agreement. Also include whatever representations and warranties, covenants, and conditions that the Purchase Offer requires. If it is unclear whether a term is a covenant or a condition, I'd like to be able to sue as well as to get out of this deal.
6. The parties have agreed that they may agree to terminate the agreement at any time.
7. Samson told me that the I-800's maximum range with eight passengers and four crewmembers is 8,000 nautical miles at Mach 90. That's a fabulous distance and speed. Please make sure that the contract includes this information.
8. Samson told me something else that he wants changed. The representations and warranties have lots of language dealing with material adverse changes to Wings' business. He says that language would be appropriate for the sale of a business, but I'm buying only a single asset—the jet. Please come up with a material adverse change standard that is more transaction specific.
9. Sam has agreed to have the Aircraft's tail painted by the Closing with Fly-by-Night's logo. But, the paint shop may have trouble fitting in the I-800 between now and the Closing. If the Aircraft is not painted on time, we've agreed that I don't have to close. Because that is a fairly extreme outcome for something relatively minor, he has good incentive to get it done. Just this one provision should do it.
10. The draft attached as Exhibit A is rife with drafting errors. There's legalese, provisions are way too long, and there's a total lack of craftsmanship. Please clean it up.
11. Please spell out how the escrowed amount is to be distributed if we don't close. Figure out all the reasons we might not close and make sure that the escrow is distributed appropriately. Remember: *Follow the cash*. Also, my recollection is that the Purchase Offer requires me to pay \$3 million if the deal doesn't close because of something I did wrong. Please figure out how this interacts with the financing out.
12. I've been doing some more thinking on Section 5.5. Only some of those restrictions make sense for our deal. Choose those that you think apply and make them transaction specific.

13. The Seller and the Buyer each have conditions to their closing obligations related to litigation. Please decide whether each condition should cover litigation against
 - (a) the Seller and the Buyer, each as individual defendants or jointly, or
 - (b) against just one party, and if so, which party.Please explain your decision in your memo to me.
14. Do not draft any Exhibits.
15. For clarity, the \$3 million payment referred to in Paragraph 9 of the Purchase Offer is intended by the parties to be liquidated damages. Assume that the provision is enforceable. Do not research this issue.
16. If a representation and warranty includes a schedule and you have the relevant information, please draft the schedule and attach it to the agreement. Assume that the only facts that exist are those that you know. (Stated differently, if you don't have facts, then don't draft a schedule.) Eliminate references to any unnecessary schedules. Of course, you could always omit the schedule and put the information in the agreement—if appropriate. Which you do is a judgment call. (In making that judgment call, consider the amount of information and whether including it in the agreement or a schedule facilitates reading the contract.)
17. Define *Escrow Amount* as \$300,000. This definition differs from the Escrow Agreement's definition of *Escrow Amount*. This revised definition will permit you to separately treat the \$300,000 and the accrued interest on the Escrow Amount. Remember: The Escrow Agreement and the Aircraft Purchase Agreement are separate agreements and need not have identical defined terms and definitions. They must, however, work together.
18. As you know from our due diligence, Wings is the current registered owner of the Aircraft. I want to make sure that Wings gives us any documentation that we need from it so that we can register the Aircraft. Please determine what that is and make sure that the agreement provides that we receive it at the Closing. Do we need the consent of the FAA? Let me know what you find out.
19. Do not add a representation and warranty about existing litigation.
20. I'm wondering whether the definitions of Maintenance Agreement and Pilot Agreement should treat amendments the same way and whether there's a cascade effect (hint) from the way the definitions do treat amendments.
21. I've also been worrying about the Engines. My mechanic didn't think that they were properly maintained. I don't think that the Seller can say more than that they are in adequate condition. The rest of the Aircraft, however, is in good condition, except for ordinary wear and tear. Please provide that between now and the Closing the Aircraft will be maintained and repaired in accordance with its FAA Approved Maintenance and Inspection Program. That should bring the Engines to an appropriate maintenance level before the Closing. Also, please make sure that the Seller is obligated to keep the Aircraft's logbook and other flight maintenance records accurate, complete, and current.
22. Here's some additional information with respect to my financing plans. So far, I am negotiating with three banks and have submitted full applications to two: First National Bank of Lex and Lex Banking, N.A. I mentioned this to Sam, and it gave him comfort to know this. He wants it in the agreement—of course.
23. Samson confirmed to me that Wings doesn't do business outside of its state of incorporation. Neither does Fly-by-Night. Please figure out how and where this should be reflected in the agreement.
24. There are no defaults under the Purchase Offer or the Escrow Agreement.
25. Please include the necessary provisions so that the Aircraft Purchase Agreement, once signed, supersedes the Purchase Offer. My recollection is that Chapter 16 from your law

school drafting textbook might have something that could help you here. Do not draft any other “boilerplate” provisions. Sam and I have agreed to deal with those issues in a later draft.

26. Include the appropriate signature lines.
27. When you send me the finished agreement, please include a cover memo of no more than two pages. Follow the guidelines on drafting memos to clients in Chapter 32, Document 7 of your law school drafting textbook.

Finally, please draft an agreement that favors me, but that is not so one-sided or overly aggressive that it impedes negotiations. We want to get the deal done, so no gratuitously demanding provisions just to appear tough.

H.F.

Note to students: The following draft of the Aircraft Purchase Agreement is on the *Drafting Contracts* website.

EXHIBIT A

Aircraft Purchase Agreement

AGREEMENT, dated October 30, 20XX, by and among Supersonic Wings Corp., a Delaware corporation, (the “Seller”) and Fly-by-Night Aviation, Inc., a New York corporation having its principal place of business at 987 East 48th Street, New York, New York 10036 (“Buyer”).

WHEREAS, the Seller desires to sell to Buyer, and Buyer desires to purchase from the Seller, the Aircraft; and

WHEREAS, the Buyer hereby agrees to pay the Seller \$23,000,000 in immediately available funds.

NOW, THEREFORE, in consideration of the mutual promises herein set forth and subject to the terms and conditions hereof, the parties agree as follows:

Article 1 — Definitions

1.1 Defined Terms. As used in this Agreement, terms defined in the preamble and recitals of this Agreement have the meanings set forth therein, and the following terms have the meanings set forth below:

“Agreement” means this Agreement of Sale and all Schedules and Exhibits hereto, as the same may be amended from time to time.

“Aircraft” means the Airframe, equipped with the two Rolls-Royce engines, Model No. BR710, bearing Serial Nos. 72725 and 72726, together with all appliances, avionics, furnishings, and other components, equipment, and property incorporated in or otherwise related to the Airframe or engines.

“Airframe” means the Icarus Aerospace Corporation I-800 aircraft, bearing United States Registration No. N765BW and Manufacturer’s Serial No. 8181.

“Assigned Contracts” means the Maintenance Agreement (as hereafter defined) and the Pilot Agreement (as hereafter defined).

“Assumed Liabilities” means, collectively, all liabilities and obligations of the Seller that arise under either (a) the Maintenance Agreement on or after the Closing Date or (b) the Pilot Agreement on or after the date of the Closing.

“Aviation Fuel” means the gas or liquid that is used to create power to propel the aircraft. At the time of the Seller’s delivery of the Aircraft to Buyer, the fuel gauge of the Aircraft shall register as full.

“Closing” means the closing of the sale of the Aircraft contemplated by this Agreement in New York, New York on the Closing Date.

“Closing Date” has the meaning specified in Section 2.04(a).

“Consent” shall mean any consent of, approval of, authorization of, notice to, or designation, registration, declaration or filing with, any Person.

“Contract” shall mean any contract, lease, agreement, license, arrangement, commitment or understanding to which the Buyer or any Seller is a party or by which it or any of its properties or assets may be bound or affected.

“Engines” means the two Rolls-Royce engines, Model No. BR710, bearing Serial Nos. 72725 and 72726.

“Laws” means all federal, state, local or foreign laws, rules and regulations.

“Lien” means any lien, charge, encumbrance, security interest, mortgage, or pledge.

“Maintenance Agreement” means that certain Maintenance Agreement, dated as of April 3, 20X0 between Greasemonkeys, Inc., and Seller, as the same may be amended from time to time.

“Order”: any judgment, award, order, writ, injunction or decree issued by any federal, state, local or foreign authority, court, tribunal, agency, or other governmental authority, or by any arbitrator, to which any Seller or its assets are subject, or to which the Buyer or its assets are subject, as the case may be.

“Person” shall mean any individual, partnership, joint venture, corporation, trust, unincorporated organization, government (and any department or agency thereof) or other entity.

“Pilot Agreement” means that certain Pilot Agreement between Seller and Ace Pilots, Inc., dated as of May 12, 20X1, as of the date of this Agreement.

Article 2 — Purchase and Sale

[To be inserted.]

Article 3 — Representations and Warranties of the Seller

The Seller represents and warrants to the Buyer as follows:

3.1 Organization; Good Standing. The Seller is a corporation duly organized, validly existing and in good standing under the laws of the state of its incorporation as set forth in Schedule 2, with all requisite corporate power and authority to own, operate and lease its properties, and to carry on its business as now being conducted. The Seller is duly qualified to do business and is in good standing in each jurisdiction where the conduct of its business or the ownership of its property requires such qualification. The jurisdictions in which the Seller is qualified to do business are set forth in Schedule 2 hereto.

3.2 Authority. The Seller has full corporate power, authority and legal right to execute and deliver, and to perform its obligations under this Agreement and to consummate the transactions contemplated hereunder, and has taken all necessary action to authorize the purchase hereunder on the terms and conditions of this Agreement and to authorize the execution, delivery, and performance of this Agreement.

3.3 Enforceability. This Agreement has been duly executed and delivered by the Seller and constitutes a legal, valid, and binding obligation of the Seller enforceable against Seller in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, or other similar laws from time to time in effect, which affect the enforcement of creditors' rights in general and by general principles of equity regardless of whether such enforceability is considered in a proceeding in equity or at law.

3.4 Noncontravention. Neither the execution and the delivery of this Agreement by Seller nor the consummation of the transactions contemplated hereby will (i) conflict with or result in any violation of the certificate of incorporation or the bylaws of the Seller, (ii) result in the violation of any Law or Order applicable to the Seller or any of its assets, or (iii) will conflict with, result in the breach of (with or without notice or lapse of time or both), or constitute a default under (with or without notice or

lapse of time or both), any Contract to which the Seller is a party or to which the Seller or its assets is subject.

3.5 Governmental and Other Consents, etc. No consent, approval or authorization of or designation, declaration, or filing with any governmental authority or other persons or entities on the part of the Seller is required in connection with the execution or delivery of this Agreement or the consummation of the transactions contemplated hereby.

3.6 Title to Assets. A description of all real property owned by the Seller is set forth in Schedule 5. Except as set forth in said Schedule 5 or in any title insurance policy obtained by the Buyer prior to the execution of this Agreement by the Buyer, the Seller has good title to all its properties and assets, real, personal and intangible, subject to no mortgage, pledge, lien, security interest, lease, charge, encumbrance or conditional sale or other title retention agreement, except for such imperfections of title, liens, easements or encumbrances, if any, as are not material.

3.7 Agreements. A list and brief description of all agreements to which the Seller is a party is set forth in Schedule 6. All such agreements are valid and effective in accordance with their respective terms. Except as set forth in Schedule 6, there are no existing defaults or events which with notice or lapse of time or both would constitute defaults thereunder, the consequences of which in the aggregate would have a material adverse effect on the business and operations of the Seller.

3.8 Condition of Property. Except as set forth in **Schedule 3.9**, the plants, structures, and equipment of the Seller are in good operating condition and repair, subject only to ordinary wear and tear.

3.9 Law Compliance. The Seller has complied with and is not in default under any Laws the violation of which could have a material adverse effect on the business, properties, assets, or operations, or on the condition, financial or otherwise, of the Seller. Seller agrees to comply in all material respects with any Law the violation of which could have a material adverse effect on the Seller.

Article 4 — Representations and Warranties of the Buyer

The Buyer represents and warrants to the Seller as follows:

4.1 The Buyer is a corporation duly incorporated, validly existing and in good standing under the laws of its jurisdiction of incorporation and has all requisite corporate power and authority and legal right to own, operate, and lease its properties and assets and to carry on its business as now being conducted.

4.2 Authority. The Buyer has full corporate power, authority, and legal right to execute and deliver, and to perform its obligations under this Agreement and to consummate the transactions contemplated hereunder, and has taken all necessary action to authorize the purchase hereunder on the terms and conditions of this Agreement and to authorize the execution, delivery, and performance of this Agreement. This Agreement has been duly executed by the Buyer, and constitutes a legal, valid and binding obligation of the Buyer enforceable against Buyer in accordance with its terms except as such enforceability may be limited by applicable bankruptcy, insolvency, or other similar laws from time to time in effect, which affect the enforcement of creditors' rights in general and by general principles of equity regardless of whether such enforceability is considered in a proceeding in equity or at law.

4.3 Compliance with Instruments, Consents, Adverse Agreements. Neither the execution and the delivery of this Agreement by Buyer nor the consummation of the transactions contemplated hereby will conflict with or result in any violation of or constitute a default under any term of the certificate of incorporation or the bylaws of the Buyer, or conflict with or result in any violation of or constitute a default under any Law or Contract by which the Buyer is, or its properties or assets, are bound.

4.4 Financing. Buyer has all monies or appropriate binding commitments from responsible financial institutions to provide Buyer with funds sufficient to satisfy the obligations of Buyer to Seller under this Agreement.

Article 5 — Covenants of the Seller

The Seller agrees that from the date the parties execute and deliver this Agreement until the Closing, the Seller shall do the following:

5.1 Cooperation. To use its commercially reasonable efforts to cause the sale contemplated by this Agreement to be consummated, and, without limiting the generality of the foregoing, to obtain the Consents, permits and licenses that may be necessary or reasonably required in order for the Seller to effect the transactions contemplated hereby.

5.2 Transactions Out of Ordinary Course of Business. Except with the prior written consent of the Buyer, the Seller shall not enter into any transaction out of the ordinary course of business.

5.3 Maintenance of Properties, etc. To maintain all of its properties in customary repair, order and condition (taking into consideration the age and condition thereof), reasonable wear and tear excepted.

5.4 Access to Properties, etc. The Seller shall give to the Buyer and to its counsel, accountants, and other representatives access during normal business hours (on reasonable prior notice) to copies of all of its Contracts and Permits, books and records, and shall furnish to the Buyer all such documents and information with respect to the affairs of the Seller as the Buyer may from time to time reasonably request.

5.5 Ordinary Course. The Seller shall not (i) enter into any contract to merge or consolidate with any other corporation, (ii) change the character of its business, or sell, transfer or otherwise dispose of any material assets other than in the ordinary course of business or (iii) declare or pay any dividend or other distribution in respect of shares of capital stock. In addition, the Seller agrees not to make any purchase, redemption or other acquisition, directly or indirectly, of any outstanding shares of its capital stock or purchase any assets or securities of any Person, except with the prior written consent of the Buyer.

Article 6 — Covenants of the Buyer

The Buyer agrees that from the date the parties execute and deliver this Agreement until the Closing, the Buyer shall do the following:

6.1 Cooperation. The Buyer shall use its commercially reasonable efforts to cause the sale contemplated by this Agreement to be consummated, and, without limiting the generality of the foregoing, to obtain the Consents and Permits which may be necessary or reasonably required in order for the Buyer to effect the transactions contemplated hereby.

Article 7 — Conditions to the Seller's Obligations

The Seller is obligated to consummate the transactions that this Agreement contemplates only if each of the following conditions has been satisfied or waived on or before the Closing Date.

7.1 Buyer's Representations and Warranties. The representations and warranties of the Buyer set forth herein shall be true in all material respects on and as of the Closing Date, except as affected by transactions contemplated or permitted by this Agreement.

7.2 Buyer's Covenants. The Buyer shall have performed all its obligations and agreements and complied with all its covenants contained in this Agreement to be performed and complied with by the Buyer prior to the Closing Date.

7.3 Buyer's Closing Certificate. The Seller must have received a certificate of the Buyer, certifying to the truth of the statements in Sections 7.1 and 7.2.

7.4 No Litigation. No action, suit or proceeding before any court or any governmental or regulatory authority shall have been commenced and still be pending, no investigation by any governmental or regulatory authority shall have been commenced and still be pending, and no action, suit or proceeding by any governmental or regulatory authority shall have been threatened against the Seller or the Buyer (i) seeking to restrain, prevent or change the transactions contemplated hereby or questioning the validity or legality of any of such transactions, or (ii) which if resolved adversely to

such party would materially and adversely affect the financial condition, business, property, assets or prospects of any such Person.

7.5 Documentation. All matters and proceedings taken in connection with the Acquisition as herein contemplated, including forms of instruments and matters of title, shall be reasonably satisfactory to the Seller and to its counsel.

Article 8 – Conditions to the Buyer's Obligations

The Buyer is obligated to consummate the transactions that this Agreement contemplates only if each of the following conditions has been satisfied or waived on or before the Closing Date.

8.1 Seller's Representations and Warranties. The representations and warranties of the Seller contained herein shall be true and correct in all material respects on and as of the Closing Date, except as affected by transactions contemplated or permitted by this Agreement.

8.2 Seller's Covenants. The Seller shall have performed all of its obligations and agreements and complied with all of its covenants contained in this Agreement to be performed and complied with by it prior to the Closing Date.

8.3 Seller's Closing Certificate. The Buyer must have received a certificate of the Seller, certifying to the truth of the statements in Sections 8.1 and 8.2.

8.4 No Litigation. No action, suit or proceeding before any court or any governmental or regulatory authority shall have been commenced and still be pending, no investigation by any governmental or regulatory authority shall have been commenced and still be pending, and no action, suit or proceeding by any governmental or regulatory authority shall have been threatened against the Seller or the Buyer (i) seeking to restrain, prevent or change the transactions contemplated hereby or questioning the validity or legality of any of such transactions or (ii) which if resolved adversely to such party, would materially and adversely affect the financial condition, business, Property, assets or prospects of any such Person.

8.5 Documentation. All matters and proceedings taken in connection with the Acquisition as herein contemplated, including forms of instruments and matters of title, shall be reasonably satisfactory to the Buyer and to its counsel.

Note to Students: Add endgame provisions and signature lines.

Icarus Aerospace Corporation
Icarus I-800 Specifications
You're safe with us. You'll never burn.



Range — 7,200 nautical miles when traveling at Mach 85 with four passengers and eight crew.

High speed — 5,500 nautical miles at Mach 90 with four passengers and eight crew.

Engines — Two GE Passport engines.

DIMENSIONS

Exterior

Length: 95.6 feet

Wingspan: 100.7 feet

Height overall: 27 feet

Interior

Cabin length: 55 feet

Cabin maximum width: 7.98 feet

Cabin height: 6.25 feet