
NOTE

Kickstart My Lawsuit: Fraud and Justice in Rewards-Based Crowdfunding

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INTRODUCTION

On September 24, 2012, Ed Nash created a Kickstarter webpage in order to obtain funding for the production of a themed playing card deck.¹ The website's goal was to solicit small sums of money from a large number of people with little investing experience to fund a project.² This process is an example of "crowdfunding."³ Although individual contributions from crowdfunding tend to be small, the large number of people contributing can make the final sum substantial.⁴ Kickstarter.com, the website Nash used to create his crowdfunding webpage, is the most popular crowdfunding website.⁵ Backers fully funded Nash's Kickstarter project, Asylum Playing Cards, on October 31, 2012, ultimately surpassing the \$15,000 funding goal by over \$10,000.⁶ Those who funded Nash's Kickstarter project did so with the expectation of receiving a deck of customized playing cards in return for their financial support.⁷ Nash had completed all of the

¹ *Asylum Playing Cards*, KICKSTARTER, <https://www.kickstarter.com/projects/213177064/asylum-playing-cards/description> (last visited Sept. 5, 2015).

² *Id.*; see Daniel M. Satorius & Stu Pollard, *Crowd Funding: What Independent Producers Should Know About the Legal Pitfalls*, 28 ENT. & SPORTS LAW. 15, 15 (2010) (defining crowdfunding as "[s]ums — generally in small increments — . . . collected from a wide breadth of people who generally have little to no prior experience in financing entertainment ventures").

³ See Karina Sigar, *Fret No More: Inapplicability of Crowdfunding Concerns in the Internet Age and the JOBS Act's Safeguards*, 64 ADMIN. L. REV. 473, 478 (2012) (defining crowdfunding as "a fundraising strategy that pools capital, typically in small amounts, from a large group of people"); Tanya Prive, *What Is Crowdfunding and How Does It Benefit the Economy*, FORBES (Nov. 27, 2012), <http://www.forbes.com/sites/tanyaprive/2012/11/27/what-is-crowdfunding-and-how-does-it-benefit-the-economy/> (defining crowdfunding as "the practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the Internet").

⁴ See C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 10 (2012); Prive, *supra* note 3; Matt Villano, *Small Donations in Large Numbers, with Online Help*, N.Y. TIMES (Mar. 14, 2010), <http://www.nytimes.com/2010/03/18/arts/artsspecial/18CROWD.html>.

⁵ Edmund W. Kitch, *Crowdfunding and an Innovator's Access to Capital*, 21 GEO. MASON L. REV. 887, 889 (2014) ("The most well-known and successful crowdsourcing site is Kickstarter."); Sally Outlaw, *10 Top Crowdfunding Websites*, ENTREPRENEUR (Oct. 10, 2013), <http://www.entrepreneur.com/article/228534> (calling Kickstarter "[t]he most well-known of the crowdfunding websites"); see also David Groshoff, *Kickstarter My Heart: Extraordinary Popular Delusions and the Madness of Crowdfunding Constraints and Bitcoin Bubbles*, 5 WM. & MARY BUS. L. REV. 489, 538 (2014) (ranking Kickstarter and Indiegogo as "the two most popular reward-based crowdfunding platforms").

⁶ *Asylum Playing Cards*, *supra* note 1 (the Asylum Playing Cards Kickstarter project had a funding goal of \$15,000 and was funded at \$25,146).

⁷ Nash's Asylum Playing Cards Kickstarter profile states that backers who donate

card designs prior to receiving funding. His Kickstarter campaign received more funding than he initially believed was necessary to deliver this playing card deck to the public.⁸ Yet, despite these facts, three years after the launch of the campaign, the 810 backers who funded the project still had not received their playing cards.⁹ During the production of this article, three years after the original anticipated delivery date, and seemingly in response to a default judgment entered against him, Ed Nash has finally delivered some of the promised rewards in the Asylum Playing Cards Kickstarter project.¹⁰

\$9 or more would “[r]eceive ONE (1) Asylum deck with free US shipping” with an estimated delivery of December 2012. There were 502 backers who pledged at this level. *Id.*; see also *Kickstarter Basics*, KICKSTARTER, <https://www.kickstarter.com/help/faq/kickstarter%20basics> (last visited Jan. 13, 2015) (“Many backers are rallying around their friends’ projects. Some are supporting a new effort from someone they’ve long admired. Some are just inspired by a new idea, while *others are motivated to pledge by a project’s rewards.*” (emphasis added)).

⁸ *Asylum Playing Cards*, *supra* note 1 (The Asylum Playing Cards Kickstarter project had a funding goal of \$15,000 and was funded at \$25,146).

⁹ *Asylum Playing Cards Comments*, KICKSTARTER, <https://www.kickstarter.com/projects/213177064/asylum-playing-cards/comments> (last visited Sept. 5, 2015) (several backers posted in the comments sections that as of August 20, 2015, many backers were still waiting for their cards, almost three years after the original anticipated delivery date); see Tracey Lien, *Washington Sues Card Game Developer for Failing to Deliver on Kickstarter Promises*, POLYGON (May 2, 2014, 2:39 PM), <http://www.polygon.com/2014/5/2/5675834/washington-sues-card-game-developer-for-failing-to-deliver-on> (“The estimated delivery date for the backer rewards was Dec. 2012, but the deadline passed and, more than a year later, backers still have not received a thing.”). Interestingly, a new Kickstarter project offering backers of the new project a chance to finally own the original Asylum playing cards deck surfaced during the writing of this article. See *Back to the Asylum Playing Cards by NoirArts (NPCC)*, KICKSTARTER, <https://www.kickstarter.com/projects/891191024/back-to-the-asylum-playing-cards-by-noirarts-npcc> (last visited May 20, 2015).

¹⁰ During the production of this article, Bob Ferguson, Washington State Attorney General announced a successful judgment against Ed Nash and his company, Altius Management. See Press Release, AG Makes Crowdfunded Company Pay for Shady Deal, Wash. State Office of the Attorney Gen. (July 27, 2015), available at <http://www.atg.wa.gov/news/news-releases/ag-makes-crowdfunded-company-pay-shady-deal>. Although it does not appear that fulfilling the rewards of the Kickstarter campaign was a requirement of the order issued in the Washington State Attorney General enforcement action, comments from the Asylum Playing Cards campaign profile indicate that some (but not all) backers have now received their playing cards. For the terms of the enforcement action, see Default Judgment, *State of Washington v. Altius Mgmt., LLC*, No. 14-2-12425-2-SEA (Wash. Super. Ct. July 22, 2015), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/201507221452.pdf. See also *Asylum Playing Cards Comments*, *supra* note 9 (for comments indicating that some backers have received their playing cards); Austin Jenkins, *Strange Twist in ‘Asylum Playing Cards’ Crowdfunding Case*, NW NEWS NETWORK (July 28, 2015), <http://nwnewsnetwork.org/post/strange-twist-asylum-playing-cards-crowdfunding-case> (stating that “a spokeswoman for [Washington State

Nash's failure to deliver the promised rewards to his backers generated criticism of not only Nash and his company, but also of Kickstarter and its relationship to project creators.¹¹ This project's failure to deliver rewards seems particularly egregious because the project generated an amount that exceeded its funding goal and the process to print and manufacture an already designed deck of playing cards seemed relatively easy.¹² This Kickstarter project, along with other failed projects, has created questions about what constitutes fraud on Kickstarter and how to combat this behavior while preserving the positive aspects of crowdfunding in general.¹³

Several high profile and high grossing projects have received funding since the inception of crowdfunding as a viable and democratized means of raising capital for projects.¹⁴ This method of funding allows people to donate to projects that they want to see come to fruition.¹⁵ On Kickstarter, project creators make a project profile detailing their project, a list of rewards to serve as incentives for

Attorney General] Ferguson said the fact Nash is now suddenly fulfilling orders doesn't change the judgment against him. But she added that if Nash decides to contact the Attorney General's office, it would 'hear him out'). For the complaint in this case, see *Complaint for Injunctive and Other Relief, Washington v. Altius Mgmt., LLC*, No. 14-2-12425-SEA (Wash. Super. Ct. Apr. 30, 2014), <http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/AsylumComplaint%202014-05-01.pdf>.

¹¹ In the comments, backers note how Nash repeatedly fails to answer inquiries as to the status of the playing cards and discuss legal remedies available to them. See *Asylum Playing Cards Comments*, *supra* note 9; see also Lien, *supra* note 9; Taylor Soper, *Kickstarter Fraud: Washington Files First Consumer Protection Lawsuit Involving Crowdfunding*, GEEKWIRE (May 1, 2014, 3:28 PM), <http://www.geekwire.com/2014/attorney-general-asylum-playing-cards-crowdfunded-project/> (describing critical comments on the Kickstarter page comment thread and the ensuing lawsuit).

¹² Soper, *supra* note 11.

¹³ *Id.*; see also Owen S. Good, *Artist Got \$35K for Two Weeks of No Work, Says Developer of Failed Kickstarter Game*, POLYGON (July 20, 2014, 10:00 AM), <http://www.polygon.com/2014/7/20/5920079/yogscast-kickstarter-canceled-yogventures-winterkewl>. For another failed Kickstarter project that drew a significant amount of criticism, see Chris Welch, *Kickstarter-Funded Board Game Cancelled a Year After Raising over \$100,000*, THE VERGE (July 26, 2013, 12:19 PM), <http://www.theverge.com/2013/7/26/4559836/kickstarter-funded-board-game-cancelled-after-raising-over-100000>.

¹⁴ See Maya Kosoff, *The 10 Highest-Funded Kickstarter Projects of All Time*, BUS. INSIDER (July 9, 2014, 8:18 PM), <http://www.businessinsider.com/highest-funded-kickstarter-projects-2014-7?op=1>.

¹⁵ *Seven Things to Know About Kickstarter*, KICKSTARTER, <https://www.kickstarter.com/hello> (last visited Jan. 13, 2015) ("If people like a project, they can pledge money to make it happen."); see also Prive, *supra* note 3 (listing three main reasons that people back a project: (1) backers connect to the purpose of the campaign, (2) backers want the rewards, and (3) backers connect to the display of the campaign).

donation, images or concept art of the project, and any other information potential backers might want to know.¹⁶ “Project creators” solicit “pledges” from backers, who then choose whether to pledge money to a project.¹⁷ If the project reaches or surpasses its funding goal by the end of the funding period, Kickstarter withdraws the money from the backer’s bank account and transfers the funds to the project creator.¹⁸

Kickstarter is an example of reward-based crowdfunding, which consists of individuals giving financial support in exchange for samples or rewards.¹⁹ This is in contrast to equity-based crowdfunding, an

¹⁶ See *Seven Things to Know About Kickstarter*, *supra* note 15; see also Groshoff, *supra* note 5 (discussing reward-based crowdfunding, which Kickstarter is an example of: “[r]eward-based crowdfunding generally entails raising capital to fund some sort of creative project from which contributors receive some form of reward, tangible or otherwise, in exchange for contributions to reach a certain monetary benchmark”); Prive, *supra* note 3 (“Project creators can create a profile typically containing a short video, an introduction to their project, a list of rewards per donation, and some images to elaborate.”). For examples of what Kickstarter profiles look like, see *Asylum Playing Cards*, *supra* note 1; *The Doom that Came to Atlantic City!*, KICKSTARTER, <https://www.kickstarter.com/projects/forkingpath/the-doom-that-came-to-atlantic-city> (last visited Jan. 4, 2015) [hereinafter *Doom*]; *Ouya: A New Kind of Video Game Console*, KICKSTARTER, <https://www.kickstarter.com/projects/ouya/ouya-a-new-kind-of-video-game-console> (last visited Jan. 4, 2015) [hereinafter *Ouya*].

¹⁷ *Seven Things to Know About Kickstarter*, *supra* note 15.

¹⁸ *Kickstarter Basics*, *supra* note 7 (“Funding on Kickstarter is all-or-nothing. No one will be charged for a pledge towards a project unless it reaches its funding goal.”); see also Groshoff, *supra* note 5 (“Kickstarter uses an ‘all or nothing’ funding strategy from which project creators receive contributed funds only if the project creator’s defined funding goal is met, within a set time period.”).

¹⁹ See Uriel S. Carni, *Protecting the Crowd Through Escrow: Three Ways That the SEC Can Protect Crowdfunding Investors*, 19 FORDHAM J. CORP. & FIN. L. 681, 686 (2014) (“Under the reward model, investors make capital contributions in return for a reward, which may include any commodity, service, or even mere recognition.”); Groshoff, *supra* note 5 (“Reward-based crowdfunding generally entails raising capital to fund some sort of creative project from which contributors receive some form of reward, tangible or otherwise, in exchange for contributions that reach a certain monetary benchmark.”). This description matches the behavior of Kickstarter projects. See *Creator Handbook: Rewards*, KICKSTARTER, <https://www.kickstarter.com/help/handbook/rewards> (last visited Jan. 13, 2015) (“Rewards are what you share with the folks who helped you bring your project to life.”); *Seven Things to Know About Kickstarter*, *supra* note 15; see also Prive, *supra* note 3; cf. Daniel Isenberg, *The Road to Crowdfunding Hell*, HBR BLOG NETWORK (Apr. 23, 2012), <https://hbr.org/2012/04/the-road-to-crowdfunding-hell/> (classifying Kickstarter as “donation crowdfunding,” contrary to Groshoff’s classification of Kickstarter as “reward-based”). Groshoff also defines donation crowdfunding and lists several other crowdfunding sites that utilize this method. This shows that the crowdfunding lexicon is not yet universally agreed upon. See Groshoff, *supra* note 5, at 539.

approach taken by other crowdfunding sites that offer cash paybacks or stock in return for investments.²⁰ Often, the rewards offered in reward-based crowdfunding may include an actual prototype of the project or a souvenir related to the project.²¹ For the Veronica Mars movie, backers received a digital download of the completed film.²² For the Ouya game console, backers who contributed a certain amount were shipped an actual video game console.²³

However, the legal obligations between the project creator and backers remain undetermined.²⁴ There are several documented

²⁰ Carni, *supra* note 19 (listing the four types of crowdfunding as donation, rewards, pre-purchase, and equity); Groshoff, *supra* note 5, at 537 (discussing how equity-based crowdfunding “permits certain investors to provide capital in return for a stake in the company or dividend”); *see also* Kay Koplovitz, *Equity Crowdfunding at Year One, What’s the Impact?*, FORBES (Sept. 26, 2014, 11:23 AM), <http://www.forbes.com/sites/kaykoplovitz/2014/09/26/equity-crowdfunding-at-year-one-whats-the-impact/> (listing Crowdfunder, Founders Fund, CircleUp and Angel List as sites that offer equity crowdfunding).

²¹ 25 Killer Kickstarter Reward Ideas, CROWDFUNDING PR (Sept. 9, 2013), <http://www.crowdfundingpr.org/25-killer-kickstarter-reward-ideas/> (listing the three functions of Kickstarter rewards as: (1) to involve backers in the creative process, (2) to provide an incentive for people to back your project, (3) to allow backers to own the end product); *Creator Handbook: Rewards*, *supra* note 19 (listing common rewards offered as “copies of the thing,” “limited editions,” “collaborations,” “experiences,” and “mementos”); *see, e.g., Doom*, *supra* note 16 (listing t-shirts with the game’s logo, desktop backgrounds, a copy of the game, and extra pewter game pieces as rewards); *Ouya*, *supra* note 16 (listing username reservations, Ouya consoles and controllers as rewards).

²² Steven Tweedie, *The 13 Biggest Projects in Kickstarter History and Where They Are Now*, BUSINESS INSIDER (July 17, 2013, 8:57 PM), <http://www.businessinsider.com/the-highest-funded-kickstarters-2013-7?op=1> (describing the Veronica Mars Movie Project); *The Veronica Mars Movie Project*, KICKSTARTER, <https://www.kickstarter.com/projects/559914737/the-veronica-mars-movie-project> (last visited Jan. 4, 2015) (stating that backers who pledged a \$35 reward would “receive a digital version of the movie within a few days”).

²³ *Ouya*, *supra* note 16; Tweedie, *supra* note 22.

²⁴ In many instances where projects experience delays or never deliver the promised rewards, backers are unsure of their legal rights. Several news articles have discussed the uncertainty present in this situation. *See, e.g.,* Katherine Bindley, *9-Year-Old’s \$20,000 Kickstarter Campaign Draws Scam Accusations*, HUFFINGTON POST (Mar. 26, 2013, 6:17 PM), http://www.huffingtonpost.com/2013/03/26/9-year-old-kickstarter-campaign_n_2949294.html; Eric Markowitz, *When Kickstarter Investors Want Their Money Back*, INC. (Jan. 10, 2013), <http://www.inc.com/eric-markowitz/when-kickstarter-investors-want-their-money-back.html>; Michael Nunez, *Kickstarter Crooks: The Biggest Frauds in Crowdfunding*, SUPERCOMPRESSOR (Feb. 19, 2014), <http://www.supercompressor.com/gear/kickstarter-frauds-worst-crooks-in-crowdfunding>; Aarti Shahani, *When a Kickstarter Campaign Fails, Does Anyone Get the Money Back?*, NPR: ALL THINGS CONSIDERED (Sept. 3, 2012, 3:40 PM), <http://www.npr.org/blogs/alltechconsidered/2012/09/03/160505449/when-a-kickstarter-campaign-fails-does>

instances of individual backers requesting a refund because the project creator failed to meet a delivery deadline or complete the project.²⁵ In some of those cases, the project creator, out of his or her own free will, decided to offer a refund after a failed project.²⁶

Despite the fact that some backer requests for refunds have been granted in the past by generous project creators, the reality is that most requests for refunds are declined or ignored.²⁷ Kickstarter states that a project creator is obligated to make a good faith effort to complete his or her project or otherwise be subject to legal action by backers.²⁸ However, the site ultimately gives the project creator the power to remedy a failed project by offering refunds, or detailing how they used the funds.²⁹ Kickstarter states that their Terms of Use require creators to fulfill the promised project rewards or refund any backer whose reward they are unable to fill.³⁰ However, Kickstarter neither provides nor

anyone-get-their-money-back.

²⁵ Markowitz, *supra* note 24 (noting that backer Neil Singh requested a refund after supporting a failed Kickstarter project and has yet to receive one); Chris Morran, *Kickstarter: Project Backers Must Get Rewards (But Leave Us out of It)*, CONSUMERIST (Sept. 19, 2014), <http://consumerist.com/2014/09/19/kickstarter-project-backers-must-get-rewards-but-leave-us-out-of-it/> (arguing that Kickstarter's refusal to intervene in projects has led to "numerous instances of successfully funded projects where the backers wait much longer than expected for their promised rewards, and where the project creators stop responding to queries and refund requests"); Shahani, *supra* note 24 (listing multiple failed projects in which backers have requested refunds).

²⁶ Markowitz, *supra* note 24 (describing how one backer "said he planned to offer refunds to backers"); Morran, *supra* note 25; Shahani, *supra* note 24.

²⁷ See Morran, *supra* note 25 (noting that many requests for refunds go unanswered); Shahani, *supra* note 24 (noting that one project creator, David Barnett, decided to pay back 40 of his 500 backers).

²⁸ *Terms of Use*, KICKSTARTER, <https://www.kickstarter.com/terms-of-use> (last visited Jan. 13, 2015) [hereinafter *Kickstarter Terms*] ("When a project is successfully funded, the creator must complete the project and fulfill each reward. Once a creator has done so, they've satisfied their obligation to their backers If [the project creator is] unable to satisfy the terms of this agreement, [the project creator] may be subject to legal action by backers.").

²⁹ *Id.* ("A creator in this position has only remedied the situation and met their obligations to backers if: they post an update that explains what work has been done, how funds were used, and what prevents them from finishing the project as planned; they work diligently and in good faith to bring the project to the best possible conclusion in a timeframe that's communicated to backers; they're able to demonstrate that they've used funds appropriately and made every reasonable effort to complete the project as promised; they've been honest, and have made no material misrepresentations in their communications to backers; and they offer to return any remaining funds to backers who have not received their reward.").

³⁰ *Id.*

suggests any methods for backers to hold project creators accountable in the event that promised rewards are not honored.³¹

This Note argues that Kickstarter creates an environment that is vulnerable to fraud without providing any clear and reliable remedy for the victims of that fraud.³² Kickstarter's Terms of Use state that when a campaign is funded, a contract between project creators and backers is created.³³ Thus, Part I summarizes the relevant contracts law.³⁴ Part II applies the law summarized in Part I and finds that in crowdfunding endeavors, a contract between the project creator and backers is indeed formed.³⁵ Part III analyzes why contracts law falls short of providing an adequate remedy for defrauded Kickstarter backers and discusses potential solutions that would allow backers to hold fraudulent project creators accountable.³⁶ This analysis ultimately finds that all parties in successfully funded Kickstarter campaigns (project creator and backers) generally intend to create a contract, and that a contract is likely formed between the parties.³⁷ However, that contract is hard to enforce because of the disparity between the high cost of initiating a lawsuit and the reality that most backers have only pledged a nominal amount to the project.³⁸ This Note only considers instances where the project was never delivered to constitute fraud and does not consider instances where a reward was delivered but was not as described or expected.

³¹ See *id.*; see also Shahani, *supra* note 24. At least partially due to unresponsiveness to the mentioned complaints, the Better Business Bureau has previously given Kickstarter an "F rating," the lowest possible score. See Charles Luzar, *Kickstarter, Lawsuits, and an F From the BBB*, CROWDFUND INSIDER (Aug. 22, 2013, 7:23 PM), <http://www.crowdfundinsider.com/2013/08/21221-kickstarter-lawsuits-f-bbb-better-business-bureau/> (stating that Kickstarter had an F rating from the Better Business Bureau). As of September 2015, it should be noted that Kickstarter now has an A+ rating. See BBB BUSINESS REVIEW: KICKSTARTER, <http://www.bbb.org/new-york-city/business-reviews/professional-fundraiser/kickstarter-inc-in-brooklyn-ny-137092> (rated as an A+ with eleven closed complaints in the "Delivery Issues" category).

³² Nunez, *supra* note 24 (discussing examples of fraud and deceit of backers on Kickstarter); see also Shahani, *supra* note 24 (discussing lack of remedies for backers who contributed to a failed project).

³³ *Kickstarter Terms*, *supra* note 28.

³⁴ See *infra* Part I.

³⁵ See *infra* Part II.

³⁶ See *infra* Part III.

³⁷ See *infra* Part II.

³⁸ See *infra* Part III.

I. BACKGROUND

Kickstarter's Terms of Use state that contract law is applicable to the relationship between project creators and backers.³⁹ Generally, contract law governs transactions over the internet.⁴⁰ However, contract creation over the internet remains an amorphous and uncertain area of the law.⁴¹ Kickstarter's Terms of Use state that "[w]hen a creator posts a project on Kickstarter, they're inviting other people to *form a contract* with them. Anyone who backs a project is accepting the creator's offer, and forming that *contract*."⁴² Kickstarter also states that users must be at least "18 years old, or *old enough to form a binding contract*."⁴³ Kickstarter explicitly excludes itself as a party in the contract between project creators and backers.⁴⁴ Although the Terms of Use do not provide specific guidance on what remedies a disgruntled project backer might be able to pursue, these excerpts suggest that Kickstarter believes contract law is applicable.⁴⁵

For clarity and general applicability, this Note focuses on contract law as enumerated in the Uniform Commercial Code (UCC) and the common law. This section provides a brief overview of contract law as it applies to contracts created over the internet. It begins by describing contract formation in the UCC and how contract law has adapted to business over the internet using website Terms of Use. It then explains how to incorporate terms not mentioned in the contract into the contract, such as information on the profile page. This section concludes by discussing the remedies available after a breach.

³⁹ *Kickstarter Terms*, *supra* note 28.

⁴⁰ See E-COMMERCE AND INTERNET LAW § 14.01 (West 2014–2015); DRAFTING INTERNET AGREEMENTS § 3.15 (2014).

⁴¹ See generally E-COMMERCE AND INTERNET LAW, *supra* note 40; Shawn E. Tuma & Christopher R. Ward, *Contracting Over the Internet in Texas*, 52 BAYLOR L. REV. 381, 381–82 (2000) (stating that changes in technology are outpacing the development of the law).

⁴² *Kickstarter Terms*, *supra* note 28 (emphasis added).

⁴³ *Id.* (emphasis added).

⁴⁴ See *id.* ("The creator is *solely* responsible for fulfilling the promises made in their project.") (emphasis added).

⁴⁵ Numerous references to "contracts" within Kickstarter's Terms of Use suggest that Kickstarter believes a contract action will be sufficient to enforce a refund against a fraudulent Kickstarter project creator. See generally *id.* ("To sign up for an account, you need to be at least 18 years old, or old enough to form a binding contract When a creator posts a project on Kickstarter, they're inviting other people to form a contract with them. Anyone who backs a project is accepting the creator's offer, and forming that contract.").

A. *Contract Law Encourages Finding a Valid Enforceable Contract When the Facts Indicate that the Parties Intended to Have an Agreement*

Although the UCC is not a statute in any one jurisdiction, it is widely adopted in most states.⁴⁶ The UCC is essentially a model code, “designed to simplify and clarify the law, and to secure uniformity in the adopting states.”⁴⁷ For this reason, it is a simple way of ensuring a widely relevant analysis of the applicability of contract law to the facts present in a Kickstarter dispute.

A contract is a set of promises for which, in the event of a breach, the law recognizes a duty or provides a remedy.⁴⁸ The elements of a valid and binding contract include an offer, acceptance, capacity to contract, consideration, mutual assent, and legality of the object.⁴⁹ Generally, the UCC encourages the finding of a valid enforceable contract whenever the facts indicate that the parties mutually intended to have an agreement, even if there are missing terms.⁵⁰

Making an offer is the first step to creating an enforceable agreement.⁵¹ Offers give the offeree power to respond to the offer and create a legal obligation between the parties.⁵² Offers can be made to wider audiences.⁵³ These offers can be enforceable where a communication creates a reasonable belief in the offeree that the communication is extending an offer that he or she has the power to

⁴⁶ ALAN S. GUTTERMAN, *BUSINESS TRANSACTIONS SOLUTIONS* § 117:17 (2015); Alexander Van Voorhees, *Ebay Sellers and Article 2: Selling a Broader Merchant Concept*, 56 CASE W. RES. L. REV. 1199, 1201 (2006) (stating that “[e]very state in the union has adopted the U.C.C.” with the caveat that Louisiana has not adopted Article 2).

⁴⁷ *Atlas Thrift Co. v. Horan*, 104 Cal. Rptr. 315, 317 (Ct. App. 1972).

⁴⁸ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

⁴⁹ See *Perlmutter Printing Co. v. Strome, Inc.*, 436 F. Supp. 409, 414 (N.D. Ohio 1976); *Schreiber v. Olan Mills*, 627 A.2d 806, 808 (Pa. Super. Ct. 1993); *Advantage Physical Therapy, Inc. v. Cruse*, 165 S.W.3d 21, 24 (Tex. App. 2005).

⁵⁰ See U.C.C. § 2-204 (2012) (“1. A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. . . . 3. Even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”).

⁵¹ See U.C.C. § 2-206 (2012); HOWARD O. HUNTER, *MODERN LAW OF CONTRACTS* § 3:1 (2015).

⁵² See U.C.C. § 2-206 (“[A]n offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.”); HUNTER, *supra* note 51.

⁵³ For examples of instances where the court has found that an offer was made to a wide audience, see *Buhr v. Reliance Standard Life Ins.*, 591 F. Supp. 1558, 1560-61 (E.D. Wis. 1984); *James v. Turilli*, 473 S.W.2d 757, 759 (Mo. Ct. App. 1971).

accept.⁵⁴ Once an offer is given, the common law rule is that the offeror may freely withdraw that offer without liability until the offeree accepts it.⁵⁵ Generally, there is no contract until the offeree accepts.⁵⁶ For an offer and acceptance to create a binding contract, there must be a “meeting of the minds,” or an objective manifestation of mutual assent.⁵⁷ Thus, to be enforceable, a contract requires that the offer be accepted and that the parties agree to all material terms.⁵⁸

B. Terms of Use Are Usually Enforceable Against Users of the Web Site Where the User Has Affirmatively Assented to the Terms

Terms of Use can also form a binding contract.⁵⁹ Most websites typically contain Terms of Use that govern the terms of a visitor’s use of the site.⁶⁰ These terms typically try to describe any legal responsibility or relationship between the website and the user.⁶¹ They

⁵⁴ See HUNTER, *supra* note 51, at § 3:4.

⁵⁵ Peerless Cas. Co. v. Hous. Auth., 228 F.2d 376, 378 (5th Cir. 1955); Kuhnoffer v. Naperville Cmty. Sch. Dist. 203, 758 F. Supp. 468, 470 (N.D. Ill. 1991); Beard Implement Co. v. Krusa, 567 N.E.2d 345, 348 (Ill. App. Ct. 1991).

⁵⁶ U.C.C. § 2-206 (“[A]n order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods.”); Houston Dairy, Inc. v. John Hancock Mut. Life Ins. Co., 643 F.2d 1185, 1186 (5th Cir. 1981) (holding that a contract is not formed, and thus an offeror is not bound, until acceptance of an offer).

⁵⁷ Perlmutter Printing Co. v. Strome, Inc., 436 F. Supp. 409, 414 (N.D. Ohio 1976); Nortek, Inc. v. Liberty Mut. Ins. Co., 843 N.E.2d 706, 713-14 (Mass. App. Ct. 2006); Connor v. Harless, 626 S.E.2d 755, 757 (N.C. Ct. App. 2006).

⁵⁸ U.C.C. § 2-207 (2012) (“[A]dditional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: . . . (b) they materially alter it.”); Duffy v. Duffy, 881 A.2d 630, 634 (D.C. 2005); Jack Baker, Inc. v. Office Space Dev. Corp., 664 A.2d 1236, 1238 (D.C. 1995).

⁵⁹ See Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1180 (9th Cir. 2014) (holding that “Nguyen had insufficient notice of Barnes & Noble’s Terms of Use, and thus did not enter into an agreement with Barnes & Noble to arbitrate his claims”); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996) (holding shrinkwrap licenses as enforceable unless their terms are objectionable); E-COMMERCE AND INTERNET LAW, *supra* note 40.

⁶⁰ E-COMMERCE AND INTERNET LAW, *supra* note 40. Almost all websites that receive a significant amount of traffic have Terms of Use. See, e.g., Facebook Terms and Policies, FACEBOOK, <http://www.facebook.com/policies> (last visited Jan. 14, 2015); Terms of Use, INSTAGRAM, <https://help.instagram.com/478745558852511> (last visited Jan. 14, 2015); Twitter Terms of Service, TWITTER, <https://twitter.com/tos?lang=en> (last visited Jan. 14, 2015).

⁶¹ DRAFTING INTERNET AGREEMENTS, *supra* note 40; see, e.g., Facebook Terms and Policies, *supra* note 60; Terms of Use, *supra* note 60; Twitter Terms of Service, *supra* note 60.

also provide users with information about restrictions on use.⁶² Many disputes involving websites and Terms of Use hinge upon whether there was binding assent.⁶³

Many websites utilize unilateral licenses in order to demonstrate a user has assented to the Terms of Use.⁶⁴ A unilateral license is a one-sided contract where the offeror makes an offer that an offeree is free to accept by performing on the contract.⁶⁵ Visitors to websites are typically asked to accept unilateral licenses that are referred to as clickwrap, browsewrap, or click-to-accept agreements.⁶⁶ A “clickwrap” is essentially an electronic contract that forces users to express consent by taking some affirmative action like clicking on a button to indicate assent to the Terms of Use before using a website or service.⁶⁷

⁶² DRAFTING INTERNET AGREEMENTS, *supra* note 40; *see, e.g., Facebook Terms and Policies*, *supra* note 60; *Terms of Use*, *supra* note 60; *Twitter Terms of Service*, *supra* note 60.

⁶³ *See, e.g., Nguyen*, 763 F.3d at 1180 (finding that Nguyen did not have constructive notice of Barnes & Noble’s Terms of Use); *ProCD, Inc.*, 86 F.3d at 1452-53 (finding that the shrinkwrap license was binding on the buyer under the UCC); *Ward v. TheLadders.com, Inc.*, 3 F. Supp. 3d 151, 170 (S.D.N.Y. 2014) (granting in part and denying in part, defendant’s motion to dismiss after consideration of the Terms of Use governing use of Ladders.com).

⁶⁴ *See Tarra Zynda, Ticketmaster Corp. v. Tickets.com, Inc.: Preserving Minimum Requirements of Contract on the Internet*, 19 BERKELEY TECH. L.J. 495, 504 (2004); Venkat Balasubramani, *Court Blesses Instagram’s Right to Unilaterally Amend Its User Agreement* — Rodriguez v. Instagram, TECH. & MKTG L. BLOG (Mar. 6, 2014), <http://blog.ericgoldman.org/archives/2014/03/court-blesses-instagram-right-to-unilaterally-amend-its-user-agreement-rodriquez-v-instagram.htm>. For examples of websites that use unilateral licenses, *see generally* EBAY, <http://www.ebay.com> (last visited Jan. 14, 2015); INSTAGRAM, <http://instagram.com> (last visited Jan. 14, 2015); KICKSTARTER, <https://www.kickstarter.com> (last visited Jan. 14, 2015).

⁶⁵ Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 UC DAVIS L. REV. 1, 1 (1992) (“[A]n offer of a unilateral contract may be accepted only by completed performance, and that consequently the offeror may revoke his proposal as long as the offeree has not done all that is required of her.”); *see also Kuhnoffer v. Naperville Cmty. Sch. Dist.* 203, 758 F. Supp. 468, 470 (N.D. Ill. 1991); 2 WILLISTON ON CONTRACTS § 6:2 (4th ed. 2015).

⁶⁶ *See Woodrow Hartzog, The New Price to Play: Are Passive Online Media Users Bound by Terms of Use?*, 15 COMM. L. & POL’Y 405, 432-33 (2010); Zynda, *supra* note 64; Rachel Cormier Anderson, Note, *Enforcement of Contractual Terms in Clickwrap Agreements: Courts Refusing to Enforce Forum Selection and Binding Arbitration Clauses*, 3 SHIDLER J. L. COM. & TECH. 11, 11 (2007). Since Kickstarter has a clickwrap, browsewraps are not particularly relevant to and thus omitted from this discussion.

⁶⁷ Hartzog, *supra* note 66, at 406 (“A clickwrap agreement is electronically presented and requires an individual to click on a button indicating assent.”); Anderson, *supra* note 66.

A user establishes affirmative consent by clicking “I accept” on the site after reviewing the Terms of Use.⁶⁸ Courts are more likely to consider the Terms of Use to be an enforceable contract with the user where such consent is obtained.⁶⁹ The enforceability of a clickwrap is dependent on its ability to serve as notice of the terms it is seeking to enforce.⁷⁰ The UCC generally supports the validity of contracts created by clickwraps.⁷¹ These agreements typically contain boilerplate terms and conditions.⁷² There are numerous cases stating that Terms of Use are not enforceable against the user if the user did not see or affirmatively consent to them.⁷³ In other instances, a court will consider the terms contained in the clickwrap agreement and invalidate certain terms using traditional contract concepts.⁷⁴ Generally, courts will enforce the Terms unless they are unconscionable.⁷⁵

A forum selection clause is a contractual designation as to where litigation, if it is to take place, may occur.⁷⁶ Some courts have found

⁶⁸ See *i.LAN Sys., Inc. v. NetScout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (finding “i.LAN explicitly accepted the clickwrap license agreement when it clicked on the box stating ‘I agree’”); Ronald J. Mann, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 990 (2008); Anderson, *supra* note 66 (“[C]lickwrap’ refers to electronic contracts requiring users to express their consent by clicking on an ‘I accept’ button.”).

⁶⁹ See *i.LAN Sys.*, 183 F. Supp. 2d at 330 (finding that clickwrap license was enforceable); Mann, *supra* note 68; Anderson, *supra* note 66.

⁷⁰ See Hartzog, *supra* note 66, at 425 (“Courts considered notice the most important factor in determining whether to bind a party to an online agreement. In nearly every clickwrap agreement . . . notice was found by evaluating the prominence, location and language indicating an intent to bind the Web site user.”); Mann, *supra* note 68, at 991 (stating that in determining the terms of a contract, a court asks whether “the site provides reasonable notice of the terms of the contract”); see also *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 31 (2d Cir. 2002).

⁷¹ Zynda, *supra* note 64, at 507 (“U.C.C. and case law generally support the validity of [] contracts [created by shrinkwraps and clickwraps].”).

⁷² Anderson, *supra* note 66; see also *Iberia Credit Bureau v. Cingular Wireless LLC*, 379 F.3d 159, 171 (5th Cir. 2004) (considering the enforceability of a boilerplate arbitration clause); *Aral v. Earthlink, Inc.*, 134 Cal. App. 4th 544, 558 (2005) (describing the Terms in this case as a “standardized contract, imposed upon the subscribing party”).

⁷³ See, e.g., *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390, at *3 (C.D. Cal. 2000); *Williams v. Am. Online, Inc.*, No. 00-0962, 2001 WL 135825, at *3 (Mass. Super. Ct. 2001); *Caspi v. Microsoft Network, LLC*, 732 A.2d 528, 532-33 (N.J. Super. Ct. 1999).

⁷⁴ Anderson, *supra* note 66.

⁷⁵ E-COMMERCE AND INTERNET LAW, *supra* note 40; see Anderson, *supra* note 66 (stating that the general enforceability of clickwraps is becoming more common).

⁷⁶ David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP.

forum selection clauses or arbitration clauses unenforceable when embedded in clickwrap agreements.⁷⁷ Generally, courts find that users are bound by forum selection clauses when the user has had an opportunity to read it before giving consent.⁷⁸ For example, in *Caspi v. Microsoft Network*, the court upheld a forum selection clause because it was reasonable, clear, and contained no material misrepresentations.⁷⁹ However, several states have held that similar forum selection clauses are invalid because they violate or conflict with state consumer protection acts.⁸⁰

For a demonstration of many of these concepts, eBay provides a good example. In order to use eBay, a user must first register an account.⁸¹ The registration process includes requiring the potential user to affirmatively check off a clickwrap box, indicating that the user has read and agreed to eBay's user agreement.⁸² Users who fail to do so cannot complete the registration.⁸³ On eBay, the bidding process demonstrates mutual assent, payment, and eventual shipment of goods.⁸⁴ When an eBay seller offers to sell and the buyer bids for and

L. REV. 785, 785 (1993).

⁷⁷ Anderson, *supra* note 66 (“[F]orum selection and mandatory arbitration clauses are the two types of clauses embedded in agreements that have recently been found unenforceable by courts.”). *But see* Michael D. Moberly & Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 SW. L. REV. 265, 324 (2009) (suggesting that there is a trend that courts are increasingly moving towards enforcement of forum selection clauses).

⁷⁸ See Anderson, *supra* note 66; *see also* Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1014-15 (D.C. 2002); Williams, 2001 WL 135825, at *3.

⁷⁹ Caspi v. Microsoft Network, LLC, 732 A.2d 528, 530 (N.J. Super. Ct. 1999).

⁸⁰ Anderson, *supra* note 66. In California, a court held that a forum selection clause was invalid because it constituted “a contractual waiver of the consumer protections under” California's Consumers Legal Remedies Act (CLRA). *Am. Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 5 (2001); *see also* Dix v. ICT Gr., Inc., 125 Wash. App. 929, 935-36 (2005), *cert. granted*, 155 Wash. 2d 1024 (2005). Typically, such forum selection clauses will be invalid under state consumer protections acts if the selected forum affords significantly lesser consumer protection than the state consumer protection act. *Am. Online*, 90 Cal. App. 4th at 4-5; *see also* Koch v. Am. Online, Inc., 139 F. Supp. 2d 690, 695 (D. Md. 2000).

⁸¹ *Tricome v. eBay, Inc.*, No. 09-2492, 2009 WL 3365873, at *1 (E.D. Pa. 2009) (“Had Plaintiff not clicked that [clickwrap,] he would not have been allowed to register [on eBay].”); *How to Register*, EBAY, <http://pages.ebay.com/help/account/questions/why-register.html> (last visited Jan. 13, 2015).

⁸² *Tricome*, 2009 WL 3365873, at *1; *see How to Register*, *supra* note 81 (stating that a user must register, by checking the clickwrap, in order to use the site).

⁸³ *Tricome*, 2009 WL 3365873, at *1; *How to Register*, *supra* note 81 (user must register before making any purchases).

⁸⁴ *Sayeedi v. Walser*, 835 N.Y.S.2d 840, 846 (Civ. Ct. 2007) (“The mutual assent of the two parties is evidenced through the eBay bidding process, payment and the

wins that item, the two parties have entered into a contract.⁸⁵ Courts, subject to proper jurisdictional requirements, have repeatedly enforced eBay contracts for the sale of goods.⁸⁶

C. *Extrinsic Evidence May Be Used to Define the Terms that Are Missing from a Contract*

If a contract exists, the logical next step would be to determine what terms are contained in that contract. The parol evidence rule prohibits evidence of agreements outside of the contract from adding to or modifying the terms of an integrated contract.⁸⁷ An integrated agreement is a writing that constitutes the final expression of at least one term of an agreement.⁸⁸ Extrinsic evidence, such as a project profile page, may supplement the contract's terms if the agreement is

ultimate shipment of goods. In the eBay terms and conditions members agree to abide by eBay policies which state clearly 'when a seller lists an item on eBay, and the buyer bids for and wins that item, the seller and buyer have entered into a contract.'").

⁸⁵ *Id.*; *eBay User Agreement*, EBAY, <http://pages.ebay.com/help/policies/user-agreement.html> (last visited Jan. 13, 2015) ("eBay is a marketplace that allows users to offer, sell and buy just about anything in a variety of pricing formats and locations. The actual contract for sale is directly between the sellers and buyers.").

⁸⁶ See *Tricome*, 2009 WL 3365873, at *5; *McGuire v. Lavoie*, No. Civ.A. 3:03-CV-0161-BH, 2003 WL 23174753, at *3-6 (N.D. Tex. 2003) (denying defendant's motion to dismiss for lack of personal jurisdiction after applying the *Zippo* test for internet activity); *Machulsky v. Hall*, 210 F. Supp. 2d 531, 539 (D.N.J. 2002) (stating that "commercial activity via the Internet must be substantially more regular and pervasive to constitute 'purposeful availment of doing business' within a given state"); *Sayeedi*, 835 N.Y.S.2d at 845-46 (finding that an on-line auction such as eBay does not rise to the level of purposeful conduct necessary for the assertion of specific personal jurisdiction).

⁸⁷ U.C.C. § 2-202 (2012); *Ross Eng'g Co. v. Pace*, 153 F.2d 35, 42-43 (4th Cir. 1946) (citing RESTATEMENT (FIRST) OF CONTRACTS § 237 (1932)) ("Moreover, it would be a violation of the established rule that any agreement made or opinion expressed in previous parol negotiations as to the terms or legal effect of a subsequent written agreement does not prevail over the provisions thereof in the absence of some artifice or fraud."); *G.L. Webster Co. v. Trinidad Bean & Elevator Co.*, 92 F.2d 177, 178-79 (4th Cir. 1937) ("Where negotiations had been entered into with regard to a transaction and . . . the contract as finally agreed upon is to be reduced to writing, all of the agreements made between the parties are presumed to be incorporated in the written contract when finally executed by both parties. The parol evidence rule as stated in [the first Restatement] is that the 'integration of an agreement makes inoperative to add to or to vary the agreement . . . all prior oral or written agreements relating thereto.'").

⁸⁸ *RGJ Assoc., Inc. v. Stainsafe, Inc.*, 338 F. Supp. 2d 215, 244 (D. Mass. 2004); RESTATEMENT (SECOND) OF CONTRACTS, § 209(1) (2015) [hereinafter RESTATEMENT (SECOND)]; *HUNTER, supra* note 51, at § 7:8; see *G.L. Webster Co.*, 92 F.2d at 178-79.

not integrated.⁸⁹ In determining the admissibility of extrinsic evidence for completely integrated agreements, courts traditionally employ the “plain meaning rule.”⁹⁰ First, the judge determines whether the writing is ambiguous. If the writing is not ambiguous, extrinsic evidence as to the writing’s meaning is inadmissible. If the writing is determined to be ambiguous, the court considers extrinsic evidence to interpret the contract.⁹¹

D. The Remedies Available Depend on Whether the Transaction May Be Considered a Sale of Goods

Once a court finds that a contract exists and the terms are defined, a breach of contract action may enforce that contract. A breach of contract is a failure to perform a whole or part of a contract.⁹² According to the Restatement Second of Contracts, anything short of full performance of a contract is a breach, even if the party who failed to perform was not at fault.⁹³ The remedy for a breach of contract depends on whether Article 2 of the UCC governs the transaction.⁹⁴ If Article 2 applies, several buyer remedies become available for the buyer to pursue against the seller.⁹⁵ One buyer remedy under Article 2

⁸⁹ See *Benvenuti Oil Co. v. Foss Consultants, Inc.*, 781 A.2d 435, 439 (Conn. App. Ct. 2001) (“The parol evidence rule does not apply, however, if the written contract is not completely integrated.”); *Lester v. Resort Camplands Int’l, Inc.*, 605 A.2d 550, 554 (Conn. App. Ct. 1992); *Handy Boat Serv., Inc. v. Profl Servs., Inc.*, 711 A.2d 1306, 1308-09 (Me. 1998) (“Application of the [parol evidence] rule requires an initial finding that the parties intended the writing to integrate their understandings concerning the subject matter of the agreement.”).

⁹⁰ FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 382 (Robert C. Clark et al. eds., 7th ed. 2008).

⁹¹ *Id.*

⁹² *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1343 (Fed. Cir. 2000); WILLISTON ON CONTRACTS § 63:1 (4th ed. 2015).

⁹³ See *RESTATEMENT (SECOND)*, *supra* note 88, at § 235(2).

⁹⁴ See *Rector v. Karlstad Farmers Elevator*, No. A07-0693, 2008 WL 3287910, at *3 (Minn. Ct. App.) (holding that claim for damages was governed exclusively by the UCC, precluding plaintiff’s common law breach of contract claim); *Vitolo v. Dow Corning Corp.*, 651 N.Y.S.2d 104, 105 (1996) (holding that negligence cause of action was unavailable to plaintiff because the underlying transaction was governed by Article 2 of the UCC).

⁹⁵ The following are a few remedies that would not be available if Article 2 was not held to apply to a transaction. Thus, the applicability of Article 2 is relevant to what remedies are available to a buyer to pursue. See, e.g., U.C.C. §§ 2-103, 2-313, 2-711, 2-713 (2012).

of the UCC is the right to cancel the transaction and recover the price paid where the seller fails to make a delivery or repudiates.⁹⁶

Article 2 of the UCC governs the sale of goods. Goods are essentially things movable at the time of sale and can include specially manufactured goods.⁹⁷ A sale is the passage of title, for a price, from the seller to the buyer.⁹⁸ The general test for determining the applicability of Article 2 to a contract is whether the primary purpose of the contract is the sale of goods or services.⁹⁹ In contracts involving eBay, courts have held that Article 2 is applicable to transactions between users of the site, but is not applicable to contracts between users of eBay and eBay itself.¹⁰⁰ This is because eBay is not selling a good, but rather providing a platform for sellers to connect with buyers.¹⁰¹ For instance, in *Bobholz v. Banaszak*, the court held that Article 2 applied to a contract between two eBay users because a user was actually selling goods.¹⁰²

Some contracts, called mixed development-sales contracts, are entered into to hire one party to develop and then sell a product to the other party. Article 2 governs mixed development-sales contracts in which the development portion is only incidental to the dominant purpose of sale and purchase of the developed product.¹⁰³ In *Rajala v.*

⁹⁶ *Id.* § 2-711 (“In the case of rightful cancellation, rightful rejection, or justifiable revocation of acceptance, recover so much of the price as has been paid.”).

⁹⁷ *Id.* § 2-103 (defining “goods” as things that “are movable at the time of identification to the contract for sale,” including specially manufactured goods).

⁹⁸ *Id.* § 2-106 (defining “sale” as “the passing of title from the seller to the buyer for a price”).

⁹⁹ *Rajala v. Allied Corp.*, 66 B.R. 582, 590 (D. Kan. 1986); *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*, 612 N.E.2d 550, 555 (Ind. 1993); HUNTER, *supra* note 51, at § 9:11.

¹⁰⁰ See *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 836 (2002) (dismissing action brought by buyers of fraudulently autographed sports collectibles against eBay); *Evans v. Matlock*, No. M2001-02631-COA-R9-CV, 2002 WL 31863294, at *3 (Tenn. Ct. App. 2002) (holding that eBay Terms of Use requiring arbitration of disputes was applicable only to disputes between eBay and users of eBay and did not apply to disputes between users); *Bobholz v. Banaszak*, 655 N.W.2d 547, 547 (Wis. Ct. App. 2003) (holding that sale between eBay buyer and seller was governed by Article 2 because eBay seller breached an express warranty). *But see Metcalf v. Lawson*, 802 A.2d 1221, 1227 (N.H. 2002) (eBay seller did not purposely avail herself of protections of buyer’s state).

¹⁰¹ See *Bobholz*, 655 N.W.2d at 547. See generally *Who We Are*, EBAY, http://www.ebayinc.com/who_we_are/one_company (last visited Jan. 15, 2015) (explaining how eBay enables individuals and businesses to sell online).

¹⁰² *Bobholz*, 655 N.W.2d at 547 n.2 (finding that Article 2 was applicable was not dependent on a finding that eBay seller was a merchant under the UCC).

¹⁰³ See *Rajala*, 66 B.R. at 591 (applying New York and UCC law to hold that a

Allied Corp., General Poly contracted with Allied Corporation to develop and supply General Poly with a specific quality of resin.¹⁰⁴ The court held that the contract was not entirely for the sale of goods because it contained a portion concerning development of the resin.¹⁰⁵ Further, the contract is more similar to a mixed sale and service contract, thus requiring the court to apply the “predominant focus test.”¹⁰⁶ Under this test, the *Rajala* court held that the development portion of the contract was incidental to the predominant goal, which was the sale and purchase of resin.¹⁰⁷ Since the predominant purpose of the contract was a sale of goods, the court held that Article 2 of the UCC should govern the entire contract.¹⁰⁸

Under the predominant focus test, in mixed contracts for both the sale of goods and services, Article 2 is applicable where the sale of goods aspect of the contract predominates.¹⁰⁹ Conversely, if the service aspect predominates, Article 2 is inapplicable.¹¹⁰ A court has also found that Article 2 governed a city’s contract for development and training assistance in a personnel management system because the predominant aspect of the contract could be termed a transaction in goods within the ambit of the UCC.¹¹¹

E. Existing Crowdfunding Regulation Does Not Encompass Kickstarter

Much of the literature discussing the law of crowdfunding focuses on the potential implications of the Crowdfund Act.¹¹² The

mixed development-sales agreement was subject to Article 2 of the UCC).

¹⁰⁴ *Id.* at 584-85.

¹⁰⁵ *Id.* at 590.

¹⁰⁶ *Id.* (“Under the predominant purpose test, the court must determine the ‘essence’ or main objective of the parties’ agreement. . . . If the provision of services or rendition of other performance predominates and is not merely incidental or collateral to the sale of goods, then the contract will not be subject to Article 2 of the UCC.”).

¹⁰⁷ *Id.* at 591.

¹⁰⁸ *Id.*

¹⁰⁹ See *Princess Cruises, Inc. v. Gen. Elec. Co.*, 143 F.3d 828, 832 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 444 (1998); *Rajala*, 66 B.R. at 590; *Nat’l Civil Serv. League v. City of Santa Fe*, 370 F. Supp. 1128, 1131 (D.N.M. 1973).

¹¹⁰ See *Princess Cruises*, 143 F.3d at 832; *Rajala*, 66 B.R. at 590; *Nat’l Civ. Serv. League*, 370 F. Supp. at 1131.

¹¹¹ *Nat’l Civil Serv. League*, 370 F. Supp. at 1131-32.

¹¹² See, e.g., Andrew C. Fink, *Protecting the Crowd and Raising Capital Through the Crowdfund Act*, 90 U. DET. MERCY L. REV. 1 (2012) (discussing the implications of the Crowdfund Act for the investors contributing to crowdfunding projects); Joan MacLeod Heminway, *The New Intermediary on the Block: Funding Portals Under the Crowdfund Act*, 13 UC DAVIS BUS. L.J. 177 (2013) (discussing the role of funding portals under the Crowdfund Act); John S. (Jack) Wroldsen, *The Social Network and*

Crowdfund Act puts in place several protections for crowdfunding investors.¹¹³ However, these protections are only applicable to crowdfunding projects offering securities.¹¹⁴ It is against Kickstarter's Terms of Use to offer securities.¹¹⁵ Instead, Kickstarter only allows the offering of rewards, which are not considered "securities" under existing regulations.¹¹⁶ Thus, although the Crowdfund Act protects crowdfunding investors, Kickstarter has exempted itself from regulation under the Act by prohibiting the offering of securities in Kickstarter campaigns.

II. THE LAW OF KICKSTARTER

A. *Kickstarter Is Vulnerable to Fraud*

Recent figures suggest that less than five percent of crowdfunding projects result in fraud.¹¹⁷ However, there are numerous examples of funded Kickstarter projects where the backers never received the promised rewards.¹¹⁸ Some of these projects involved creators who

the Crowdfund Act: Zuckerberg, Saverin, and Venture Capitalists' Dilution of the Crowd, 15 VAND. J. ENT. & TECH. L. 583 (2013) (discussing the Crowdfund Act from a venture capitalist perspective).

¹¹³ Gregory D. Deschler, Comment, *Wisdom of the Intermediary Crowd: What the Proposed Rules Mean for Ambitious Crowdfunding Intermediaries*, 58 ST. LOUIS U. L.J. 1145, 1153 (2014) (stating that the Crowdfund Act requires that intermediaries offering securities "provide disclosures related to risks and other investor education materials that the SEC determines are necessary. The intermediary must ensure that each investor reviews the investor education materials, affirms their understanding of the same, acknowledges the possibility they might lose their entire investment, and answers questions showing an understanding of startup investment risk" among other protections); see also JOBS Act, Pub. L. No. 112-106, § 302(b), 126 Stat. 306, 315 (2012) (codified at 15 U.S.C. § 77d-1(a)(2)) (describing restrictions on intermediaries that protect investors).

¹¹⁴ Groshoff, *supra* note 5 ("[R]eward-based capital providers essentially pay for whatever the goodie bag entails. Doing so avoids the scope of current securities laws and SEC rules and regulations, which do not govern reward-based crowdfunding because a goodie bag does not constitute a 'security.'").

¹¹⁵ *Our Rules*, KICKSTARTER, <https://www.kickstarter.com/rules> (last visited Jan. 7, 2015) ("Projects . . . can't offer financial incentives like equity or repayment.").

¹¹⁶ Groshoff, *supra* note 5.

¹¹⁷ Ethan R. Mollick, *The Dynamics of Crowdfunding: An Exploratory Study*, 29 J. BUS. VENTURING 1, 11 (2014), available at <http://ssrn.com/abstract=2088298>.

¹¹⁸ Statistics on what proportion of Kickstarter project rewards are never delivered are not available, however a glance at the comments on a Kickstarter project page generally reveals whether delivery has been fulfilled (backers can be seen in the comments exchanging complaints, discussing feasibility of lawsuits, etc.). See, e.g., *Asylum Playing Cards*, *supra* note 1; *Doom*, *supra* note 16; *Hanfree iPad Accessory: Use*

negligently managed the Kickstarter funds and depleted the funds before completing the projects.¹¹⁹ Other projects have been more overt in their fraudulent behavior.¹²⁰ There are several documented examples of overtly fraudulent projects. In one campaign, a project creator tried to invest in his or her own project to make the project appear more credible, only to retract the funding once the project gained legitimate funding.¹²¹ In another campaign, the project creator attempted to take the Kickstarter money for his or her own personal use.¹²² In another campaign, a project creator took products from elsewhere and marketed them as a new invention or a product of his or her own design.¹²³ In all of these examples, Kickstarter backers pledged financial support to a project and received nothing in return.¹²⁴

the iPad Hands Free, KICKSTARTER, <https://www.kickstarter.com/projects/831303939/hanfrees-ipad-accessory-use-the-ipad-hands-free/comments> (last visited Sept. 2, 2015) [hereinafter *Hanfrees iPad Accessory*]; *Rob & Anna's — It's Just Bananas!*, KICKSTARTER, <https://www.kickstarter.com/projects/1460959733/rob-and-annas-its-just-bananas/comments> (last visited Sept. 2, 2015).

¹¹⁹ See, e.g., *Hanfrees iPad Accessory*, *supra* note 118 (Neil Singh, a backer of the project, commented that he initiated discovery proceedings and obtained financial records that showed poor management of the Kickstarter funds that ultimately led to the project creator's bankruptcy); Markowitz, *supra* note 24 (discussing the Hanfrees iPad lawsuit in which Neil Singh attempted to use discovery to obtain information about how the Kickstarter funds were used). These examples point out one of the significant drawbacks of reward-based crowdfunding: information about the amount of capital raised via crowdfunding is readily available to the public. See Groshoff, *supra* note 5, at 538-39. One can certainly imagine how difficult it might be to arrange for manufacturing contracts in circumstances where a Google search can reveal one's maximum possible bid.

¹²⁰ One "classic fraudulent offering involves an issuer who accepts investments for a fictitious project and disappears after the offering closes." See R. Kevin Saunders II, Note, *Power to the People: How the SEC Can Empower the Crowd*, 16 VAND. J. ENT. & TECH. L. 945, 964-65 (2014) (referring to a fraudulent Kickstarter project in which the project creator nearly succeeded in scamming investors out of \$120,000 before Kickstarter cancelled the project).

¹²¹ See *id.* at 964.

¹²² See Steven Tweedie, *A Fake Beef Jerky Kickstarter Campaign Almost Got Away with Taking \$120,000*, BUSINESS INSIDER (June 17, 2013), <http://www.businessinsider.com/fake-kickstarter-almost-took-120000-2013-6>.

¹²³ Mike Masnick, *Watch One Kickstarter Creator Self-Destruct as People Call Him Out for Scam Project*, TECHDIRT (Dec. 9, 2013), <https://www.techdirt.com/articles/20131207/02231325495/kickstarter-projects-getting-called-out-just-reselling-products-china.shtml>; Resale or offer of rewards that are already existing products not produced by the Kickstarter project are against the company's Terms of Use. *Kickstarter Terms*, *supra* note 28.

¹²⁴ See Saunders II, *supra* note 120, at 964; Masnick, *supra* note 123; Tweedie, *supra* note 122.

Part of the risk of fraud on Kickstarter is merely attributable to it being an internet company.¹²⁵ The internet substitutes in-person encounters with “virtual meetings” that make it more difficult for potential backers to distinguish between legitimate business and fraudulent scams.¹²⁶ Many project creators are also anonymous individuals and unknown entities.¹²⁷ However, some of the risk is attributable to the fact that many of the project creators on Kickstarter are actually unproven individuals or start-up companies.¹²⁸

A majority of Kickstarter backers pledge to only one campaign.¹²⁹ Estimates also suggest a majority of Kickstarter backers are male, earn less than \$50,000 a year, and have a college education.¹³⁰ Thus, it appears that the typical crowdfunding investor has little experience in investing and has limited capital to invest. These qualities likely increase the risk of fraud on crowdfunding sites.¹³¹ Some industry experts have argued that the typical crowdfunding investor is an “ideal target[] for repeated crowdfunding frauds because they may not be able to discern legitimate offerings from scams or even recognize when they have been defrauded.”¹³² Kickstarter’s unwillingness to

¹²⁵ Sigar, *supra* note 3, at 481 (“[I]t is likely that some fraud will occur through crowdfunding. The Internet, which replaces real-life encounters with virtual meetings, could make it more difficult for investors to know whether an issuer’s business is legitimate.”); see also *Internet Fraud*, FRAUD.ORG, <http://www.fraud.org/learn/internet-fraud> (last visited Jan. 15, 2015) (“[C]rooks also recognize the potentials of cyberspace.”); *Mass Marketing Fraud*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/criminal/fraud/internet/> (last visited Jan. 19, 2015) (listing frequently asked questions regarding mass-marketing fraud on the internet).

¹²⁶ Sigar, *supra* note 3, at 481.

¹²⁷ Joan M. Heminway & Shelden R. Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 933 (2011) (“Promoters of crowdfunding interests often are anonymous individuals and unknown entities.”). *But see Creator Questions*, KICKSTARTER, https://www.kickstarter.com/help/faq/creator+questions#faq_41823 (last visited Jan. 15, 2015) (explaining that Kickstarter recently started requiring project creators to “verify [their] identity.” It is unclear what this process entails).

¹²⁸ Heminway & Hoffman, *supra* note 127; Sigar, *supra* note 3, at 481-82.

¹²⁹ *Stats*, KICKSTARTER.COM, <https://www.kickstarter.com/help/stats> (last visited July 19, 2015) (Kickstarter states that of 9,062,742 total backers, 2,775,795 are repeat backers).

¹³⁰ Matt Ward, *Crowdfunding Demographics: Understand Kickstarter and Indiegogo Backers*, ART OF THE KICKSTART (Nov. 28, 2014) <http://artofthekickstart.com/crowdfunding-demographics-understand-kickstarter-and-indiegogo-backers/> (data obtained from online statistics company Quantcast.com).

¹³¹ Laura Michael Hughes, *Crowdfunding: Putting a Cap on the Risks for Unsophisticated Investors*, 8 CHARLESTON L. REV. 483, 499-500 (2014).

¹³² *Id.* at at 500; see also Thomas G. James, Note, *Far From the Maddening Crowd: Does the JOBS Act Provide Meaningful Redress to Small Investors for Securities Fraud in*

implement significant barriers to fraudulent projects further compounds this problem.¹³³ Thus, Kickstarter is vulnerable to fraud because of an inability of potential backers to distinguish between legitimate and fraudulent projects due to a lack of investment experience.

eBay utilizes a reputation system in order to combat fraud,¹³⁴ however this solution would likely be inadequate on Kickstarter because over 90 percent of project creators propose only one campaign.¹³⁵ And because most project creators will only propose one campaign, even bona fide project creators are unproven commodities, indistinguishable from a potential fraudster. Thus, a reputation system would likely not remedy the problem of potential backers being unable to distinguish between fraudulent and bona fide project creators.

Some scholars and industry experts, including Kickstarter, have argued that the “wisdom of the crowd” can be an effective check to fraud on Kickstarter.¹³⁶ The “wisdom of the crowd” theory posits that

Connection with Crowdfunding Offerings?, 54 B.C. L. REV. 1767, 1780 (2013).

¹³³ Kickstarter has repeatedly maintained that “wisdom of the crowd” is sufficient to combat a majority of fraudulent projects. See Leonid Bershidsky, *Kickstarter Finally Trusts Wisdom of the Crowd*, BLOOMBERG VIEW (June 4, 2014), <http://www.bloombergvew.com/articles/2014-06-04/kickstarter-finally-trusts-wisdom-of-the-crowd> (arguing that Kickstarter’s recent simplification of its vetting process was evidence that Kickstarter finally trusted backers to make decisions on whether projects are trustworthy for themselves). Under “How do backers know if a project will follow through?” Kickstarter also states that backers can use their connections, common sense, and internet research to determine whether a project is legitimate and will be successful. See *Kickstarter Basics*, *supra* note 7.

¹³⁴ See *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 835 (2002) (eBay had stated that a seller’s rating was “worth its weight in gold”); HOSSEIN BIDGOLI, *ELECTRONIC COMMERCE: PRINCIPLES AND PRACTICE* 88 (2002) (“To increase the reliability and satisfaction of online auctions, eBay created a rating system in which after each transaction, buyers can submit ratings of sellers and vice versa, providing an online history of business transaction satisfaction”); *Feedback Scores, Stars, and Your Reputation*, EBAY, <http://pages.ebay.com/help/feedback/scores-reputation.html> (last visited Jan. 16, 2015) (“The number of positive, negative, and neutral Feedback ratings a member has received over time are part of the Feedback score.”).

¹³⁵ See Venkat Kuppuswamy & Barry L. Bayus, *Crowdfunding Creative Ideas: The Dynamics of Project Backers in Kickstarter* 8 (UNC Kenan-Flagler Research Paper No. 2013-15, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2234765 (“Over ninety percent of creators only propose a single Kickstarter project.”); Saunders II, *supra* note 120.

¹³⁶ See Bradford, *supra* note 4, at 114 (“Under the right conditions, crowdfunding could benefit from ‘the wisdom of crowds.’”); Hughes, *supra* note 131, at 488 (“[M]embers of the public (the crowd) . . . [may] use the information to decide whether or not to fund the campaign based on the collective ‘wisdom of the crowd.’”); see also JAMES SUROWIECKI, *THE WISDOM OF CROWDS* 16-17 (2004) (positing that

the crowd of potential investors will search through the information available and determine whether a crowdfunding project is legitimate.¹³⁷ There is evidence that this is a real phenomenon.¹³⁸ For example, *Mythic: The Story of Gods and Men* was a 2012 Kickstarter campaign for a videogame.¹³⁹ Research by potential backers revealed that the creators plagiarized nearly all of the components of the campaign.¹⁴⁰ With this information revealed to the public, the project creator withdrew the campaign before reaching the funding goal and backers did not lose any money.¹⁴¹ However, wisdom of the crowd essentially puts the responsibility of distinguishing a fraudulent campaign from a legitimate one squarely on potential backers, and not on Kickstarter.

B. A Contract Between the Project Creator and Backers Likely Exists

Because Kickstarter is an environment that is vulnerable to fraud, backers might attempt to use contract law to hold project creators accountable. Kickstarter's Terms of Use devote a section to describe the contract between backers and creators.¹⁴² This section of Kickstarter's

Google is an example of wisdom of the crowd).

¹³⁷ Hughes, *supra* note 131, at 495 (“[T]he crowd of potential investors will search through and scrutinize each crowdfunding campaign listed on the varying websites, compile information and conduct due diligence on the startup and its issuer, and inform the rest of the crowd of possible fraudulent campaigns before any damage to an investor materializes.”). *But see* Charles Luzar, *Crowdfunding: Crowd Wisdom, Mob Mentality*, CROWDFUND INSIDER (Apr. 19, 2013), <http://www.crowdfundinsider.com/2013/04/13861-crowdfunding-crowd-wisdom-mob-mentality/> (arguing that “wisdom of the crowd” may be linked to more negative aspects of collective knowledge and action, such as groupthink, bandwagoning, and the Dunning-Kruger Effect).

¹³⁸ See Hughes, *supra* note 131, at 495; *see also, e.g.*, Adrienne Jeffries, *This Is What a Kickstarter Scam Looks Like*, OBSERVER (Apr. 30, 2012), <http://observer.com/2012/04/this-is-what-a-kickstarter-scam-looks-like/>.

¹³⁹ *Mythic: The Story of Gods and Men (Cancelled)*, KICKSTARTER, <https://www.kickstarter.com/projects/273246798/mythic-the-story-of-gods-and-men> (last visited July 19, 2015).

¹⁴⁰ *Kickstarter Video Game Project Exposed as a Scam*, BBC (May 1, 2012) [hereinafter *Video Game Scam*], <http://www.bbc.com/news/technology-17915305> (noting that *Mythic* was revealed to be fraudulent by users of Reddit). For similar examples of wisdom of the crowd, *see* Caitlin Dewey, *This Debunked Kickstarter Project May be the Biggest Crowdfunding Fail to Date*, WASH. POST (Oct. 16, 2014), <http://www.washingtonpost.com/news/the-intersect/wp/2014/10/16/this-debunked-kickstarter-project-may-be-the-biggest-crowdfunding-fail-to-date/>; Jeffries, *supra* note 138.

¹⁴¹ *See Video Game Scam*, *supra* note 140 (noting that the project was withdrawn by the creator after the fraudulent aspects of the project were revealed).

¹⁴² *Kickstarter Terms*, *supra* note 28 (contained under the heading “4. How Projects Work”). Most of the rest of Kickstarter's Terms of Use discuss the relationship

Terms of Use does not provide defrauded backers any significant guidance on any legal remedies they can pursue against an absent or unreliable project creator.¹⁴³ Below is a summary of relevant terms:

1. A creator posting a project is inviting others to form a contract with him or her (an offer). By pledging support to the project, a backer is accepting that offer and forming a contract.
2. Kickstarter is not a party in the contract created between creator and backer. “[T]he contract is a direct legal agreement between creators and their backers.”
3. Once a project is funded, a “creator must complete the project and fulfill each reward.” Doing so satisfies a creator’s obligation to backers.
4. If a creator fails to complete the project and fulfill the rewards promised to backers, the creator “must make every reasonable effort to find another way of bringing the project to the best possible conclusion for backers.” The Terms suggest that creators: postpone delivery, explain how funds were spent, demonstrate appropriate use of funds and reasonable effort to complete the project, demonstrate that they have made no material misrepresentations to backers, or offer to return any remaining funds to backers who have received no rewards.
5. “The creator is solely responsible for fulfilling the promises made in [the] project.” Thus, excluding Kickstarter from liability. If creators are unable to satisfy these terms, they may be subject to legal action by backers.¹⁴⁴

In accordance with the UCC § 2-206 definition of an offer, a Kickstarter profile does invite acceptance by pledging support, which, in this context, is reasonable given the circumstances.¹⁴⁵ A Kickstarter

between Kickstarter and its users. *See id.*

¹⁴³ *Id.* (offering no guidance beyond discussion of legal remedies limited to repeated references to “contracts” and that if creators are unable to satisfy the stated terms, they may be subject to legal action by backers).

¹⁴⁴ *Id.*

¹⁴⁵ *See* U.C.C. § 2-206 (“[A]n offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.”). Considering that “if people like the project, they can pledge money to make it happen,” and that people determine whether they like a project by viewing

campaign states that for a specific contribution level, the backer can own a specific reward. Thus, a Kickstarter project profile is an offer. As an offer to enter into a contract, a Kickstarter profile invites acceptance by pledging support.¹⁴⁶ A pledge is a reasonable means of acceptance because the intended purpose of the Kickstarter profile is, after all, to solicit pledges.¹⁴⁷ Further, a project profile requires the project creator to fulfill the project's rewards if the project reaches the funding goal.¹⁴⁸ Notably, the project must be fully funded in order to create a legal obligation in the project creator.¹⁴⁹ Although an individual backer is unlikely to fully fund the project alone, the potential for acceptance remains.

Similarly, a contract on eBay is formed not at the moment of the highest bid, but instead at the expiration of the bidding period.¹⁵⁰ Contracts between eBay buyers and sellers exist.¹⁵¹ The eBay auction page constitutes the offer, which the highest bidder accepts once the bidding period ends.¹⁵² On Kickstarter, a project creator creates the project profile,¹⁵³ which is similar to an eBay seller soliciting bids.¹⁵⁴

the project profile, thus a project profile invites acceptance by soliciting pledges. See *Kickstarter Basics*, *supra* note 7.

¹⁴⁶ See generally *Kickstarter Basics*, *supra* note 7; Shahani, *supra* note 24.

¹⁴⁷ Shahani, *supra* note 24.

¹⁴⁸ The legal obligation requiring project creators to fulfill rewards arises when the funding goal is met. See *Kickstarter Terms*, *supra* note 28 (“If [project creators are] unable to satisfy the terms of this agreement [including fulfilling all rewards], they may be subject to legal action by backers.”); see also U.C.C. § 2-206. The power to meet the funding goal lies with the backers. *Kickstarter Basics*, *supra* note 7 (“Backers are folks who pledge money to join creators in bringing projects to life.”).

¹⁴⁹ Kickstarter requires that projects meet their crowdfunding goal prior to receiving any funds. See *Kickstarter Basics*, *supra* note 7. (“Funding on Kickstarter is all-or-nothing. No one will be charged for a pledge towards a project unless it reaches its funding goal. This way, creators always have the budget they scoped out before moving forward.”).

¹⁵⁰ See *Ewert v. eBay, Inc.*, No. C-07-02198 RMW, 2008 WL 906162, at *1 (N.D. Cal. 2008) (“[A] sale [on eBay] does not culminate by acceptance by the auctioneer of the highest offer but rather at the expiration of the fixed period designated by the seller.”); see also *Foley v. Yacht Mgmt. Grp., Inc.*, No. 09-11280-DJC, 2011 WL 4020835, at *4 (D. Mass. 2011) (holding that an eBay auction where there is no reserve price constitutes an offer by the seller and that a buyer may accept by being the highest bidder at the end of the bidding period).

¹⁵¹ See *Foley*, 2011 WL 4020835 at *4; *Tricome v. eBay, Inc.*, No. 09-2492, 2009 WL 3365873, at *1 (E.D. Pa. 2009); *Sayeddi v. Walsler*, 835 N.Y.S.2d 840, 846 (Civ. Ct. 2007).

¹⁵² See *Ewert*, 2008 WL 906162, at *1; see also *Foley*, 2011 WL 4020835, at *4.

¹⁵³ *Prive*, *supra* note 3 (“Project creators can create a profile typically containing a short video, an introduction to their project, a list of rewards per donation, and some images to elaborate.”).

Just as the eBay auction solicits bids from the public, the Kickstarter project profile solicits pledges from the public. In the eBay auction, a buyer can accept the offer by becoming the highest bidder by the time the bidding period ends.¹⁵⁵ Doing so creates a legal obligation in the eBay seller, requiring his or her performance.¹⁵⁶ On Kickstarter, a backer can accept the project profile's offer by pledging enough support to meet the funding goal by the end of the funding period.¹⁵⁷ Thus, a Kickstarter project profile is an offer, and pledging enough support to that project to meet the funding goal by the end of the funding period should constitute acceptance of that offer, creating a legal obligation in the project creator.

¹⁵⁴ See *Price It Right*, EBAY, <http://pages.ebay.com/sellerinformation/tips-for-selling-online/effective-ebay-listings/online-pricing.html> (last visited July 19, 2015) (stating that eBay allows users to sell for a fixed price, or in an auction-style listing, which would require bidding). For a comparison of eBay and Kickstarter listings, compare examples of Kickstarter projects, *Doom*, *supra* note 16; *Ouya*, *supra* note 16, and examples of eBay auctions, *Star Trek Monopoly Game Limited Edition Shrink Contents New*, EBAY, http://www.ebay.com/itm/star-trek-monopoly-game-limited-edition-shrink-contents-new-/121544344972?pt=Games_US&hash=item1c4c9b858c (last visited Jan. 17, 2015); *Lego Star Wars Death Star (10188)*, EBAY, http://www.ebay.com/itm/LEGO-Star-Wars-Death-Star-10188-/261734004978?pt=Building_Toys_US&hash=item3cf08ff8f2 (last visited Jan. 17, 2015). Both Kickstarter profiles and eBay auctions are created by a user of the site and have a page on the intermediary's site. Both have set periods within which the bidding or backing can be completed. Both act as offers to do business with the public. And both may be accepted by the larger public in order to create a binding contract requiring the eBay seller or project creator to perform. Some authors have also argued that users have begun using Kickstarter and eBay in similar ways for similar purposes. See Gordon Fletcher, *Kickstarter Is Turning into eBay as Shoppers Play Investors*, THE CONVERSATION (July 31, 2014), <http://theconversation.com/kickstarter-is-turning-into-ebay-as-shoppers-play-investors-29798> (arguing that Kickstarter backers have begun to act like eBay shoppers because of a practice called "pretailing," which is essentially pre-ordering a retail product); Peter Nowak, *The Kickstarter Potato Salad Is the eBay Auction Stunt for a New Era*, CANADIAN BUSINESS (July 10, 2014), <http://www.canadianbusiness.com/technology-news/potato-salad-on-kickstarter-is-ebay-stunt-for-new-era/> (arguing that Kickstarter is falling prey to "stunts" such as sale of a grilled cheese with Jesus' face and other bizarre items, just as eBay did over the past decade. Nowak argues that this, although amusing, sacrifices the more utilitarian aspects of both sites).

¹⁵⁵ See *Buying Basics*, EBAY, <http://pages.ebay.com/help/buy/basics.html> (last visited July 19, 2015).

¹⁵⁶ *Sayeedi v. Walser*, 835 N.Y.S.2d 840, 846 (Civ. Ct. 2007) ("[T]he eBay terms and conditions members agree to abide by eBay policies which state clearly 'when a seller lists an item on eBay, and the buyer bids for and wins that item, the seller and buyer have entered into a contract.'"); see *Ebay User Agreement*, *supra* note 85 ("eBay is a marketplace that allows users to offer, sell and buy just about anything in a variety of pricing formats and locations. The actual contract for sale is directly between the sellers and buyers.").

¹⁵⁷ See *Kickstarter Basics*, *supra* note 7.

C. *Kickstarter Contains a “Click-to-Accept” Notice that Supports the Existence of a Contract Between Project Creators and Backers*

As many other websites do,¹⁵⁸ Kickstarter requires that users, both backers and project creators, affirmatively consent to the Terms of Use by a clickwrap acceptance.¹⁵⁹ While signing up for a Kickstarter account, users are prompted with a “click-to-accept” notice that states “[b]y signing up, you agree to our terms of use, and privacy policy, and our cookie policy.”¹⁶⁰ Individual Kickstarter users cannot become project creators or backers without first signing up for a Kickstarter account.¹⁶¹ Additionally, project creators are required to affirmatively consent a second time upon creating a new project page and click a checkbox that states “I have read . . . the Terms of Use and the Kickstarter Project Guidelines.”¹⁶² This shows that all project creators have affirmatively consented to having read and agreed to the Terms of Use at least twice before publishing a project profile.¹⁶³ Clickwrap contracts, as long as they were validly formed, are generally enforced unless found to be unconscionable.¹⁶⁴

While Kickstarter’s Terms of Use do contain a forum selection clause,¹⁶⁵ this clause is not likely to render the rest of the terms

¹⁵⁸ See Zynda, *supra* note 64, at 503-04. For examples of websites that use clickwraps to require users to affirmatively consent to the Terms of Use prior to using the website, see EBAY, <http://www.ebay.com> (last visited Jan. 14, 2015); INSTAGRAM, <http://instagram.com> (last visited Jan. 14, 2015); KICKSTARTER, <https://www.kickstarter.com> (last visited Jan. 14, 2015).

¹⁵⁹ See *Kickstarter Sign Up*, KICKSTARTER, <https://www.kickstarter.com/signup?ref=nav> (last visited Aug. 21, 2015) (where clicking the “Sign Me Up!” button and creating an account indicates assent to the terms of use, privacy policy and cookie policy); see also *Kickstarter Terms*, *supra* note 28.

¹⁶⁰ *Kickstarter Sign Up*, *supra* note 159.

¹⁶¹ *Kickstarter Terms*, *supra* note 28.

¹⁶² Perry Chen, Yancey Strickler, & Charles Adler, *Accountability on Kickstarter*, KICKSTARTER BLOG (Sept. 4, 2012), <https://www.kickstarter.com/blog/accountability-on-kickstarter> (providing a link showing a screenshot of the notice that project creators are shown before publishing their project profile).

¹⁶³ Kickstarter project creators affirmatively consent by clicking the clickwrap while signing up for a Kickstarter account, and consent again as they are creating the Kickstarter project profile. See *id.* (linking to a screenshot of the clickwrap project creators see before launching a project); see also *Kickstarter Sign Up*, *supra* note 159 (showing that project creators must also affirmatively consent to Kickstarter’s Terms of Use when creating a Kickstarter account).

¹⁶⁴ See Zynda, *supra* note 64, at 504-05 (stating that the UCC and case law generally support the enforceability of clickwraps); see also Anderson, *supra* note 66 (stating that the general enforceability of clickwraps is becoming more common).

¹⁶⁵ *Kickstarter Terms*, *supra* note 28 (see “17. Dispute Resolution and Governing Law” for the forum selection clause).

unenforceable. Although courts have previously invalidated forum selection clauses within clickwrap agreements,¹⁶⁶ these terms apply to the users' relationship to Kickstarter, not to the contract between project creators and backers.¹⁶⁷ The few cases that have invalidated these clauses have always left the rest of the contract intact and enforceable.¹⁶⁸ Even if Kickstarter's forum selection clause was found to be invalid, it is likely that the remainder of the Terms would be enforced because of the multiple times they have been consented to as well as the prominent display of the Terms during sign-up and creation of the project page.¹⁶⁹ The Terms applicable to the contract created between the backer and creator do not contain any provisions that have traditionally been found to be unconscionable or invalid.¹⁷⁰ Thus, the existence of a clickwrap in the creation of a Kickstarter account and the creation of the project profile make it very likely that an enforceable contract exists between project creators and backers.

D. The Contract Between Project Creators and Backers Is Likely Not Integrated and Project Profile Information May Be Used to Supplement the Terms of the Contract

Although Kickstarter's Terms of Use contain an integration clause,¹⁷¹ it is likely that this integration only applies to the contract between Kickstarter and its users. This is supported by the fact that the integration clause does not appear in the section of the Terms of Use that discusses the project creator's obligations owed to project

¹⁶⁶ Anderson, *supra* note 66. *But see* Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1015 (D.C. 2002) (holding that disgruntled customers who had consented to a shrinkwrap containing a buried forum selection clause must litigate in Virginia).

¹⁶⁷ This is similar to a case involving eBay in which the court held that Article 2 of the UCC and express warranties applied only to the contracts between eBay users and not to the contract between eBay and users. *See* Bobholz v. Banaszak, 655 N.W.2d 547, 547 (Wis. Ct. App. 2003).

¹⁶⁸ *See* Anderson, *supra* note 66 (considering multiple cases discussing clickwraps and noting that in some instances, the court found the forum selection portion of the clickwrap invalid while retaining the rest).

¹⁶⁹ *See* Hartzog, *supra* note 66, at 425 (stating that courts are more likely to enforce a clickwrap agreement where notice is prominently displayed); Anderson, *supra* note 66, at 2.

¹⁷⁰ *See generally* Kickstarter Terms, *supra* note 28; Anderson, *supra* note 66, at 7.

¹⁷¹ *See* Kickstarter Terms, *supra* note 28 ("These Terms and the other material referenced in them are the entire agreement between you and Kickstarter with respect to the Services. They supersede all other communications and proposals (whether oral, written, or electronic) between you and Kickstarter with respect to the Services and govern our future relationship."); *see also* Anderson, *supra* note 66, at 7.

backers.¹⁷² Further, the integration clause explicitly states “[t]hese terms and the other material referenced in them are the entire agreement *between you and Kickstarter*.”¹⁷³ The integration clause does not mention the contract between the backers and project creators.¹⁷⁴ Thus, the agreement between project creators and their backers is not integrated.

Because the agreement is not integrated, outside evidence may be used to supplement the agreement.¹⁷⁵ This is relevant because it allows for the use of outside evidence, such as information on the project page, emails to backers, and updates posted to the profile, in interpreting and supplementing the contract. This is especially important because many of the essential terms that a backer might attempt to enforce are contained on the Kickstarter project profile (for example, delivery date, assurances of quality and fitness for a particular purpose, rewards and price tiers, etc.).¹⁷⁶ Thus, backers may use terms found on the project profile to hold project creators accountable because the agreement between project creators and backers is not integrated.

E. Failure to Deliver Project Rewards Constitutes a Breach of Contract for Which Refund of Pledges Should Be Available

A contract exists between the project creator and backers for the design and manufacture of specific goods.¹⁷⁷ Many rewards are “goods” that are movable at the time of identification.¹⁷⁸ The main

¹⁷² See *Kickstarter Terms*, *supra* note 28; see also Anderson, *supra* note 66, at 7.

¹⁷³ See *Kickstarter Terms*, *supra* note 28; see also Anderson, *supra* note 66, at 7.

¹⁷⁴ See *Kickstarter Terms*, *supra* note 28; see also Anderson, *supra* note 66, at 7.

¹⁷⁵ See, e.g., *Jesselson v. Outlet Assoc. of Williamsburg, Ltd. P’ship*, 784 F. Supp. 1223, 1230 (E.D. Va. 1991) (“[W]hen an agreement is not integrated, parol evidence is admissible to supplement the writing to form the entire contract.”); *Brawthen v. H & R Block, Inc.*, 28 Cal. App. 3d 131, 137 (1972) (“[I]f the writing is unintegrated, . . . extrinsic or parol evidence will ordinarily be admitted in aid of establishing the Complete agreement.”); *Monsanto Co. v. Int’l Ins. Co.*, 652 A.2d 36, 39 (Del. 1994) (“A court may not consider, however, extrinsic evidence that serves to vary, alter or contradict the contract unless the party offering the extrinsic evidence can show that the contract was either: (a) unintegrated, or (b) ambiguous.”).

¹⁷⁶ Kickstarter project profiles typically contain information regarding when the project creator expects to ship rewards, how much individuals must pledge in order to qualify for a reward, etc. See, e.g., *Asylum Playing Cards*, *supra* note 1; *Doom*, *supra* note 16; *Ouya*, *supra* note 16.

¹⁷⁷ See *supra* Part II.B.

¹⁷⁸ See U.C.C. § 2-105 (2012) (“Goods” is defined as “all things (including specially manufactured goods) which are movable at the time of identification to the

difference between goods purchased on the internet and Kickstarter rewards is that rewards are not yet manufactured.¹⁷⁹ However, this should not exclude rewards from classification as goods because UCC § 2-105 explicitly includes specially manufactured goods within its definition of goods.¹⁸⁰ The delivery of a reward would also likely constitute a “sale” because by shipping the reward to the backer, the project creator is passing title of a good in exchange for a price (the price being the amount pledged).¹⁸¹ Thus, rewards are “goods” within the UCC definition.

Article 2 should be applicable to the contract between project creators and backers because this contract resembles a development-

contract for sale.”). Most rewards fall into this classification. Things such as a deck of playing cards, a videogame console, and a board game would all be considered goods if they were sold. *See, e.g., Asylum Playing Cards, supra* note 1; *Doom, supra* note 16; *Ouya, supra* note 16. But there are also many Kickstarter rewards that would clearly not be considered goods. For example, the reward for backers who pledged \$400 or more to the Veronica Mars Movie was that Kristen Bell and Rob Thomas would follow those backers on Twitter for an entire year. *The Veronica Mars Movie Project, supra* note 22. The fact that items that are clearly not goods under the UCC definition can be offered as rewards on Kickstarter should not exempt the rest of rewards from being considered UCC goods. Just like Kickstarter, eBay sometimes allows individuals to auction items that would clearly not be considered UCC goods. However, this fact does not exempt the other items sold on eBay from being considered UCC goods. *See Van Voorhees, supra* note 46 (“Article 2 applies only to transactions in ‘goods’; while that term is broadly defined in Article 2, section 105(1), it would not include services and other intangibles. Thus, while online auctions purporting to sell a ‘ghost’ or an e-mail containing ‘the secrets of the pirates of the Caribbean’ would not be covered, virtually everything else sold on Ebay would be.”).

¹⁷⁹ *See* Perry Chen, Yancey Strickler & Charles Adler, *Kickstarter Is Not a Store*, KICKSTARTER BLOG (Sept. 20, 2012), <https://www.kickstarter.com/blog/kickstarter-is-not-a-store> [hereinafter *Kickstarter Is Not a Store*] (citing the fact that many of the projects have yet to be developed and manufactured as one of the risks of pledging support for a project).

¹⁸⁰ *See* U.C.C. § 2-105 (stating the UCC includes “specially manufactured goods” within the definition of goods); *see also* P & F Constr. Corp. v. Friend Lumber Corp., 575 N.E.2d 61, 63 (Mass. App. Ct. 1991) (“Specially manufactured things which are moveable at the time of identification to the contract of sale are ‘goods’ within the meaning of the Uniform Commercial Code.”).

¹⁸¹ *See* U.C.C. § 2-401 (2012) (“[T]itle to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.”). Since extrinsic evidence may be included in the contract, the reward tiers are made explicit within the contract. These reward tiers make it clear that if the backer pledges support to the project, once the project is completed, title to the owed reward will pass from the project creator to the buyer. These are “conditions explicitly agreed upon by the parties.” *See id.*; *see, e.g., Doom, supra* note 16 (listing different rewards tiers for amounts pledged); *Ouya, supra* note 16 (listing different rewards tiers for amounts pledged).

sales contract in which the development portion was incidental to the dominant purpose of sale of the developed product.¹⁸² As is required in a development-sales contract, a Kickstarter contract consists of two parts: the development of the project and the distribution of the rewards.¹⁸³ Contracts involving development and sale of a product call for the application of the predominant purpose test to determine whether Article 2 applies.¹⁸⁴ Several authors have argued that the behavior of Kickstarter backers suggests that backers pledge support to campaigns primarily in order to obtain the reward.¹⁸⁵ The assertion that backers pledge support to campaigns primarily in order to obtain the reward would suggest that the dominant purpose of the contract is for the sale of specially manufactured goods, that is, the Kickstarter rewards. In *Rajala v. Allied Corp.*, a contract had terms relating to the development of a high quality resin; however, those terms were only incidental to the dominant purpose of the sale of resin.¹⁸⁶ Similarly, although part of the contract in Kickstarter projects is for the development of the project, backers are motivated primarily by the prospect of owning the product.¹⁸⁷ A demonstration of how rewards

¹⁸² See *Rajala v. Allied Corp.*, 66 B.R. 582, 590 (D. Kan. 1986); *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*, 612 N.E.2d 550, 555 (Ind. 1993).

¹⁸³ See generally Prive, *supra* note 3 (discussing the reasons backers pledge support to projects, and stating that some of the reasons for entering into a contract with the project creator include: backers connect to the purpose of the campaign and want to see the project succeed, and that the backers want the rewards).

¹⁸⁴ When mixed contracts are analyzed for applicability of Article 2 of the UCC, the predominant purpose test is applied. See *Rajala*, 66 B.R. at 590; *Insul-Mark Midwest*, 612 N.E.2d at 555.

¹⁸⁵ See Adrienne Jeffries, *Kickstarter Is Not a Store, Except When It Is*, THE VERGE (Apr. 17, 2013), <http://www.theverge.com/2013/4/17/4230440/kickstarter-is-not-a-store-except-when-it-is> [hereinafter *Kickstarter Store*] (arguing that Kickstarter backers behave like they are making a purchase. As evidence, Jeffries states that 96 percent of backers of the Pebble Smartwatch pledged more than \$99 so that they could qualify to receive an actual Pebble Smartwatch as a project reward. This is despite the fact that all of those backers had the option of donating as little as \$1). Another author makes a similar argument, noting that backers in the 3Doodler project predominantly pledged at the \$75 and up range in order to qualify to receive a 3Doodle pen. See Fletcher, *supra* note 154 (arguing that Kickstarter rewards have become purchases rather than as incentives or mementos).

¹⁸⁶ *Rajala*, 66 B.R. 582 at 591.

¹⁸⁷ The fact that backers are supporters of Kickstarter projects and not another crowdfunding site that offers securities may be taken as evidence that backers are attempting to make a purchase. See Fletcher, *supra* note 154 (arguing that Kickstarter backers have begun to act like eBay shoppers because of a practice called “preailing,” which is essentially pre-ordering a retail product); Jeffries, *Kickstarter Store*, *supra* note 185 (arguing that when conditions are ideal, Kickstarter functions like a store, and also that many users treat Kickstarter like a store by placing pre-orders for

are the primary impetus for backers is illustrated in backing behavior. For example, during the *Pebble Smartwatch* project, 96 percent of the 68,929 backers pledged more than \$99 to qualify to receive a Pebble Smartwatch.¹⁸⁸ This is despite the fact that the minimum pledge amount was \$1.¹⁸⁹ One assumes that if backers were motivated more by an altruistic desire to see the Pebble Smartwatch on the market, there would be many more pledges between \$1-98 than there would be at \$99. Pledging at reward thresholds essentially amounts to pre-ordering the smartwatch. Thus, backers are motivated to enter this contract more by the prospect of owning the product, and are less motivated simply to fund the development process of the product.¹⁹⁰ Therefore, the predominant interest of the backers is the purchase of rewards or goods, not the design and development of the product.

Because the predominant purpose of the contract between backers and the creator is the acquisition of goods, Article 2 applies. Further, because Article 2 applies, when the contract is breached, the buyer has the right to cancel the transaction and recover the price paid.¹⁹¹ Thus, a defrauded backer has the right to recover the support pledged to a failed Kickstarter project.

A project creator might argue that the predominant purpose of the Kickstarter contract was not a “sale of goods,” but rather a contract to fund the manufacture of a product for sale in the market to the general public. This is instead of just a sale to backers of the Kickstarter project. While a court could certainly take this position for a potential Kickstarter dispute, this argument resembles one already rejected by the *Rajala* court.¹⁹² There, the court rejected defendant’s argument that the court should bifurcate the sales and development portions of the contract.¹⁹³ The *Rajala* court held that the “thrust of the agreement between [the parties] was the sale and purchase of resin.”¹⁹⁴ Therefore, the court continued its analysis of the contract as a sales contract.¹⁹⁵

products). *But see* Chen et al., *Kickstarter Is Not a Store*, *supra* note 179 (arguing that Kickstarter is not a store and that backers should not “shop” on Kickstarter. Instead, backers should back projects because they want to see those products on the market).

¹⁸⁸ Jeffries, *Kickstarter Store*, *supra* note 185.

¹⁸⁹ *Id.*

¹⁹⁰ *See* Fletcher, *supra* note 154; Jeffries, *Kickstarter Store*, *supra* note 185.

¹⁹¹ *See* U.C.C. § 2-711.

¹⁹² *See* *Rajala v. Allied Corp.*, 66 B.R. 582, 590-91 (D. Kan. 1986).

¹⁹³ *Id.* at 591.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

A project creator could also argue that Kickstarter rewards do not constitute “goods” under UCC § 2-105 and that delivery of rewards does not constitute a “sale” under UCC § 2-401. There is some evidence to support this assertion. Kickstarter has previously claimed that it is not a store, and that individuals do not “shop” or make purchases on Kickstarter.¹⁹⁶ However, regardless of how Kickstarter wishes people would use the site, there is substantial evidence that individuals back projects in order to “purchase” the reward.¹⁹⁷

In most instances of a breached Kickstarter project agreement, it is not likely that specific performance would be a remedy because a backer is unlikely to suffer irreparable injury if not given his or her reward.¹⁹⁸ Journalists have described Kickstarter as a platform for solving “first world problems”¹⁹⁹ primarily because it offers luxury items, that is, items that are not essential for daily functioning.²⁰⁰ Thus, it is unlikely that a court would order the project creator to remedy a breached contract by specific performance. To do so would require additional capital because presumably, the original funds have already been spent. Further, backers would likely be hesitant to provide additional funding for a project whose positive resolution is uncertain. Thus, it is more likely that if a court granted remedies to defrauded backers, it would grant damages rather than specific

¹⁹⁶ Chen et al., *Kickstarter Is Not a Store*, *supra* note 187 and accompanying text.

¹⁹⁷ See Jeffries, *Kickstarter Store*, *supra* note 185; see also G.F., *Kickstarter Is a Store, After All*, *THE ECONOMIST* (June 6, 2014), <http://www.economist.com/blogs/babbage/2014/06/crowdfunding> (arguing that allowing Kickstarter users to buy rewards in bulk amounts to wholesaling, which was interpreted as evidence of Kickstarter operating as a store).

¹⁹⁸ See *eBay v. MercExchange, LLC*, 547 U.S. 388, 388 (2006) (stating that the traditional four-factor test applies when considering whether to award permanent injunctive relief requires that the plaintiff demonstrate that it has suffered irreparable injury as one of the four factors); *Kickstarter Basics*, *supra* note 7 (“[Backers] get to choose from a variety of unique rewards offered by the project creator. Rewards vary from project to project, but often include a copy of what is being produced (CD, DVD, book, etc.) or an experience unique to the project.”).

¹⁹⁹ Noreen Malone, *The False Promise of Kickstarter*, *NEW REPUBLIC* (Nov. 16, 2012), <http://www.newrepublic.com/article/politics/magazine/110225/the-false-promise-kickstarter> (“Kickstarter has positioned itself as the world’s No. 1 solver of First World problems.”); see also *Kickstarter, Solving First World Problems*, *TAO OF MAC* (June 13, 2012), <http://taoofmac.com/space/blog/2012/06/13/1914> (arguing that Kickstarter backers fund projects that solve first world problems more often than projects of actual consequence).

²⁰⁰ An example of a luxury item not needed for daily life would be the Bunch O Balloons project. See Tinnus Enterprises, *Bunch O Balloons: 100 Water Balloons in Less Than 1 Minute*, *KICKSTARTER*, <https://www.kickstarter.com/projects/bunchoballoons/bunch-o-balloons-100-water-balloons-in-less-than-1> (last visited Aug. 22, 2015).

performance.²⁰¹ Typically, the court attempts to provide the non-breaching party with the monetary equivalent of performance, and no additional damages.²⁰² In this instance, the monetary equivalent of performance would probably amount to the return of the amount pledged to the project.

III. PROBLEMS WITH ENFORCEMENT AND POTENTIAL SOLUTIONS

The above analysis suggests that the relationship between project creators and backers does create an enforceable contract. The existence of a contract would require the return of pledged funds in the event of a failed or fraudulent Kickstarter project.²⁰³ However, in practice, procuring the return of pledged funds would likely be difficult.²⁰⁴

A. *Small Investments Cannot Justify the Cost of Litigation*

The largest barrier to a backer recovering from a failed Kickstarter project is the fact that most pledges are of a trivial amount.²⁰⁵ The loss suffered by a single backer is insufficient to justify the effort and expense necessary to litigate this issue.²⁰⁶ The average Kickstarter pledge amount is \$70, and the most frequent pledge amount is \$25.²⁰⁷ Meanwhile, the median cost of contract litigation is \$91,000.²⁰⁸ Although there is at least one example of a Kickstarter backer

²⁰¹ Another factor of the test for permanent injunction described in *MercExchange*, is “that remedies available at law are inadequate to compensate for that injury.” 547 U.S. at 388. In the instance of a failed Kickstarter project, the injury is fairly easy and adequate to calculate damages for because the backer has pledged support. Thus, the remedy can merely be the return of the pledge.

²⁰² HUNTER, *supra* note 51, at § 14:1; O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

²⁰³ See generally *supra* Part II (explaining that a Kickstarter contract between the buyer and developer is predominantly a contract for the sale of goods, so pledged funds must be returned if the goods are not delivered).

²⁰⁴ See, e.g., Markowitz, *supra* note 24 (stating that some projects fail because of poor planning and that after this failure, project creators are unable to return the pledged funds because the money has been spent already); Shahani, *supra* note 24 (noting that while Kickstarter states that backers are entitled to a refund of their pledge if a project fails, the site provides no mechanism to accomplish or enforce this policy).

²⁰⁵ See *Creator Handbook: Rewards*, *supra* note 19.

²⁰⁶ See Bradford, *supra* note 4. But see Markowitz, *supra* note 24.

²⁰⁷ *Creator Handbook: Rewards*, *supra* note 19.

²⁰⁸ Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 COURT STATISTICS PROJECT 1, 7 (2013).

attempting to assert his right to a refund despite the lack of financial incentive, this is unlikely to be the norm.²⁰⁹ Thus, a potential plaintiff in a Kickstarter contract case has no financial incentive to enforce this right, even if the lawsuit is a guaranteed success.

The use of a class action would remedy this problem. A class action is appropriate only if “the class is so numerous that joinder of all members is impracticable.”²¹⁰ There is no bright line to indicate how many potential plaintiffs are numerous enough to make joinder impracticable.²¹¹ However, joinder is generally possible in classes of fewer than 20 members, while it is deemed impracticable in classes of more than 40 members.²¹² A joinder may also be impracticable if individual claims are small or individual class members are financially unable or unwilling to fund litigation.²¹³ Many Kickstarter projects involve more than 40 backers.²¹⁴ Thus, joinder of the backers in a single Kickstarter class action may be impracticable.

Class actions may also be a viable means of overcoming the fact that pledges tend to be an inconsequential amount far lower than the average cost of litigation. Further, the inconsequential amount of most pledges ensures that few backers will be willing to pay the cost of litigation, and even fewer will be in a position for such litigation to be profitable or worthwhile.²¹⁵ Thus, class actions appear to be a viable remedy for failed Kickstarter projects.

B. By the Time Backers Realize Delivery Will Not Take Place, the Funds Have Been Spent

A refund is not an adequate solution because project creators are likely to be insolvent by the time a backer requests a refund. Most

²⁰⁹ See, e.g., Markowitz, *supra* note 24 (explaining how Neil Singh, an attorney and a backer of a failed project, at his own expense, initiated a lawsuit against Seth Quest, the project creator).

²¹⁰ FED. R. CIV. P. 23.

²¹¹ WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 3:11 (5th ed. 2013).

²¹² *Id.*

²¹³ Charles Donelan, *Prerequisites to a Class Action Under New Rule 23*, 10 B.C. L. REV. 527, 531 (1969); see also *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 594-95 (3d Cir. 2012).

²¹⁴ See, e.g., *Asylum Playing Cards*, *supra* note 1; *Doom*, *supra* note 16; *Ouya*, *supra* note 16.

²¹⁵ The average person will most likely be unwilling to initiate a \$91,000 lawsuit in order to recover a loss of \$70. See *Hannaford-Agor & Waters*, *supra* note 208; *Creator Handbook: Rewards*, *supra* note 19.

Kickstarter projects eventually ship behind schedule.²¹⁶ Because of this, it is hard for the backer to distinguish between a late delivery and a delivery that will never arrive.²¹⁷ Further, by the time a backer realizes that delivery may never be fulfilled, the project creator has already squandered most of the funds on ill-considered purchases.²¹⁸ Thus, offering refunds for unfinished projects is not an adequate solution because the money has already been spent. After a failed project, it is unlikely that there will be enough money to fully refund all the backers.²¹⁹ Essentially, if all of the backers request a full refund, then the creator will not grant any requests for refunds.²²⁰

Further, the entire premise of Kickstarter is that project creators do not have access to traditional sources of capital to fund the project.²²¹ Thus, it is possible that many individual project creators will be insolvent or close to insolvent.²²² This implies that if the project fails,

²¹⁶ From a survey of high-profile Kickstarter projects with an estimated delivery date of November 2012, CNNMoney found that more than half of these projects did not deliver on the estimated delivery date. See *Kickstarter's Top Projects: When They Shipped*, CNN MONEY, <http://money.cnn.com/interactive/technology/kickstarter-projects-shipping/> (last visited Jan. 2, 2015).

²¹⁷ See *id.*; see also JD Alois, *Attorney General: "Washington State Will Not Tolerate Crowdfunding Theft"*, CROWDFUND INSIDER (Aug. 2, 2015), <http://www.crowdfundinsider.com/2015/08/72163-attorney-general-washington-state-will-not-tolerate-crowdfunding-theft/> (reporting that backers in the Asylum Playing Cards project "magically" started to receive their Kickstarter rewards three years late).

²¹⁸ See, e.g., Markowitz, *supra* note 24 (reporting on the Hanfree Kickstarter project, in which the project creator did not have a contract in place before the project launched, and because the manufacturers were able to see how much money the project had raised, manufacturers gained too much leverage in negotiations, depleting the funds).

²¹⁹ See Kris Naudus, *Should Failed Kickstarter Projects Offer Refunds?*, ENGADGET (Sept. 19, 2014), <http://www.engadget.com/discuss/should-failed-kickstarter-projects-offer-refunds-1sx4/> (discussing a failed Kickstarter project that was offering refunds to backers who requested one, the author asks "how many backers of this project will step forward to ask for refunds? How many can request one before [the project creator] has to put its foot down and say 'no more, we don't have the money to give you'? The amount of cash they can refund is limited").

²²⁰ See *id.*

²²¹ See generally Sgar, *supra* note 3, at 480-81 (explaining the benefits of crowdfunding for small businesses).

²²² See, e.g., Markowitz, *supra* note 24 (discussing how Seth Quest, the project creator of a failed project, was bankrupt and thus unable to refund disgruntled backers); Alyson Shontell, *How One Stupid Mistake and \$35,000 from Kickstarter Made an Average Guy Bankrupt*, BUSINESS INSIDER (Jan. 14, 2013), <http://www.businessinsider.com/how-one-stupid-mistake-and-35000-from-kickstarter-made-an-average-guy-bankrupt-2013-1> (describing a project creator who was bankrupted by a Kickstarter failure).

there will be no capital available from which the project creator will be able to obtain funds to refund backers.

Kickstarter might be able to remedy this problem internally by requiring that project creators update backers any time a large purchase or commitment of funds is made. It might also be helpful for Kickstarter to provide in-house business and money management counseling services to project creators. Interestingly, the provision of investment educational materials is one of the investor protections mandated by the Crowdfund Act.²²³ However, this requirement is not applicable to Kickstarter because the Crowdfund Act only applies to crowdfunding intermediaries offering securities,²²⁴ and Kickstarter explicitly prohibits the offering of securities in campaigns.²²⁵ These actions would likely provide an educational aspect to Kickstarter projects that would increase goodwill towards Kickstarter while also increasing the punctuality and success rate of Kickstarter projects.

C. *Applicability of Contracts Law and UCC to Crowdfunding Campaigns Remains Uncertain*

Many of the issues discussed in this Note remain unlitigated. Any courts considering these issues will have to apply statutes and case law that are not adequately adapted to the issue of fraud on crowdfunding platforms.²²⁶ To date, no court has applied Article 2 to Kickstarter projects, nor has any published decision ordered a return or refund of Kickstarter funds.²²⁷

Aside from actually litigating these issues, states could amend their UCC statutes to better apply to crowdfunding disputes. Article 2 could also be amended to further clarify whether mixed transactions like those on Kickstarter, which are meant to fund the development,

²²³ See JOBS Act, Pub. L. No. 112-106, § 302(b), 126 Stat. 306, 5315 (2012) (codified at 15 U.S.C. § 77d-1(a)(3)); Groshoff, *supra* note 5, at 547-48.

²²⁴ See JOBS Act § 302(b); Groshoff, *supra* note 5, at 547-48.

²²⁵ See *Kickstarter Basics*, *supra* note 7 (“Kickstarter cannot be used to offer equity [or] financial returns.”).

²²⁶ For an illustration of how confused people are regarding the legal implications of failed crowdfunding projects, see Markowitz, *supra* note 24; Shahani, *supra* note 24.

²²⁷ This author has performed extensive searches for published decisions discussing this topic and has been unable to locate any such sources. However, comments on the Hanfree iPad Accessory webpage suggest that Neil Singh did eventually obtain a default declaratory judgment in Arizona Justice Court; the Court stated that he was owed the return of his Kickstarter pledge. See *Hanfree iPad Accessory*, *supra* note 118. In addition, in an action against Ed Nash, the project creator of Asylum Playing Cards, he was ordered to pay restitution to backers in the state of Washington as well as civil penalties to the state. See Alois, *supra* note 217.

manufacture and distribution of a unique product, are included under “sale of goods.” Although Kickstarter rewards are probably a sale of goods under the existing definition,²²⁸ the remedy for backers would be clearer if UCC § 2-105 was amended to explicitly state that an offer of crowdfunding rewards is considered a sale of goods.

D. *Allowing Enforcement of Contracts May Lower the Quality of Crowdfunding Products*

Crowdfunding has been a useful tool for funding projects that have high consumer interest but have difficulty obtaining traditional sources of capital.²²⁹ The success of Kickstarter and other crowdfunding sites demonstrate that there is a demand and a willing crowd to fund these types of projects.²³⁰ If the enforcement of contracts against project creators becomes a common practice, this could deter good faith Kickstarter projects. A project creator might worry that unforeseen circumstances could prevent the timely completion of the Kickstarter project. This could also lead to a decrease in the quality of delivered Kickstarter rewards because project creators might rush development of the product for fear of missing the delivery date. Thus, there are serious concerns that increased accountability on Kickstarter might actually lower the quality of the service.

Professor Steven Bradford, of the Nebraska College of Law suggests that crowdfunding intermediaries should be liable for fraudulent statements made by users in three circumstances, where: (1) the intermediary knows the material is fraudulent, (2) the intermediary deliberately ignores cues that should have alerted them to the fraud, and (3) if the intermediary recommends a project with inadequate investigation.²³¹ Although Professor Bradford suggests these criteria of

²²⁸ See *supra* Part II.E.

²²⁹ See Sigar, *supra* note 3, at 480-81 (explaining that small businesses and startups, who have traditionally had difficulty obtaining traditional sources of funding, have experienced great growth as a result of using crowdfunding methods to obtain capital). Crowdfunding provides a method for small businesses to connect directly to the public for funding. See *id.* Crowdfunding has also been useful for entrepreneurs seeking feedback on their products and services. See *id.*

²³⁰ See Groshoff, *supra* note 5, at 538-39 (“In 2012, approximately 2.2 million people from 177 countries pledged approximately \$319.8 million to fund a total of 18,109 projects through Kickstarter.”); see also Stats, KICKSTARTER, <https://www.kickstarter.com/help/stats?ref=footer> (last visited Sept. 5, 2015) (stating that Kickstarter has fully funded 91,955 projects with \$1,928,910,185 pledged by backers as of Sept. 5, 2015).

²³¹ C. Steven Bradford, *Shooting the Messenger: The Liability of Crowdfunding*

intermediary liability, they can also be applied to liability between project creators and backers. If the contract listed these as the exclusive grounds for a lawsuit against project creators, it could assuage some of the above concerns about deterring legitimate crowdfunding projects. However, such a requirement would also likely unintentionally shield some fraudulent project creators because it requires an additional showing of bad faith in order to enter judgment.

E. The Crowdfund Act Does Not Regulate Crowdfunding Sites Offering “Rewards”

The Crowdfund Act provides numerous protections for crowdfunding investors, however none of those protections are applicable to Kickstarter because the Act only applies to crowdfunding sites offering securities.²³² The Crowdfund Act requires crowdfunding intermediaries offering securities to provide disclosures of the risks involved in investing as well as providing investor education materials.²³³ The intermediary must make educational investment materials available and then ensure that each investor reviews those materials, is aware of the risks of investment, and answers questions demonstrating a grasp of startup investment risk.²³⁴ Intermediaries must also perform background checks on project creators and all of their officers.²³⁵ The Act also states that officers of intermediaries may not have a financial interest in any project receiving funding.²³⁶ Finally, the Act also allows the SEC to provide whatever other guidance that is necessary “for the protection of investors and in the public interest.”²³⁷ Thus, amending the Crowdfund Act to encompass crowdfunding sites offering rewards as well as securities would better protect Kickstarter backers from fraud.

F. State Consumer Protection Statutes May Coerce Project Creators to Perform

The introductory case of this article suggests another avenue through which Kickstarter backers may obtain either restitution, or

Intermediaries for the Fraud of Others, 83 U. CIN. L. REV. 371, 373 (2015).

²³² See *supra* Part I.E.

²³³ JOBS Act, Pub. L. No. 112-106, § 302(b), 126 Stat. 306, 5315 (2012) (codified at 15 U.S.C. § 77d-1(a)(3)); Deschler, *supra* note 113.

²³⁴ Deschler, *supra* note 113.

²³⁵ JOBS Act § 302(b); Deschler, *supra* note 113.

²³⁶ JOBS Act § 302(b); Deschler, *supra* note 113, at 1154.

²³⁷ JOBS Act § 302(b); Deschler, *supra* note 113, at 1154.

their project rewards. On April 30, 2014, Washington State Attorney General Bob Ferguson filed a complaint for injunctive and other relief under the Washington State Consumer Protection Act against Ed Nash, the project creator for Asylum Playing Cards.²³⁸ The court asserted personal jurisdiction over the defendant under the state Consumer Protection Act and the Washington Superior Court entered a default judgment.²³⁹ Since that judgment was entered, some backers have reported that they have received the playing cards owed to them as rewards in the Asylum Playing Cards Project.²⁴⁰ However, having delivered the project rewards does not appear to negate Ed Nash's obligation to pay restitution and civil penalties under the default judgment.²⁴¹

Moreover, in the Washington State Attorney General action, the Superior Court did not consider the merits of the case due to the defendant's failure to defend.²⁴² Nevertheless, it seems that state consumer protection lawsuits brought by state attorneys general may also be a viable means of obtaining restitution or coercing a project creator into delivering the rewards.²⁴³ However, this requires that a state attorney general take an interest in the case, and it also requires that several backers reside in the same state. In the Washington case, 31 of 810 backers lived in the state.²⁴⁴

CONCLUSION

Kickstarter is an environment that is vulnerable to fraud.²⁴⁵ Although Kickstarter states that a project creator is legally obligated to make a good faith effort to complete his or her project, the site suggests no possible methods by which a backer might hold a project

²³⁸ Complaint for Injunctive and Other Relief, *Washington v. Altius Mgmt., LLC*, No. 14-2-12425-SEA (Wash. Super. Ct. Apr. 30, 2014).

²³⁹ Default Judgment at 2, *Washington v. Altius Mgmt., LLC*, No. 14-2-12425-2-SEA (Wash. Super. Ct. July 22, 2015).

²⁴⁰ See Alois, *supra* note 217.

²⁴¹ See *id.*; see also Default Judgment at 1, *Washington v. Altius Mgmt., LLC*, No. 14-2-12425-2-SEA (Wash. Super. Ct. July 22, 2015).

²⁴² Wash. Super. Ct. Civ. R. 55.

²⁴³ It remains unclear whether Ed Nash actually has money available to pay the civil penalties ordered in the default judgment. It is also unknown how Nash was able to deliver the playing cards within three weeks of the judgment when the three years prior yielded no results.

²⁴⁴ Default Judgment at 2, *Washington v. Altius Mgmt., LLC*, No. 14-2-12425-2-SEA (Wash. Super. Ct. July 22, 2015).

²⁴⁵ See *supra* Part II.A.

creator accountable.²⁴⁶ This Note argued that a contract between the project creator and backers exists because (1) both parties generally intend to create a contract (2) the requisite offer and acceptance are present, and (3) both parties have affirmatively consented to the Terms of Use at least once via a clickwrap.²⁴⁷ This contract is composed of terms made up from all of the communications between the project creator and backers as well as all of the information contained in the Kickstarter project profile.²⁴⁸

In the event of a breach of contract, the backer should be entitled to the return of the pledged support,²⁴⁹ however obstacles to enforcement prevent this from happening.²⁵⁰ The low value of most Kickstarter pledges is simply too small for any individual to litigate.²⁵¹ It is also likely that the creator has already spent the funds by the time a backer realizes the creator will not deliver.²⁵² Finally, allowing enforcement of contracts against project creators may be contrary to the purpose of crowdfunding because allowing such enforcement might deter good faith Kickstarter submissions.²⁵³ With this deterrence, only project creators that are certain that success is obtainable will submit project profiles.

This Note argues that a contract likely exists between Kickstarter project creators and backers. However, backers currently lack a financial incentive to enforce that contract. Despite this, because of the increasing salience of fraudulent Kickstarter projects, for crowdfunding to continue to grow as a reliable method of funding projects, the remedies available to backers will have to be more clearly defined. Otherwise, this method of funding will simply be too unreliable to continue to exist unregulated. Until these issues are clarified by a court, Kickstarter contracts will remain in legal limbo, as a seeming Schrödinger's contract, simultaneously enforceable and not.

²⁴⁶ Caveat: Kickstarter suggests that “wisdom of the crowd” might be sufficient to combat fraudulent Kickstarter projects. *See supra* Part II.A.

²⁴⁷ *See supra* Part II.B.

²⁴⁸ *See supra* Part II.D.

²⁴⁹ *See supra* Part II.E.

²⁵⁰ *See supra* Part III.

²⁵¹ *See supra* Part III.A.

²⁵² *See supra* Part III.B.

²⁵³ *See supra* Part III.D.