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Choice of a New Generation: Can an Advertisement Create a Binding Contract, The

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The Choice of a New Generation: Can an Advertisement Create a Binding Contract?

*Leonard v. PepsiCo, Inc.*¹

I. INTRODUCTION

Merchants who advertise their products generally intend to deal according to the terms of their advertisements. For the most part, “Dealers of Goods” are happy to receive offers induced by their advertisements.² This would account for why there are relatively few cases concerning whether advertisements can create binding contracts. Only in unusual circumstances does a consumer seek to establish that an offer was made by an advertisement, which if accepted would create a contract.³ This Note evaluates one such unusual circumstance, and the options a court faces in resolving that type of a disagreement.

II. FACTS AND HOLDING

This dispute arose out of a promotional campaign conducted by PepsiCo, Inc. (“PepsiCo”).⁴ As part of the promotional campaign, entitled “Pepsi Stuff,” consumers were encouraged to collect Pepsi Points from specially marked packages of Pepsi and Diet Pepsi that could be redeemed for merchandise featuring the Pepsi logo.⁵ Before introducing the campaign nationwide, PepsiCo began the Pepsi Stuff promotion by test marketing in the Pacific Northwest.⁶

1. 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff'd*, No. 99-9032, 2000 WL 381742 (2d Cir. Apr. 17, 2000).

2. ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 2.4, at 122 (rev. ed. 1993).

3. Don F. Vaccaro, Annotation, *Advertisement Addressed to Public Relating to Sale or Purchase of Goods at Specified Price as an Offer the Acceptance of Which Will Consummate a Contract*, 43 A.L.R.3D 1102 (1996).

4. *Leonard*, 88 F. Supp. 2d at 117-18. PepsiCo, Inc. is the producer and distributor of the soft drinks Pepsi and Diet Pepsi. *Id.* at 118.

5. *Id.*

6. *Id.* Test marketing took place from October 1995 through March 1996. *Id.*

PepsiCo advertised the promotion in a television commercial⁷ and distributed Pepsi Stuff catalogs to consumers in the test market area.⁸

John D.R. Leonard ("Leonard"), a resident of Seattle, Washington, saw the Pepsi commercial for "Pepsi Stuff" and claimed that the commercial constituted an offer for a Harrier Jet.⁹ The commercial showed a series of products with the Pepsi logo and the respective number of Pepsi Points required to purchase them.¹⁰ In the final scene of the commercial, a teenage boy is seen flying a Harrier Jet to school.¹¹ After he parks the jet on the playground and emerges with a Pepsi in hand, the words "HARRIER FIGHTER 7,000,000 PEPSI POINTS" appear on the screen.¹² After having seen the Pepsi Stuff commercial, Leonard was inspired and set out to obtain a Harrier Jet.¹³ He consulted the Pepsi Stuff Catalog and the attached Order Form.¹⁴ Even though the Harrier Jet was not shown in the catalog, Leonard claimed that, based on the television commercial, the Jet was part of the promotion.¹⁵ According to the accompanying directions for Pepsi Point redemption, each order had to contain

7. *Id.* The court describes the television commercial in detail. The commercial opens in the morning with the appearance of a teenager preparing to leave for school. *Id.* He is dressed in a shirt "emblazoned with the Pepsi logo" and the subtitle "T-SHIRT 75 PEPSI POINTS" scrolls across the screen. *Id.* The teenager walks down the hallway wearing a leather jacket and the subtitle "LEATHER JACKET 1450 PEPSI POINTS" appears. *Id.* The teenager opens the front door and puts on a pair of sunglasses and simultaneously the subtitle "SHADES 175 PEPSI POINTS" is displayed. *Id.* A voiceover then says, "Introducing the new Pepsi Stuff catalog," and the following message appears at the bottom of the screen: "Offer not available in all areas. See details on specially marked packages." *Id.* at 118 n.2. The close of the commercial shows the teenager exiting a Harrier Jet that he flew to school and parked next to the bicycle rack. *Id.* at 119. A voiceover says: "Now the more Pepsi you drink, the more great stuff you're gonna get." *Id.* The helmetless teenager then appears in the cockpit of the Harrier Jet and while holding a Pepsi exclaims, "Sure beats the bus." *Id.* At that point the words "HARRIER FIGHTER 7,000,000 PEPSI POINTS" appear. *Id.* The commercial ends with the text "Drink Pepsi—Get Stuff." *Id.*

8. *Id.* The Pepsi Stuff merchandise ranged from 15 Pepsi Points for a "Jacket Tattoo" to 3300 Pepsi Points for a "Fila Mountain Bike." *Id.* The Order Form in the Pepsi Stuff Catalog did not contain an entry or description of a Harrier Jet. *Id.*

9. *Id.*

10. *Id.* at 118-19.

11. *Id.* at 119.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

at least fifteen original Pepsi Points, but more Pepsi Points could be purchased for ten cents each, if needed to obtain a desired item.¹⁶

Leonard originally set out to collect 7,000,000 Pepsi Points by consuming Pepsi Products.¹⁷ It soon became clear to Leonard that it would be impossible for him to purchase and drink enough Pepsi to earn the required number of Pepsi Points during the limited time of the promotion.¹⁸ Leonard then realized that buying Pepsi Points would be a better option.¹⁹

In March 1996, Leonard submitted an Order Form²⁰ with fifteen original Pepsi Points and his check for \$700,008.50.²¹ PepsiCo's fulfillment house rejected Leonard's submission and returned his check in early May.²² Leonard's counsel responded with a letter demanding that PepsiCo's fulfillment house transfer a new Harrier Jet to Leonard in compliance with the offer made in the Pepsi Stuff commercial.²³ The next month, Leonard sent a similar demand letter to PepsiCo.²⁴

PepsiCo brought suit on July 18, 1996 in the United States District Court for the Southern District of New York ("N.Y. Suit") to obtain a declaratory judgment stating that it was not obligated to transfer a Harrier Jet to Leonard.²⁵ On August 6, 1996, Leonard brought suit in Florida state court ("Florida Action")²⁶ as a response to PepsiCo's N.Y. Suit.²⁷ Leonard sought specific

16. *Id.* The directions also note that merchandise may be ordered "only" with the original Order Form. *Id.*

17. *Id.*

18. *Id.* The court noted that to amass 7,000,000 Pepsi Points would require drinking approximately 190 Pepsis a day for the next one hundred years. *Id.* at 129.

19. *Id.* at 129. Leonard ultimately raised approximately \$700,000. *Id.*

20. *Id.* at 119. Leonard had written in "1 Harrier Jet" at the bottom of the "Item" column on the Order Form and "7,000,000" in the "Total Points" column. *Id.*

21. *Id.* The check was drawn on an account of Leonard's first set of attorneys, and thus it appears that counsel represented him at that time. *Id.*

22. *Id.* at 120. In a letter to Leonard, the fulfillment house explained:

The item that you have requested is not part of the Pepsi Stuff collection. It is not included in the catalogue or on the order form, and only catalogue merchandise can be redeemed under this program.

The Harrier jet in the Pepsi commercial is fanciful and is simply included to create a humorous and entertaining ad. We apologize for any misunderstanding or confusion that you may have experienced and are enclosing some free product coupons for your use.

Id.

23. *Id.* The letter concluded with a threat of legal action if transfer instructions were not received within ten (10) days. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* The Florida court noted: "The only connection this case has to this forum

performance of the alleged offer for a Harrier Jet made by PepsiCo in the Pepsi Stuff television advertisement.²⁸ The Florida Action was removed to the United States District Court for the Southern District of Florida, but on December 2, 1996, it was transferred to the Southern District of New York.²⁹

Leonard later moved to dismiss PepsiCo's declaratory judgment suit for lack of personal jurisdiction.³⁰ On November 24, 1997, the Court granted Leonard's motion to dismiss, and Leonard simultaneously moved to voluntarily dismiss his own action.³¹ On December 15, 1997, the Court granted Leonard's motion for voluntary dismissal on the condition that Leonard pay certain legal fees amassed by PepsiCo.³² When Leonard failed to pay legal fees, the Court ordered him to either pay the fees or withdraw his voluntary dismissal and continue litigation.³³ Leonard chose to continue litigation and retained new counsel.³⁴ PepsiCo moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.³⁵

Judge Wood of the United States District Court for the Southern District of New York granted PepsiCo's motion for summary judgment on three separate bases.³⁶ The Court held that an advertisement that fails to contain any "words of limitation"³⁷ or is not "clear, definite, and explicit"³⁸ is merely an advertisement to receive offers and not an offer in and of itself.³⁹ Furthermore, because the commercial sought a reciprocal promise, it was not a unilateral offer.⁴⁰ The Court concluded that based on the comical nature of the

is that Plaintiff's lawyer is in the Southern District of Florida." *Id.* at 120 n.4.

27. *Id.* at 120.

28. *Id.* at 117-18.

29. *Id.* at 120-21. United States District Judge Lawrence King found that the Florida Action had been "filed in a form [sic] that has no meaningful relationship to the controversy and warrants a transfer pursuant to 28 U.S.C. § 1404(a)." *Id.* at 120.

30. *Id.* at 121.

31. *Id.*

32. *Id.* The court noted that "PepsiCo was entitled to some compensation for the costs of litigating this case in Florida, a forum that had no meaningful relationship to the case." *Id.* On October 1, 1998, Leonard was ordered to pay \$88,162 in attorney's fees within thirty days. *Id.*

33. *Id.*

34. *Id.* In the current case, Leonard consented to the jurisdiction and PepsiCo agreed not to seek enforcement of its award of legal fees. *Id.*

35. *Id.*

36. *Id.* at 132.

37. *Id.* at 124.

38. *Id.* (quoting *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689, 691 (Minn. 1957)).

39. *Id.*

40. *Id.* at 131.

commercial, a reasonable person could not conclude that PepsiCo would be giving away a Harrier Jet as part of its promotion.⁴¹ Finally, the Court rendered its summary judgment decision on the conclusion that no writing existed between the parties that met the threshold requirements of the Statute of Frauds.⁴²

III. LEGAL BACKGROUND

A. Advertisements as Offers

Although a valid offer to sell goods can be made by an advertisement, there is a strong presumption against finding that an advertisement constitutes an offer.⁴³ The *Restatement (Second) of Contracts* explains the general rule that advertisements are not ordinarily recognized as offers to sell.⁴⁴ For an advertisement to become an offer, it either has to contain specific language that commits the advertiser to making an offer or language that invites a consumer to act without further communication between the parties.⁴⁵ Courts adhering to this principle usually hold that advertisements do not constitute offers, but rather are invitations to solicit offers.⁴⁶

It is well established that an advertisement for the sale of goods does not constitute an offer that can be accepted to create a binding contract.⁴⁷ In *Lovett v. Frederick Loeser & Co.*,⁴⁸ a New York court noted that an advertisement is not an offer but only an invitation to enter into negotiations.⁴⁹ According to the court, because an advertisement is not an offer, a consumer that articulates an intention to purchase goods featured in an advertisement does not form a

41. *Id.* at 131.

42. *Id.*

43. *See* CORBIN & PERILLO, *supra* note 2, § 2.4, at 116.

44. RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (1979).

45. RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (1979).

46. SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 4:7, at 286-87 (4th ed. 1990).

47. *See* Mesaros v. United States, 845 F.2d 1576, 1581-82 (Fed. Cir. 1988); Arnold Pontiac GMC, Inc. v. General Motors Corp., 786 F.2d 564, 571-72 (3d Cir. 1986); Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 539 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038, *overruled on other grounds by* Hasbrouck v. Texaco, Inc., 842 F.2d 1034 (9th Cir. 1988); Amalgamated Clothing Workers, AFL-CIO v. Chicago Tribune Co., 307 F. Supp. 422, 424 (N.D. Ill. 1969); Bissell Carpet Sweeper Co. v. Masters Mail Order Co., 140 F. Supp. 165, 172 (D. Md. 1956); Lovett v. Frederick Loeser & Co., 207 N.Y.S. 753, 755 (N.Y. City Mun. Ct. 1924).

48. *Lovett*, 207 N.Y.S. at 755.

49. *Id.*

contract.⁵⁰ The court recognized that the general test for whether an advertisement constitutes an offer is whether, based on the facts, it can be shown that an affirmative promise of performance was made in exchange for something requested in the advertisement.⁵¹ The court concluded that, in general, an advertisement directed to all persons is considered a solicitation by the advertiser to receive offers.⁵²

The use of an attached order form does not transform an advertisement into an offer.⁵³ In *Mesaros v. United States*,⁵⁴ an advertisement for commemorative coins included an order form, but the court found that it is well established that advertisements coupled with order forms are merely advertisements and thus invitations to receive offers from consumers.⁵⁵ In accordance with the basic rules of contracts, the court then looked at the objective reasonableness of the consumer's belief that the advertisement was intended as an offer.⁵⁶ The court found it unreasonable for a person to believe that an advertiser is bound by the terms of an advertisement.⁵⁷ The court stated that advertisers would be harmed if they were bound by advertisements and solicitations for offers.⁵⁸ For example, advertisers could be held accountable for an excessive number of contracts requiring them to provide more goods than are available in the market.⁵⁹ Consequently, most courts hold that unless accepted by the seller, purchase orders and order forms are not enforceable contracts.⁶⁰

In order to create an enforceable contract, the essential terms of the contract must be specific.⁶¹ In *Alligood v. Procter & Gamble*,⁶² the court evaluated the specificity requirement as applied to advertisements and solicitations. The court determined that an advertisement printed on boxes of Pampers diapers informing

50. *Id.*

51. *Id.* at 756.

52. *Id.* at 756-57.

53. *See Mesaros v. United States*, 845 F.2d 1576, 1581-82 (Fed. Cir. 1988).

54. 845 F.2d 1576 (Fed. Cir. 1988).

55. *Id.* at 1580.

56. *Id.* at 1581.

57. *Id.*

58. *Id.*

59. *Id.*

60. *See Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 538-39 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984), *overruled on other grounds by* *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1988); RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. d (1981).

61. *See Alligood v. Procter & Gamble*, 594 N.E.2d 668, 669 (Ohio Ct. App. 1991). The court stated: "[E]ssential terms [include] the identity of the parties to be bound, the subject matter of the contract, consideration, a quantity term, and a price term." *Id.*

62. 594 N.E.2d 668 (Ohio Ct. App. 1991).

customers that they could collect attached “Teddy Bear points” and redeem them to save money on merchandise in the separate “Pampers Baby Catalog” was not specific enough to form an enforceable contract.⁶³ The court suggested that even considering the advertisement and the catalog together, no enforceable contract was formed because the essential terms of the promotion were not specific.⁶⁴ Collectively, the catalog and the advertisement on the package were an invitation to consumers to order from the catalog, which could be revoked by the company.⁶⁵

Occasionally, courts have found that an offer has been made in an advertisement for the sale of goods.⁶⁶ In *Lefkowitz v. Great Minneapolis Surplus Store*,⁶⁷ the Minnesota Supreme Court analyzed whether the advertisement was “clear, definite, and explicit” to determine if it constituted an offer.⁶⁸ The court determined that a sufficient contract of sale can be achieved if the advertisement shows, and the conduct of the parties demonstrate, a mutuality of obligation⁶⁹ between the consumer and the advertiser.⁷⁰ In *Lefkowitz*, the advertisement was specific, detailing the quantity available, the number available per person, and who could accept.⁷¹ Advertisements without words of limitation like “first-come, first-served” are sufficiently different from *Lefkowitz* to not be considered offers.⁷² A Louisiana court recognized in *Johnson v. Capital City Ford Co.*⁷³ that if the terms expressed in an advertisement are certain and definite enough to create an offer when made orally, then they likewise form an offer when communicated by an advertisement.⁷⁴

63. *Id.* at 669.

64. *Id.*

65. *Id.*

66. See CORBIN & PERILLO, *supra* note 2, § 2.4, at 119; see *Johnson v. Capital City Ford Co.*, 85 So. 2d 75 (La. Ct. App. 1955); *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689 (Minn. 1957).

67. 86 N.W.2d 689 (Minn. 1957).

68. *Id.* at 691. The court stated, “[W]here the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract.” *Id.*

69. A mutuality of obligation occurs when “some performance was promised in positive terms in return for something requested.” *Id.*

70. *Id.*

71. *Id.* The advertisement stated, “1 Black Lapin Stole Beautiful, Worth \$139.50 . . . \$1.00 First Come First Served.” *Id.* at 690.

72. *Mesaros v. United States*, 845 F.2d 1576, 1581 (Fed. Cir. 1988).

73. 85 So. 2d 75 (La. Ct. App. 1955).

74. *Id.* at 79.

B. Rewards as Offers

It is common to publicize a reward as a way to induce performance.⁷⁵ Courts generally hold that these publications constitute unilateral offers and are enforceable contracts.⁷⁶ *Carlill v. Carbolic Smoke Ball Co.*⁷⁷ was instrumental in developing the law of unilateral or one-sided offers.⁷⁸ In *Carbolic Smoke Ball*, the developers of a medical preparation called the "Carbolic Smoke Ball" issued an advertisement that induced Ms. Carlill to purchase the product and use it as described in the advertisement to prevent contracting influenza.⁷⁹ Despite using the ball as directed, Ms. Carlill was attacked by influenza and sued to recover the reward promised in the advertisement.⁸⁰ Justice Lindley construed the advertisement as offering a reward and explained that these types of advertisements are invitations for acceptance open to anyone who performs the conditions named in the advertisement.⁸¹ Lord Justice Bowen demonstrated with a common sense example⁸² that the offeror implies in a unilateral offer that

75. See CORBIN & PERILLO, *supra* note 2, § 2.4, at 119.

76. *Id.* See Newman v. Schiff, 778 F.2d 460 (5th Cir. 1985); James v. Turilli, 473 S.W.2d 757 (Mo. Ct. App. 1971); Las Vegas Hacienda v. Gibson, 359 P.2d 85 (Nev. 1961); Barnes v. Treece, 549 P.2d 1152 (Wash. Ct. App. 1976); *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256 (Ct. App. 1893).

77. 1 Q.B. 256 (Ct. App. 1893).

78. See A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 259, 281-82 (1995). Unilateral offers are contracts in which only one party is under any obligation to the other. *Id.* at 283. Although there is a promise by one party, there is no actual agreement because the parties do not even meet until a reward is to be claimed and thus the promise has been fulfilled. *Id.* at 282-83.

79. *Carbolic Smoke Ball*, 1 Q.B. at 257.

80. *Id.* The advertisement stated:

£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter. During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

Id.

81. *Id.* at 262.

82. Lord Justice Bowen hypothesizes:

If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? . . . The essence of the transaction is that the dog should be found, and it is not necessary . . .

notification of acceptance of the offer is not required to form a binding contract in this type of reward case.⁸³ Lord Justice Bowen distinguished between the offer of reward in *Carbolic Smoke Ball* and typical advertisements by explaining that an offer of reward is an offer to reward anyone who performs the conditions of the offer before it is retracted.⁸⁴ Thus, an offer of reward makes the offeror liable based solely on the actions of one party. On the other hand, offers to negotiate do not create binding contracts based on one party's performance—they are merely offers to receive offers, and thus require both parties bargaining to form a contract.⁸⁵

C. Objective Reasonable Person Standard

When evaluating the formation of contracts, courts are obligated to apply "objective principles of contract law."⁸⁶ Thus, courts are not to consider the subjective intent of the parties.⁸⁷ Because contract law uses an objective reasonable person standard, when a reasonable person would understand an offer as a joke, it cannot be construed as an offer and does not form a contract.⁸⁸ Alternatively, if it is not apparent that the offer was a joke and a reasonable person would believe that a serious offer was being made, there may be a valid offer that could form a binding contract.⁸⁹ The real but unexpressed intentions of the parties are unimportant.⁹⁰ If a reasonable person would conclude that the words and actions of the other party manifest an intention to be bound by the contract, the agreement is enforceable.⁹¹

In *Hubbard v. General Motors Corp.*,⁹² the Southern District of New York used the objective reasonable person standard to evaluate statements made by General Motors in its commercial for the Suburban automobile.⁹³ The court

that in order to make the contract binding there should be any notification of acceptance.

Id.

83. *Id.*

84. *Id.* at 268.

85. *Id.*

86. See *Kay-R Elec. Corp. v. Stone & Webster Constr. Co.*, 23 F.3d 55, 57 (2d Cir. 1994); *Mesaros v. United States*, 845 F.2d 1576, 1581 (Fed. Cir. 1988).

87. See *Kay-R Elec. Corp.*, 23 F.3d at 57; *Mesaros*, 845 F.2d at 1581; see also RESTATEMENT (SECOND) OF CONTRACTS §§ 21-23.

88. *Barnes v. Treece*, 549 P.2d 1152, 1155 (Wash. Ct. App. 1976).

89. *Id.*

90. *Id.*; see also *Lucy v. Zehmer*, 84 S.E.2d 516, 518, 520 (Va. 1954).

91. *Id.*

92. No. 95 Civ. 4362, 1996 WL 274018, at *1 (S.D.N.Y. May 22, 1996).

93. *Id.* at *6-7.

concluded that a description of the vehicle that stated it was “like a rock,” “popular,” and “the most dependable, long-lasting truck on the planet” was mere puffery, and that no reasonable consumer could rely upon these claims as statements of fact.⁹⁴ According to the court, generalized or exaggerated statements are considered “puffing” by the advertiser and will not bind the advertiser because a reasonable consumer would not rely on or interpret the statements as factual claims.⁹⁵

D. Statute of Frauds

Under U.C.C. Section 2-201(1), a writing evidencing a contract for sale is a formal requirement in sales of goods in excess of five hundred dollars.⁹⁶ Many states, including New York, use the same language included in U.C.C. Section 2-201. The writing requirement exists to prove that a real transaction is involved, the terms of which are substantiated in writing rather than by oral evidence alone.⁹⁷

Multiple signed and unsigned writings may be combined to satisfy the writing requirement so long as it is made clear in the writings that they involve the same subject matter or transaction.⁹⁸ In *Horn & Hardart Co. v. Pillsbury Co.*,⁹⁹ the Second Circuit noted that two threshold requirements must be satisfied in order for multiple combined writings to satisfy the Statute of Frauds.¹⁰⁰ First, when signed and unsigned writings are combined, the signed writing must establish that the parties are involved in a contractual relationship.¹⁰¹ Second, the unsigned writing must clearly refer to the same subject matter or transaction as set forth in the signed writing.¹⁰²

94. *Id.*

95. *Id.* at *6 (quoting *In re All Terrain Vehicle Litig.*, 771 F. Supp. 1057, 1061 (C.D. Cal. 1991)).

96. The text of U.C.C. § 2-201(1) (1989) reads as follows:

[A] contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

97. *See* U.C.C. § 2-201 cmt. 1 (1989).

98. *See* *Crabtree v. Elizabeth Arden Sales Corp.*, 110 N.E.2d 551, 554 (N.Y. 1953); CORBIN & PERILLO, *supra* note 2, § 23.3, at 771.

99. 888 F.2d 8 (2d Cir. 1989).

100. *Id.* at 11.

101. *Id.* (quoting *Crabtree*, 110 N.E.2d at 554).

102. *Id.* (quoting *Crabtree*, 110 N.E.2d at 554).

IV. INSTANT DECISION

In *Leonard v. PepsiCo*,¹⁰³ a New York district court considered whether the advertisement published by PepsiCo was an offer or merely an advertisement.¹⁰⁴ The court based its decision on the general rule that advertisements do not constitute offers.¹⁰⁵ Citing the *Restatement (Second) of Contracts*,¹⁰⁶ the court stated that “[a]dvertisements . . . are not ordinarily intended or understood as offers to sell.”¹⁰⁷ The court then emphasized that New York courts adhere to this general principle that advertisements are usually construed as invitations to offer.¹⁰⁸ In evaluating the order form in the Pepsi Stuff catalog to determine if it constituted an offer, the court based its decision on *Mesaros v. United States*.¹⁰⁹ Just like the *Mesaros* court,¹¹⁰ the district court determined that Leonard’s order form, appropriate number of Pepsi Points, and check for \$700,008.50 constituted the offer.¹¹¹ No enforceable contract could be created until PepsiCo accepted the offer and cashed Leonard’s check.¹¹²

The court then distinguished this case from *Lefkowitz*¹¹³ by determining that the commercial and catalog published by PepsiCo were not “clear, definite, and explicit” and contained no “words of limitation.”¹¹⁴ The court said that the commercial was not definite by itself because it reserved the details of the offer to the catalog and the catalog did not even contain an offer for the Harrier Jet.¹¹⁵ The court also noted that the commercial was not definite because, unlike *Lefkowitz*, the commercial by PepsiCo did not identify who could accept.¹¹⁶ Finally, the court concluded that even if the catalog contained the Harrier Jet, the

103. 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff’d*, No. 99-9032, 2000 WL 381742 (2d Cir. Apr. 17, 2000).

104. *Id.* at 122-24.

105. See CORBIN & PERILLO, *supra* note 2, § 2.4, at 116; *Leonard*, 88 F. Supp. 2d at 122.

106. RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (1979).

107. *Leonard*, 88 F. Supp. 2d at 122.

108. *Id.*

109. *Id.* (citing *Mesaros v. United States*, 845 F.2d 1576 (Fed. Cir. 1988)).

110. In *Mesaros*, a federal district court concluded that a breach of contract action was improper because no contract could be formed until order forms were accepted and payment was processed by the defendant. *Mesaros*, 845 F.2d at 1581.

111. *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116, 124 (S.D.N.Y. 1999), *aff’d*, No. 99-9032, 2000 WL 381742 (2d Cir. Apr. 17, 2000).

112. *Id.*

113. *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689 (Minn. 1957).

114. *Leonard*, 88 F. Supp. 2d at 124.

115. *Id.*

116. *Id.*

advertisement still would not constitute an offer because there were no “words of limitation,” like “first-come, first-served.”¹¹⁷ The court was swayed by the *Mesaros* court’s ruling that “words of limitation” are necessary to prevent the advertiser from being bound by an excessive number of contracts and from being responsible for providing more goods than are available.¹¹⁸ Thus, the court in *Leonard* concluded that neither PepsiCo’s commercial nor catalog constituted an offer.¹¹⁹

After concluding that the commercial in *Leonard* was not an offer, but merely an advertisement, the court distinguished advertisements from rewards.¹²⁰ The court explained that in reward cases the alleged offer is “intended to induce a potential offeree to perform a specific action, often for noncommercial reasons[,]” whereas typical advertisements are “invitation[s] to negotiate for purchase of commercial goods.”¹²¹ The court concluded that the Pepsi commercial did not direct that anyone with the required amount of Pepsi Points who showed up at Pepsi Headquarters would receive a Harrier Jet.¹²² Instead, the commercial suggested that consumers refer to their Pepsi Stuff Catalog to learn how to redeem the Pepsi Points they had accumulated.¹²³ The court suggested that by accepting and complying with the terms of the Order Form, the commercial sought a reciprocal promise and therefore was not a reward case but rather an advertisement to receive offers.¹²⁴

The court concluded that no objective person could have reasonably believed that the commercial was an offer for a Harrier Jet.¹²⁵ The court emphasized that it could not consider PepsiCo’s subjective intent in making the commercial or evaluate Leonard’s subjective view of the commercial because, based on prior case law,¹²⁶ the court was to use the objective principles of contract law.¹²⁷

In order to substantiate that no reasonable person could believe the commercial was an offer for a Harrier Jet, the court concluded that the

117. *Id.*

118. *Mesaros v. United States*, 845 F.2d 1576, 1581 (Fed. Cir. 1988).

119. *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116, 124 (S.D.N.Y. 1999), *aff’d*, No. 99-9032, 2000 WL 381742 (2d Cir. Apr. 17, 2000).

120. *Id.* at 125-27.

121. *Id.* at 126.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 127.

126. *See Kay-R Elec. Corp. v. Stone & Webster Constr. Co.*, 23 F.3d 55, 57 (2d Cir. 1994); *Mesaros v. United States*, 845 F.2d 1576, 1581 (Fed. Cir. 1988).

127. *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116, 127 (S.D.N.Y. 1999), *aff’d*, No. 99-9032, 2000 WL 381742 (2d Cir. Apr. 17, 2000).

commercial was “done in jest” and because it was not serious, no offer could have been made.¹²⁸ The court found that the commercial made exaggerated claims like many commercials do,¹²⁹ and that reasonable viewers would understand these claims were not statements of fact, but were merely puffery.¹³⁰

The court also decided whether the alleged contract satisfied the Statute of Frauds.¹³¹ The court emphasized the writing requirement under N.Y.U.C.C. Section 2-201(1) and found that there was no writing between the parties that satisfied this requirement.¹³² The court evaluated the threshold requirements for a writing under the Statute of Frauds and found that the commercial was not a writing and that the completed Order Form did not bear PepsiCo’s signature.¹³³ Consequently, the court concluded that there was no writing sufficient to satisfy the Statute of Frauds.¹³⁴

In *Leonard*, the court concluded that summary judgment was proper for three reasons.¹³⁵ First, the commercial was nothing more than an advertisement.¹³⁶ Second, because of the comical nature of the commercial, a reasonable person could not conclude that PepsiCo would be giving away a Harrier Jet as part of its promotion.¹³⁷ Finally, the court found that there was no

128. *Id.* at 128, 130.

129. *See* Hubbard v. General Motors Corp., No. 95 Civ. 4362, 1996 WL 274018, at *6-7 (S.D.N.Y. May 22, 1996).

130. Leonard v. PepsiCo, Inc., 88 F. Supp. 2d at 128. The court found many reasons why it thought the commercial was “done in jest.” *Id.* The court explained that the teenager in the commercial was a “highly improbable pilot who could barely be trusted with the keys to his parents’ car, much less the prize aircraft of the United States Marine Corps.” *Id.* at 128-29. In addition, the court said that the idea of traveling to school in a Harrier Jet is an unrealistic fantasy for teenagers and civilians in general. *Id.* at 129. Finally, the court concluded that drinking enough Pepsi to acquire 7,000,000 Pepsi Points and obtain the Harrier Jet is an unlikely possibility. *Id.* The court wrote that purchasing the Jet for \$700,000 would have been a “deal too good to be true” because a Harrier Jet costs roughly \$23 million dollars. *Id.*

131. *Id.* at 131.

132. *Id.*

133. Leonard v. PepsiCo, Inc., 88 F. Supp. 2d 116, 131 (S.D.N.Y. 1999), *aff’d*, No. 99-9032, 2000 WL 381742 (2d Cir. Apr. 17, 2000). The threshold requirements are that a signed writing establish, by itself, a contractual relationship between the parties, and that an unsigned writing refer to the same transaction as the signed writing if the two writings are to be combined to establish a writing. *See* Horn & Hardart Co. v. Pillsbury Co., 888 F.2d 8, 11 (2d Cir. 1989).

134. *Leonard*, 88 F. Supp. 2d at 131.

135. *Id.* at 131.

136. *Id.*

137. *Id.*

writing between the parties that met the threshold requirements of the Statute of Frauds.¹³⁸

V. COMMENT

The court's decision in *Leonard* fits well within the confines of existing case law,¹³⁹ and strong policy considerations support the court's holding. By following the general rule that advertisements are not construed as offers, but are instead solicitations for offers, the court's decision in *Leonard* paves the way for predictable outcomes in future controversies involving advertisements. Although most prior case law involved advertisements in print¹⁴⁰ (either published in the newspaper or in circulars), the *Leonard* decision is a more modern approach applicable to other television commercial controversies or perhaps even advertisements on the internet. The court's decision in *Leonard* supports the use of advertisements to inform people about products and services. As the court found in *Mesaros*,¹⁴¹ if advertisements are considered offers, advertisers could be "bound by an excessive number of contracts . . . in excess of amounts [of goods] available."¹⁴² If all publications by advertisers were construed as offers to form contracts that could be accepted by anyone, advertisers might refrain from advertising to avoid the costly consequences for breach of contract.

Even though the court in *Leonard* determined that no contract existed between the parties, the decision easily could have been different. The issues presented in *Leonard* are a modern version of the century old *Carlill v. Carbolic Smoke Ball*¹⁴³ decision, in which the court upheld an advertisement as a unilateral offer and maintained that the contract was enforceable. The court in *Leonard* distinguished the television advertisement from a unilateral offer by saying that the advertisement was not meant to induce specific action like reward cases do.¹⁴⁴ In fact, the advertisement and the Pepsi Stuff promotion were created to induce consumers to purchase Pepsi products. Accumulating Pepsi Points and redeeming them for merchandise is not dissimilar from the "lost dog" hypothetical posed by Lord Justice Bowen.¹⁴⁵ Like that hypothetical, consumers

138. *Id.*

139. *See supra* note 47.

140. *See supra* note 47.

141. *Mesaros v. United States*, 845 F.2d 1576, 1581 (Fed. Cir. 1988).

142. *Id.*

143. 1 Q.B. 256 (Ct. App. 1893).

144. *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116, 125-27 (S.D.N.Y. 1999), *aff'd*, No. 99-9032, 2000 WL 381742 (2d Cir. Apr. 17, 2000).

145. *See supra* note 82.

may actually accept PepsiCo's offer by collecting Pepsi Points and sending them in for redemption without PepsiCo knowing about the acceptance until the consumers are owed their reward. As in the "lost dog" hypothetical, PepsiCo would have no basis for denying a consumer's request for reward merchandise listed in the Pepsi Stuff catalog once the consumer satisfied the contest requirements.

The court in *Leonard* decided that no reasonable person could conclude that the television commercial was an offer for a Harrier Jet.¹⁴⁶ In reaching this conclusion, the court assumed that the objective reasonable person standard ought to be from an adult's perspective. Had the court considered the commercial from a reasonable teenager's perspective, the outcome may have been entirely different. Persuasive authority suggests that courts should adapt the objective reasonable person standard to fit the particular parties involved.¹⁴⁷ A compelling reason for adapting the objective reasonable person standard is that the standard, on its surface, fails to address different perspectives and vulnerabilities of different parties.¹⁴⁸ In cases involving sexual harassment or hostile work environment claims, some courts have applied a reasonable women standard in place of the traditional reasonable person analysis.¹⁴⁹ In a recent controversial case involving racial harassment, a Maine court adopted a reasonable black person standard.¹⁵⁰ Even more recently, the Ninth Circuit decided that it is appropriate to use the standard of a reasonable person with the same fundamental characteristics as the plaintiff.¹⁵¹ Keeping these more subjective standards in mind, consider that teenagers and children have different perspectives than adults when reacting to advertisements.¹⁵² After all, a reasonable teenager might conclude that the Pepsi commercial in controversy was an offer for a Harrier Jet because the Jet was advertised in the same manner

146. *Leonard*, 88 F. Supp. 2d at 130-31.

147. See generally Penny L. Cigoy, *Harmless Amusement or Sexual Harassment?: The Reasonableness of the Reasonable Woman Standard*, 20 PEPP. L. REV. 1071 (1993).

148. *Id.* at 1093.

149. See *Torres v. Pisano*, 116 F.3d 625, 632-33 (2d Cir. 1997); *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991); *Stingley v. Arizona*, 796 F. Supp. 424, 428-29 (D. Ariz. 1992).

150. See *Harris v. International Paper*, 765 F. Supp. 1509 (D. Me.), *vacated in part* by 765 F. Supp. 1529 (D. Me. 1991). *But see Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426 (2d Cir. 1999).

151. See *Crowe v. Witel Communications Sys.*, 103 F.3d 897, 900 (9th Cir. 1996).

152. See Donald W. Garner & Richard J. Whitney, *Protecting Children From Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479, 535 (1997) (discussing of the effects of tobacco advertising aimed at minors showing "a strong correlation exists between the youth-oriented ads and the rate of consumption of those brands among minors").

as the other Pepsi Stuff products.¹⁵³ Using a reasonable teenager standard may have been appropriate, especially given that the commercial was targeted at young, impressionable teens who were members of the "Pepsi Generation."

Finally, the court concluded that because there was no writing present, the alleged offer did not satisfy the Statute of Frauds.¹⁵⁴ While the court suggested that a commercial is not a writing, it gave no explanation for this distinction.¹⁵⁵ To the contrary, many cases have held that nontraditional forms of "writing" are sufficient to meet the requirements of the Statute of Frauds. Messages conveyed by telegram,¹⁵⁶ FAX,¹⁵⁷ and tape recording¹⁵⁸ have all been construed as meeting the writing requirement under the Statute of Frauds. Under this analysis, the television commercial in *Leonard* could have been analogized to the aforementioned electronic media in order to meet the Statute of Frauds writing requirement. Alternatively, the court could have broadly interpreted the writing requirement so that the commercial would have been acceptable. Article 2 of the U.C.C. is currently being revised. The current revisions to U.C.C. Section 2-201 imply a move toward accepting a broader interpretation of "writings." The current revisions to U.C.C. Section 2-201 suggest replacing the "writing" requirement with a "record" requirement so that as long as some tangible record exists, the requirement is met.¹⁵⁹ The television commercial would certainly meet the record requirement currently under consideration.

153. See *supra* note 7.

154. *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116, 131 (S.D.N.Y. 1999), *aff'd*, No. 99-9032, 2000 WL 381742 (2d Cir. Apr. 17, 2000).

155. *Id.*

156. See generally *Ryan v. United States*, 136 U.S. 68 (1890); *McMillan, Ltd. v. Warrior Drilling & Eng'g Co.*, 512 So. 2d 14 (Ala. 1986); *Kinney v. Horwitz*, 105 A. 438 (Conn. 1919); *Heffernan v. Keith*, 127 So. 903 (Fla. Dist. Ct. App. 1961); *Hillstrom v. Gosnay*, 614 P.2d 466 (Mont. 1980); *Hansen v. Hill*, 340 N.W.2d 8 (Neb. 1983); *J.E. Tarbell Co. v. Grimes*, 149 A. 73 (N.H. 1930); *La Mar Hosiery Mills, Inc. v. Credit & Commodity Corp.*, 216 N.Y.S.2d 186 (N.Y. City Ct. 1961); *Hessenthaler v. Farzin*, 564 A.2d 990 (Pa. 1989).

157. See John R. Thomas, Note, *Legal Responses to Commercial Transactions Employing Novel Communications Media*, 90 MICH. L. REV. 1145, 1155 (1992).

158. See generally *Londono v. Gainesville*, 768 F.2d 1223 (11th Cir. 1985); *Ellis Canning Co. v. Bernstein*, 348 F. Supp. 1212 (D. Colo. 1972).

159. *National Conference of Commissioners on Uniform State Laws, Revision of Uniform Commercial Code, Article 2-Sales* (visited May 9, 2000) <<http://www.law.upenn.edu/library/ulc/ucc2/ucc2999.htm>>. According to the revisions, "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." *Id.*

VI. CONCLUSION

When consumers and advertisers litigate the terms of an advertisement, the court will often find, as did the *Leonard*¹⁶⁰ court, that an advertisement is not an offer to sell. Consequently, advertisers are under no obligation to turn over the goods mentioned in their advertisements. After *Leonard*, consumers have a difficult burden to overcome. A decision to change the law so that a consumer's acceptance of the terms of an advertisement will form a binding contract is truly a choice for the next generation.

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160. *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff'd*, No. 99-9032, 2000 WL 381742 (2d Cir. Apr. 17, 2000).

