

MEMORANDUM

TO: Professor Sorkin
FROM: Junior Samples
DATE: March 21, 2007
RE: Aaron and Jesse Vernon

QUESTION PRESENTED

Is a musical group contractually bound by a reward offer made in jest by the group's manager, if the members of the group were unaware of the offer but fail to disavow it upon learning of it?

SHORT ANSWER

Yes. A reward offer is binding upon acceptance if the offeree reasonably believes it to be a serious offer. Although a principal normally is not bound by an agent's unauthorized act, one may ratify such an act by failing to repudiate it promptly.

STATEMENT OF FACTS

Aaron and Jesse Vernon are musicians who perform together in the Chicago area. Until recently they performed as a band called Memphisto, although they did not succeed in making much money. Their manager, Ann Olssen, handled bookings and promoted the band through a web page on MySpace. The Vernons occasionally distributed T-shirts bearing the MySpace page address at their shows.

On or about November 1, 2006, Olsson posted a statement on the MySpace page encouraging readers to attend the band's performances, and offering a \$2,000 reward "to the first person to get MEMPHISTO tattooed permanently on their forehead." Tom Parker read that statement and subsequently had the band's name tattooed on his forehead. He presented himself to Olsson at the band's performance on November 18 and attempted to claim the \$2,000. Olsson photographed Parker with the Vernon brothers, then posted the photograph to the MySpace page with a statement congratulating Parker on winning the "tattoo contest." The Vernons both state that they did not know of the \$2,000 offer until November 18. Since that date, the Vernons have begun performing in a new band with a different name, and they do not wish to pay Parker the \$2,000 he is demanding.

DISCUSSION

Tom Parker seeks to enforce a contract with the Vernons based upon the reward offer that Ann Olsson posted on the MySpace page promoting the band. For a person to be contractually bound based upon a statement made by a third party, the statement must have given rise to a valid contract, and the person must have either authorized or ratified the statement. *Barnes v. Treece*, 549 P.2d 1152 (Wash. App. 1976);

Valid Contract

The first issue is whether a valid contract was created based upon Parker's acceptance of the reward offer that Olsson posted. To form a unilateral contract, the statement promising a reward must qualify as a valid offer, and the other party must

accept the offer by performing the requested act under the terms of the offer. *Newman v. Schiff*, 778 F.2d 460, 465-466 (8th Cir. 1985).

Olsson's statement probably was a valid offer. For an offer to be valid, its terms must be definite, *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 124 (S.D.N.Y. 1999), and the offeror must manifest an intent to be bound thereby, *Bloomington Partners, LLC v. City of Bloomington*, 364 F. Supp. 2d 772, 779 (C.D. Ill. 2005).

First, Olsson's statement was sufficiently definite to qualify as a valid offer. Although an advertisement normally is not considered to be an offer, one that is sufficiently clear and definite may serve as a valid offer. *Leonard*, 88 F. Supp. 2d at 124. The advertisement in *Leonard* was not an offer because it did not explain the method of acceptance and explicitly reserved details of the offer to a separate writing. Olsson's statement, on the other hand, did not relegate important details of the offer to a separate writing, and implied that one could accept the offer by appearing with the tattoo at one of the band's performances. Olsson's statement therefore was sufficiently definite to be a valid offer.

Second, Olsson manifested an intent to be bound by the statement. Whether an offeror intends to be bound is determined based upon objective evidence of the offeror's expressed intent. *Bloomington Partners, LLC*, 364 F. Supp. 2d at 779. Unless a reasonable person would understand that a statement was intended as a joke rather than a serious offer, the statement constitutes a valid offer. *Barnes*, 549 P.2d at 1155; *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954). Olsson's statement appeared on a web page promoting a band, and was entirely consistent with the other content of the page. Although an offer to pay someone for being tattooed with a promotional message may be

rather extraordinary, a reasonable person might well have taken the offer seriously based upon the objective manifestations of Olsson's intent. Since Olsson's objective manifestations of intent indicated an intent to be bound and the statement itself was sufficiently definite, it probably qualified as a valid offer.

Since the offer was valid, Parker was in a position to accept it by performing the requested act. An offer of a unilateral contract makes a promise that is contingent upon performance of a requested act, and acceptance occurs when an offeree performs the act with intent to accept the offer. *Barnes*, 549 P.2d at 1155. Olsson's offer promised \$2,000 to the first person to get the Memphisto tattoo. Parker got his tattoo after reading the offer, and promptly notified Olsson that he was accepting the offer. Parker therefore accepted the offer by his performance.

Olsson's statement was a valid offer of a reward, and Parker's performance was a valid acceptance of the offer. An enforceable contract was therefore formed by this offer and acceptance.

Authority or Ratification

The second issue is whether the Vernons are bound by the contract because they authorized or ratified the reward offer. A person is bound by the act of a third party if the third party has actual or apparent authority, or if the person later ratifies the unauthorized act. *Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc.*, 759 N.E.2d 174, 181, 185 (Ill. App. 2d Dist. 2001).

Olsson probably did not have actual authority to make the reward offer on the Vernons' behalf. Actual authority may be granted expressly or by implication. *Id.* at 181.

Olsson's reward offer was not expressly authorized by the Vernons. Express authority exists only if the principal explicitly permits the agent to perform a specified act. *Id.* Since the Vernons never explicitly authorized Olsson to offer a reward on their behalf, she could not have had express authority.

Nor is it likely that Olsson had implied authority to make the offer. Implied authority is authority that is inherent in an agent's position. *Id.* at 182-183. A corporate vice president, for example, does not have inherent authority to bind the corporation to contracts. *Barnes*, 549 P.2d at 1156. As the manager for Memphisto, Olsson handled contractual arrangements with venues and promoted the band through the MySpace page. However, it is unlikely that her position ever required her to make large expenditures or enter into contracts on the band's behalf, other than booking their performances, just as a corporate vice president is not necessarily responsible for entering into contracts on the corporation's behalf. Olsson therefore did not have implied authority to offer a substantial financial reward on the band's behalf by virtue of her position as manager.

Although Olsson lacked actual authority to make the reward offer, she may have had apparent authority to do so. A principal is bound by an agent's act, even absent actual authority, if the agent has apparent authority to act on the principal's behalf. *Amcore Bank, N.A.*, 759 N.E.2d at 183. Apparent authority exists if (1) the principal consents to or knowingly acquiesces in the agent's act, (2) a third person reasonably concludes that the agent has authority, and (3) the third person relies upon the agent's

apparent authority. *Id.* The appearance of authority must arise from the principal's actions, not those of the agent. *Id.*

The Vernons probably did not consent to or acquiesce in Olsson's reward offer. The Vernons knew that Olsson used the MySpace page to promote Memphisto, but they did not know about the reward offer prior to their show on November 18, more than two weeks after Olsson posted it. If the MySpace page had previously been used to announce contests or reward offers with the Vernons' knowledge and participation, that might support an inference that they acquiesced in Olsson's use of the page to make the \$2,000 reward offer at issue here. Otherwise, however, it is very unlikely that they would be deemed to have consented to or acquiesced in Olsson's \$2,000 offer.

Second, Parker must have reasonably concluded that the reward offer was authorized. To create apparent authority, a principal must act in such a manner as to induce a prudent person to believe that the agent's act has been authorized. *Barnes*, 549 P.2d at 1156. In *Barnes*, a corporate vice president offered a \$100,000 reward on behalf of the corporation. The court held that this offer was sufficiently extraordinary that a reasonably prudent offeree would have inquired to ascertain whether it was indeed authorized by the corporation. *Id.* From the perspective of Parker and other fans of Memphisto, the MySpace page clearly appeared to have been authorized by the band. Readers of the page may well have been unaware that it was maintained by Olsson rather than the band members themselves, and the Vernons encouraged this perception by performing at venues announced on the page and by publicizing the address of the page at those performances. The size of the offer might have elicited skepticism from some potential offerees, but probably not to nearly the same degree as the much larger offer in

Barnes, especially considering that the offer in that case was made thirty years earlier. Furthermore, the offeree in *Barnes* knew that the offer was being made by a corporate officer, whereas Parker probably believed that the offer in this case emanated from the members of the band. It is therefore likely that Parker reasonably believed that the reward offer was authorized by the Vernons.

The third requirement for apparent authority is that Parker relied upon the apparent authority. One claiming apparent authority must have detrimentally relied upon the agent's apparent authority, and that reliance must have been justifiable. *Amcore Bank, N.A.*, 759 N.E.2d at 183. Parker reasonably believed that the reward offer was authorized by the Vernons, and based upon that belief he paid to have their band's name permanently tattooed to his forehead. He relied upon the appearance of authority to his detriment, and his reliance was justified under the circumstances.

Parker reasonably relied upon Olsson's apparent authority to make the reward offer, and did so to his detriment. However, the Vernons probably did not consent to or acquiesce in the offer, and therefore they are not bound by it based upon a theory of apparent authority.

Finally, even if Olsson lacked actual or apparent authority to make the offer, it is possible that the Vernons nonetheless became bound by subsequently ratifying the offer. A principal who ratifies an agent's act is bound by the act even though it was beyond the scope of the agent's authority. *Barnes*, 549 P.2d at 1156; *Newman*, 778 F.2d at 467. Ratification occurs if the principal knows the relevant facts and either chooses to accept the benefits of the act or fails to repudiate it. *Amcore Bank, N.A.*, 759 N.E.2d at 185.

First, the Vernons must have known the relevant facts about the reward offer in order to implicitly ratify it. They learned about the tattoo at their performance on November 18, and probably learned about the \$2,000 reward soon thereafter. After learning the relevant terms of the reward offer, they were in a position to implicitly ratify it.

The Vernons could have ratified the offer by choosing to accept its benefits. Implied ratification results only if the principal has an opportunity to accept or reject the benefit of the unauthorized act. *Id.* Although the Vernons could have declined to pose for the photograph with Parker on November 18, they did not receive substantial benefits from the photograph. Since they stopped performing as Memphisto soon thereafter, it is unlikely that they received any other benefits from Olsson's reward offer.

The other means by which the Vernons could have ratified the offer is by failing to repudiate it. A principal may repudiate an act by promptly disaffirming it to prevent the other party from believing that the act was authorized or ratified. *Barnes*, 549 P.2d at 1156. Since the Vernons apparently never explicitly disavowed the offer, they implicitly ratified it as a consequence of that failure to repudiate.

CONCLUSION

The Vernons probably are contractually bound by the reward offer that Olsson made on their behalf. An offer made by an agent binds the principal if the offer gives rise to a valid contract and the principal either authorizes or ratifies the offer.

Olsson made a valid offer to form a unilateral contract, and Parker accepted the offer by his performance. A unilateral contract is formed when a valid reward offer is

made and another party accepts the offer by performing under the terms of the offer. Olsson's reward offer was sufficiently definite to be a valid offer, and whatever her unexpressed intentions, she manifested an objective intent to be bound by the offer. Parker accepted the offer when he got the tattoo and presented himself to Olsson with it, thereby satisfying the terms of the offer.

The Vernons did not authorize the offer, but they ratified it by failing to repudiate it. Olsson lacked actual authority to make the offer. Since the Vernons did not even know about the reward offer, they did not acquiesce in it and therefore are not liable under an apparent authority theory. However, once the Vernons learned about the offer, they could have disavowed it and prevented Parker from continuing to believe that it was authorized or ratified by them. Since they failed to repudiate the offer promptly, they probably became bound by it under a ratification theory.