

Acceptance by Performance (Unilateral Contracts)

The traditional method of offer and acceptance involves an offer that is accepted by a return promise. A written contract signed by both parties at the bottom represents an offer by the first signee and an acceptance by the second. There are some instances, however, where the offeror will not want merely a return promise—instead, the offeror asks that the offeree perform their end of the proposed deal in order to accept the offer. In such cases, the performance is the necessary signal that the party has accepted the offer and is willing to be bound to the deal. The offeror does not want a promise to perform—actual performance is the only way to accept.

Offers which can only be accepted by performance are sometimes characterized as “unilateral contracts”—called such because one party is asked to complete performance based on the promise from the other party to make the contract. There are special concerns with respect to unilateral contracts that pertain to formation: How do we determine whether a proposed transaction is an offer or merely an invitation to offer, especially when performance is required rather than a simple return promise? When can such offers be revoked? Can they be revoked after the offeree has started their performance? How do we determine when performance is required to accept—or merely a possible way of accepting? What notice must the offeree provide? Does the offeree have to know about the offer if they in fact complete the performance requested by the offer? These issues are explored further in the cases below.

A. Unilateral Offers and Intent to Be Bound

Carlill v. Carbolic Smoke Ball Co.

1 Q.B. 256 (United Kingdom, 1893)

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," inserted in the Pall Mall Gazette of November 13, 1891, and in other newspapers, the following advertisement:

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 preventatives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s., post free. The ball can be refilled at a cost of 5s. Address, Carbolic Smoke Ball Company, 27 Princes Street, Hanover Square, London.

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's, and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the 100£. The defendants appealed.

LINDLEY, L.J.:

We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: "£1000 is deposited with the Alliance Bank, shewing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter — that is, the sincerity of his promise to pay this £100 in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay £100 to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer. ***

But then it is said, "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified." Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open

to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required * * *, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.

We, therefore, find here all the elements which are necessary to form a binding contract enforceable in point of law, subject to two observations. First of all it is said that this advertisement is so vague that you cannot really construe it as a promise — that the vagueness of the language shews that a legal promise was never intended or contemplated. The language is vague and uncertain in some respects, and particularly in this, that the £100 is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, When are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the rest of your life, and I think it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to shew what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which will answer the purpose of the plaintiff.

Possibly it may be limited to persons catching the "increasing epidemic" (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball. Then it is asked, What is a reasonable time? It has been suggested that there is no standard of reasonableness; that it depends upon the

reasonable time for a germ to develop! I do not feel pressed by that. It strikes me that a reasonable time may be ascertained in a business sense and in a sense satisfactory to a lawyer, in this way; find out from a chemist what the ingredients are; find out from a skilled physician how long the effect of such ingredients on the system could be reasonably expected to endure so as to protect a person from an epidemic or cold, and in that way you will get a standard to be laid before a jury, or a judge without a jury, by which they might exercise their judgment as to what a reasonable time would be. It strikes me, I confess, that the true construction of this advertisement is that £100 will be paid to anybody who uses this smoke ball three times daily for two weeks according to the printed directions, and who gets the influenza or cold or other diseases caused by taking cold within a reasonable time after so using it; and if that is the true construction, it is enough for the plaintiff.

I come now to the last point which I think requires attention — that is, the consideration. It has been argued that this is *nudum pactum* — that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise.

It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them

BOWEN, L.J.

I am of the same opinion. . . .

Then it was said that there was no notification of the acceptance of the contract. One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law — I say nothing about the laws of other countries — to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. 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? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

LORD JUSTICE A. L. SMITH: [Opinion omitted.]

Appeal dismissed.

Notes and Questions

1. The Carbolic Smoke Ball is iconic perhaps because it is recognizable across the years as a medical device of dubious value. In *Leonard v. PepsiCo*, Judge Wood noted: “The case arose during the London influenza epidemic of the 1890s. Among other advertisements of the time, for Clarke's World Famous Blood Mixture, Towle's Pennyroyal and Steel Pills for Females, Sequah's Prairie Flower, and Epp's Glycerine Jube–Jubes, appeared solicitations for the Carbolic Smoke Ball.” *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116, 125 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000). As described by Val Ricks, “A Carbolic Smoke Ball is a rubber ball with a short, pipe-like, hollow extension. The extension is covered with a cloth. The ball is filled with carbolic acid in powder form. The user holds the extension under her nose and taps on the ball, which makes the powder arise through the cloth. When the user breaths in the carbolic acid, it induces sneezing.” VAL RICKS, *THE STORY OF CONTRACT LAW: FORMATION* 315 (3d ed 2019).
2. Some cases would seem to have clear answers from a standpoint of fairness or equity but cause courts doctrinal difficulties in resolving them. What doctrinal hurdles did the *Carlill* court overcome in arriving at what, to most people, would be the obvious judgment? Does that indicate problems with the doctrine, or is this just an unusual case with unusual facts?
3. Lord Justice Bowen memorably dismissed the requirement of notice to the offeror here, saying “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?” It makes some sense to say that, as a general rule, there is no notice of performance required beyond the performance itself. And that’s what the Restatement seems to say: “Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification.” Restatement (Second) of Contracts § 54(1). However, in part 2 of § 54, the provision cautions that contractual obligations will be discharged “[i]f an offeree who accepts by rendering a performance has reason to know that the offeror has no adequate means of learning

of the performance with reasonable promptness and certainty.” Under such circumstances, the offeree must use “reasonable diligence” to notify the offeror of acceptance; in the alternative, the notice requirement can be met if the offeror finds out about the performance within a reasonable time, or if the offer specifically states that notification of acceptance is not required. *Id.* § 54(2). These two seemingly contradictory requirements—nestled within the same Restatement provision—reflect conflicts amongst courts between the traditional “no notice” rule and a modern trend putting some onus on offerees to notify the offeror when the offeror might otherwise be in the dark. That trend is reflected in UCC § 2-206(2), which states: “Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.”

Leonard v. PepsiCo, Inc.

[Part II]

88 F. Supp 2d. 116 (Southern District of New York 1999)

[See Part I for discussion of the facts of the case.]

2. Rewards as Offers

In opposing the present motion, plaintiff largely relies on a different species of unilateral offer, involving public offers of a reward for performance of a specified act. Because these cases generally involve public declarations regarding the efficacy or trustworthiness of specific products, one court has aptly characterized these authorities as “prove me wrong” cases. *** The most venerable of these precedents is the case of *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256 (Court of Appeal, 1892), a quote from which heads plaintiff’s memorandum of law: “[I]f a person chooses to make extravagant promises ... he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them.” *Carbolic Smoke Ball*, 1 Q.B. at 268 (Bowen, L.J.).

Other “reward” cases underscore the distinction between typical advertisements, in which the alleged offer is merely an invitation to negotiate for purchase of commercial goods, and promises of reward, in which the alleged offer is intended to induce a potential offeree to perform a specific action, often for noncommercial reasons. In *Newman v. Schiff*, 778 F.2d 460 (8th Cir.1985), for example, the Fifth Circuit held that a tax protestor’s assertion that, “If

anybody calls this show ... and cites any section of the code that says an individual is required to file a tax return, I'll pay them \$100,000," would have been an enforceable offer had the plaintiff called the television show to claim the reward while the tax protestor was appearing. See *id.* at 466–67. The court noted that, like *Carbolic Smoke Ball*, the case “concerns a special type of offer: an offer for a reward.” *Id.* at 465. *James v. Turilli*, 473 S.W.2d 757 (Mo.Ct.App.1971), arose from a boast by defendant that the “notorious Missouri desperado” Jesse James had not been killed in 1882, as portrayed in song and legend, but had lived under the alias “J. Frank Dalton” at the “Jesse James Museum” operated by none other than defendant. Defendant offered \$10,000 “to anyone who could prove me wrong.” See *id.* at 758–59. The widow of the outlaw's son demonstrated, at trial, that the outlaw had in fact been killed in 1882. On appeal, the court held that defendant should be liable to pay the amount offered. See *id.* at 762; see also *Mears v. Nationwide Mutual Ins. Co.*, 91 F.3d 1118, 1122–23 (8th Cir.1996) (plaintiff entitled to cost of two Mercedes as reward for coining slogan for insurance company).

In the present case, the Harrier Jet commercial did not direct that anyone who appeared at Pepsi headquarters with 7,000,000 Pepsi Points on the Fourth of July would receive a Harrier Jet. Instead, the commercial urged consumers to accumulate Pepsi Points and to refer to the Catalog to determine how they could redeem their Pepsi Points. The commercial sought a reciprocal promise, expressed through acceptance of, and compliance with, the terms of the Order Form. As noted previously, the Catalog contains no mention of the Harrier Jet. Plaintiff states that he “noted that the Harrier Jet was not among the items described in the catalog, but this did not affect [his] understanding of the offer.” It should have.

Carbolic Smoke Ball itself draws a distinction between the offer of reward in that case, and typical advertisements, which are merely offers to negotiate. As Lord Justice Bowen explains:

It is an offer to become liable to any one who, before it is retracted, performs the condition.... It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer, as, I think, some learned judge in one of the cases has said.

Carbolic Smoke Ball, 1 Q.B. at 268; see also *Lovett*, 207 N.Y.S. at 756 (distinguishing advertisements, as invitation to offer, from offers of reward made in advertisements, such as *Carbolic Smoke Ball*). Because the alleged offer in this case was, at most, an advertisement to

receive offers rather than an offer of reward, plaintiff cannot show that there was an offer made in the circumstances of this case.

Notes and Questions

1. How does the *Leonard* court distinguish *Carlill* in reaching a different conclusion? Are these cases reconcilable?
2. On a May Sunday in 1987, Amos Cobaugh was playing in a golf tournament on the Fairview Golf Course when he saw adjacent to the ninth tee a new Chevrolet Beretta, together with signs which proclaimed: “HOLE-IN-ONE Wins this 1988 Chevrolet Beretta GT Courtesy of KCLICK-LEWIS Buick Chevy Pontiac \$49.00 OVER FACTORY INVOICE in Palmyra.” Cobaugh then proceeded to hit a hole in one. When he contacted the dealership about collecting his prize, Klick-Lewis refused to deliver the car, saying it had offered the car as a prize for a charity golf tournament two days earlier but had neglected to remove the car and posted signs until the following Monday. Cobaugh sued to compel delivery of the car; is there a contract? What if no one else was there to witness the hole-in-one? See *Cobaugh v. Klick-Lewis, Inc.*, 385 Pa. Super. 587, 561 A.2d 1248 (1989). Is this akin to illegal gambling on games of chance?
3. Attorney J. Cheney Mason, in the course of representing criminal defendant Nelson Serrano, claimed that it would have been physically impossible for his client to have committed a series of murders in the timeline proposed by the prosecution: Serrano would have had to get off from his flight at Atlanta's busy airport, travel to a hotel several miles away, and arrive in that hotel lobby in only twenty-eight minutes. During an interview with NBC News, Mason stated, “I challenge anybody to show me, and guess what? Did they bring in any evidence to say that somebody made that route, did so? State's burden of proof. If they can do it, I'll challenge 'em. I'll pay them a million dollars if they can do it.” After Serrano received a guilty verdict, NBC featured an edited version of Mason's interview in a national broadcast of its “Dateline” television program including his \$1 million challenge. Dustin Kolodziej, then a law student at the South Texas College of Law, saw Mason's interview and decided to try to make the route in 28 minutes. He recorded himself retracing Serrano's alleged route, traveling from the Atlanta airport to the location of the now-defunct hotel within twenty-eight minutes. Kolodziej sent Mason a copy of the recording along with a letter requesting payment. Mason refused payment and denied that he made a serious offer in the interview. Did Kolodziej form a contract with Mason? See *Kolodziej v. Mason*, 774 F.3d 736, 745 (11th Cir. 2014) (“Kolodziej may have learned in his contracts class that

acceptance by performance results in an immediate, binding contract and that notice may not be necessary, but he apparently did not consider the absolute necessity of first having a specific, definite offer and the basic requirement of mutual assent.”).

B. Knowledge of the Offer and Performance

What if a party does everything requested by a unilateral offer but completes performance without knowing about the offer itself? Has a contract been formed by performance?

Glover v. Jewish War Veterans of the United States of America, Post No. 58

68 A.2d 233 (Municipal Court of Appeals for the District of Columbia 1949)

CLAGETT, Associate Judge.

The issue determinative of this appeal is whether a person giving information leading to the arrest of a murderer without any knowledge that a reward has been offered for such information by a non-governmental organization is entitled to collect the reward. The trial court decided the question in the negative and instructed the jury to return a verdict for defendant. Claimant appeals from the judgment on such instructed verdict.

The controversy grows out of the murder on June 5, 1946, of Maurice L. Bernstein, a local pharmacist. The following day, June 6, Post No. 58, Jewish War Veterans of the United States, communicated to the newspapers an offer of a reward of \$500 ‘to the person or persons furnishing information resulting in the apprehension and conviction of the persons guilty of the murder of Maurice L. Bernstein.’ Notice of the reward was published in the newspaper June 7. A day or so later Jesse James Patton, one of the men suspected of the crime, was arrested and the police received information that the other murderer was Reginald Wheeler and that Wheeler was the ‘boy friend’ of a daughter of Mary Glover, plaintiff and claimant in the present case. On the evening of June 11 the police visited Mary Glover, who in answer to questions informed them that her daughter and Wheeler had left the city on June 5. She told the officers she didn't know exactly where the couple had gone, whereupon the officers asked for names of relatives whom the daughter might be visiting. In response to such questions she gave the names and addresses of several relatives, including one at Ridge Spring, South Carolina, which was the first place visited by the officers and where Wheeler was arrested in company with plaintiff's daughter on June 13. Wheeler and Patton were subsequently convicted of the crime.

Claimant's most significant testimony, in the view that we take of the case, was that she first learned that a reward had been offered on June 12, the day after she had given the police

officers the information which enabled them to find Wheeler. Claimant's husband, who was present during the interview with the police officers, also testified that at the time of the interview he didn't know that any reward had been offered for Wheeler's arrest, that nothing was said by the police officers about a reward and that he didn't know about it 'until we looked into the paper about two or three days after that.'

We have concluded that the trial court correctly instructed the jury to return a verdict for defendant. While there is some conflict in the decided cases on the subject of rewards, most of such conflict has to do with rewards offered by governmental officers and agencies. So far as rewards offered by private individuals and organizations are concerned, there is little conflict on the rule that questions regarding such rewards are to be based upon the law of contracts.

Since it is clear that the question is one of contract law, it follows that, at least so far as private rewards are concerned, there can be no contract unless the claimant when giving the desired information knew of the offer of the reward and acted with the intention of accepting such offer; otherwise the claimant gives the information not in the expectation of receiving a reward but rather out of a sense of public duty or other motive unconnected with the reward. 'In the nature of the case,' according to Professor Williston, 'it is impossible for an offeree actually to assent to an offer unless he knows of its existence.' [1 Williston, Contracts, (rev. ed.) § 33.] After stating that courts in some jurisdictions have decided to the contrary, Williston adds, 'It is impossible, however, to find in such a case [that is, in a case holding to the contrary] the elements generally held in England and America necessary for the formation of a contract. If it is clear the offeror intended to pay for the service, it is equally certain that the person rendering the service performed it voluntarily and not in return for a promise to pay. If one person expects to buy, and the other to give, there can hardly be found mutual assent. These views are supported by the great weight of authority, and in most jurisdictions a plaintiff in the sort of case under discussion is denied recovery.'

The American Law Institute in its Restatement of the Law of Contracts follows the same rule, thus: 'It is impossible that there should be an acceptance unless the offeree knows of the existence of the offer.' The Restatement gives the following illustration of the rule just stated: 'A offers a reward for information leading to the arrest and conviction of a criminal. B, in ignorance of the offer, gives information leading to his arrest and later, with knowledge of the offer and intent to accept it, gives other information necessary for conviction. There is no contract.' [Restatement (First) of Contracts, § 53.]

We have considered the reasoning in state decisions following the contrary rule. Mostly, as we have said, they involve rewards offered by governmental bodies and in general are based upon the theory that the government is benefited equally whether or not the claimant gives the information with knowledge of the reward and that therefore the government should pay in any event. [Footnote with cases omitted.] We believe that the rule adopted by Professor Williston and the Restatement and in the majority of the cases is the better reasoned rule and therefore we adopt it. We believe furthermore that this rule is particularly applicable in the present case since the claimant did not herself contact the authorities and volunteer information but gave the information only upon questioning by the police officers and did not claim any knowledge of the guilt or innocence of the criminal but only knew where he probably could be located.

Notes and Questions

1. Must a party have intent to accept the offer while performing the required acts under a unilateral offer, or is knowledge of the offer sufficient?
2. What happens if a party completes some or even most of the performance requested by a unilateral offer without knowing about the offer, but then learns of the offer and completes performance? See Restatement (Second) of Contracts § 51 (“Unless the offeror manifests a contrary intention, an offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance.”).
3. Natalia leaves her back door open one day, and her three cats escape. All three have tags listing their address, but Natalia is fearful for their lives and wants to enlist others to help. She posts signs around the neighborhood with their pictures and the following message: “Three Lost Cats: \$100 reward for each.” Over the next day, Susie finds the first cat and brings her back without knowing of the reward. Jalen sees the sign but returns the second cat out of the goodness of his heart; he doesn’t care about the reward. Finally, Prithi finds the cat and is almost all the way to Natalia’s house to return her when she gets a call from Ken telling her about the reward. Which of these finders is entitled to a \$100 reward?
4. In *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277 (Iowa 1995), an employee brought suit when his employer failed to follow its policies with respect to progressive discipline for employee infractions. (He had been fired for taking a box of pencils to his home.) Although he was vaguely aware of the company’s disciplinary policies, he

had never actually read the employee handbook that contained them. Noting “the traditional position with respect to unilateral contracts in general, that the offeree's performance ‘must have been induced by the promise made,’” the court nevertheless declined to follow “the traditional requirement that knowledge of the offer is a prerequisite to acceptance in the limited context of employee handbook cases.” *Id.* at 284. Noting that their approach was a departure from “traditional ‘bargain-theory’ contract analysis,” the court argued that “it produces ‘the salutary result that all employees, those who read the handbook and those who did not, are treated alike.’ E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 Case W. Res. L. Rev. 203, 209 (1990).” Ultimately, however, the employee could not allege breach of contract because the handbook contained a disclaimer: “This Employee Handbook is not intended to create any contractual rights in favor of you or the Company. The Company reserves the right to change the terms of this handbook at any time.”

C. Revocation of a Unilateral Offer after Performance Begins

There is a famous hypothetical, first attributed to Fordham Law Professor Maurice Wormser, that involves unilateral offers and the Brooklyn Bridge. I. Maurice Wormser, *The True Conception of Unilateral Contracts*, 26 Yale. L.J. 136, 136-38 (1916). A version goes like this: Amy offers \$100 to Barry if Barry walks across the Bridge from Manhattan to Brooklyn. After Barry has been walking across the bridge for some time, Amy tells him that she has revoked his offer. Under traditional common-law contract rules, (a) an offer is revocable anytime prior to acceptance, and (b) a contract is not accepted by performance until the completion of performance. Thus, even though Barry may be almost finished with his walk, Amy can revoke the offer anytime before he reaches Brooklyn.

At least, those were the traditional rules—they are the rules no longer. Concerned about the reliance of offerees who begin performance and cannot recoup the value of what they have already done, the common law changed to protect these mid-performance offerees. As reflected in Restatement (Second) of Contracts § 45, “Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.” Thus, some important caveats: the offer must require acceptance by performance, and a mere promise must be insufficient to accept the offer. Otherwise, once the offeree begins the requested performance, the offer becomes irrevocable. The offeree is not bound to complete performance, but the offeree will not be entitled to return performance

or contractual relief unless their performance is completed. Once the offeree begins performance, they have a reasonable period of time to complete performance before the offer expires.

When an offer requests acceptance by either performance or promise, the Restatement takes a different approach. Once performance has begun, both the offeror and the offeree are bound to complete the deal—the beginning of performance counts as acceptance. Restatement (Second) of Contracts § 62. Thus, if the offeree starts the requested performance, the offeree is on the hook and is in breach if performance is not completed.

While the Brooklyn Bridge hypothetical is somewhat fanciful, the underlying concepts can come into play in a variety of circumstances, including the one below.

Cook v. Coldwell Banker/Frank Laiben Realty Co.

967 S.W.2d 654 (Missouri Court of Appeals 1998)

KATHIANNE KNAUP CRANE, Presiding Judge.

Defendant real estate brokerage firm appeals from a judgment entered on a jury verdict awarding defendant's former salesperson \$24,748.89 as damages for breach of a bonus agreement. Defendant claims that the salesperson failed to make a submissible case in that she did not accept the bonus offer before it was revoked. Defendant also asserts trial court errors relating to instructions, evidence, and closing argument. We affirm.

Plaintiff, Mary Ellen Cook, a licensed real estate agent, worked as a real estate salesperson or agent pursuant to a verbal agreement for defendant Coldwell Banker/Frank Laiben Realty Co. and its predecessors. Plaintiff listed and sold real estate for defendant as an independent contractor. Frank Laiben was a co-owner of defendant.

At a sales meeting in March, 1991, defendant, through Laiben, orally announced a bonus program in order to remain competitive with other local brokerage firms and to retain its agents. The bonus program provided that an agent earning \$15,000.00 in commissions would receive a \$500.00 bonus payable immediately, an agent earning \$15,000.00 to \$25,000.00 in commissions would receive a twenty-two percent bonus, and an agent earning above \$25,000.00 in commissions would receive a thirty percent bonus. Bonuses over the first \$500.00 were to be paid at the end of the year. The first year of the program would be January 1, 1991 to December 31, 1991 and it would continue on an annual basis after that. Laiben kept track of the agents' earnings in a separate bonus account.

At the end of April, 1991, plaintiff surpassed \$15,000.00 in earnings, entitling her to a \$500.00 bonus which defendant paid to her in September, 1991. By September, 1991 plaintiff surpassed \$32,400.00 in commissions.

At another sales meeting in September, 1991, Laiben indicated that bonuses would be paid at a banquet to be held in March of the following year instead of at the end of the year. Plaintiff asked if that meant that an agent had to be “here” in March in order to collect the bonus. Laiben indicated that was what it meant. Plaintiff testified that, at the time of the change in the bonus agreement, she had no intention of leaving defendant, but stayed with defendant until the end of 1991 in reliance on the promise of a bonus.

During 1991 plaintiff was contacted about joining Remax, another real estate brokerage firm. Although she was not initially interested, in January, 1992 she accepted a position with Remax and advised Laiben of her departure. Laiben informed her that she would not be receiving her bonus. At the end of 1991, plaintiff had total earnings of \$75,638.47, which made her eligible for a combined bonus of \$17,391.54. After placing her license with Remax, plaintiff finished closing four or five contracts that she had been working on prior to leaving defendant. In March, 1992 plaintiff sent a demand letter to defendant, seeking payment for the bonus she believed she had earned. Defendant did not pay plaintiff.

On December 17, 1992 plaintiff filed an action against defendant for breach of a bonus contract, seeking damages in the amount of \$18,404.31. She amended this petition to include prejudgment interest. At trial Laiben denied that at the March meeting he had stated the bonuses would be paid at the end of the year and testified that at that meeting he had told the agents the bonuses would not be paid until the following March. The jury returned a verdict in favor of plaintiff and awarded her damages in the amount of \$24,748.89. The court entered judgment in this amount.

In its first point defendant contends that the trial court erred in overruling its motions for directed verdict because plaintiff failed to make a submissible case of breach of the bonus agreement. In particular, defendant argues that plaintiff did not adduce sufficient evidence to establish a reasonable inference that 1) she tendered consideration to support defendant's offer of a bonus, or that 2) she accepted defendant's offer to give a bonus.

A directed verdict is a drastic action and should only be granted where reasonable and honest persons could not differ on a correct disposition of the case. *** In determining whether a plaintiff has made a submissible case in a contract action, we view the evidence in a light most

favorable to plaintiff, presume plaintiff's evidence is true, and give plaintiff the benefit of all reasonable and favorable inferences to be drawn from the evidence. ***

Plaintiff adduced evidence of a unilateral contract offered in March, 1991 to pay a bonus under certain conditions at the end of the year. She also adduced evidence that in September, 1991 defendant attempted to revoke that offer and make the bonus contingent upon the agent's remaining until March of the following year.

A unilateral contract is a contract in which performance is based on the wish, will, or pleasure of one of the parties. *** A promisor does not receive a promise as consideration for his or her promise in a unilateral contract. *** A unilateral contract lacks consideration for want of mutuality, but when the promisee performs, consideration is supplied, and the contract is enforceable to the extent performed. *** An offer to make a unilateral contract is accepted when the requested performance is rendered. *** A promise to pay a bonus in return for an at-will employee's continued employment is an offer for a unilateral contract which becomes enforceable when accepted by the employee's performance. ***

In the absence of any contract to the contrary, plaintiff could terminate her relationship with defendant at any time and was not obligated to earn a certain level of commissions. There was sufficient evidence that the bonus offer induced plaintiff to remain with defendant through the end of 1991 and to earn a high level of commissions for the court to submit the issue of acceptance by performance to the jury.

Defendant next argues that it was free to revoke the first offer with the second offer because, as of the time the second offer was made, plaintiff had not yet accepted the first offer. Defendant maintains that, because plaintiff did not stay until March, 1992, she did not accept the second offer and thus, did not earn the bonus.

Generally, an offeror may withdraw an offer at any time prior to acceptance unless the offer is supported by consideration. *Coffman Industries, Inc. v. Gorman-Taber Co.*, 521 S.W.2d 763, 772 (Mo.App.1975). However, an offeror may not revoke an offer where the offeree has made substantial performance. *Id.* (citing 1Williston on Contracts, Third Edition Section 60A (1957)). Coffman set out the general rule of law as follows:

Where one party makes a promissory offer in such form that it can be accepted by the rendition of the performance that is requested in exchange, without any express return promise or notice of acceptance in words, the offeror is bound

by a contract just as soon as the offeree has rendered a substantial part of that requested performance.

1 Corbin on Contracts Section 49 (1952), quoted in Coffman, 521 S.W.2d at 772. The court stated the rationale for the rule as follows:

The main offer includes a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary promises. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding. (Emphasis supplied.)

Restatement [First] of Contracts Section 45 cmt. b (1932), quoted in Coffman, 521 S.W.2d at 772. Thus, in the context of an offer for unilateral contract, the offer may not be revoked where the offeree has accepted the offer by substantial performance. *Id.* at 771–72.

In this case there was evidence that, before the offer was modified in September, 1991, plaintiff had remained with defendant and had earned over \$32,400.00 in commissions, making her eligible for the offered bonus. This constitutes sufficient evidence of substantial performance.

Plaintiff adduced evidence that defendant offered to pay a bonus at the end of 1991 if she would continue to work for it, that she stayed through 1991 with an intent to accept the offer, that she sold and listed enough property to qualify for all three bonus levels, that defendant knew of plaintiff's performance, that defendant paid \$500.00 of the bonus but did not pay the remainder, and that she was damaged. This evidence was sufficient to make a submissible case for breach of a unilateral contract. Point one is denied.

Notes and Questions

1. How does the *Cook* court's rule about the effect of performance as to a unilateral offer compare with the approach in Restatement (Second) § 45? Which is easier for an offeree to meet?

Sateriale v. R.J. Reynolds Tobacco Co.
697 F.3d 777 (9th Cir. 2012)

FISHER, Circuit Judge.

R.J. Reynolds Tobacco Company (RJR) operated a customer rewards program, called Camel Cash, from 1991 to 2007. Under the terms of the program, RJR urged consumers to purchase Camel cigarettes, to save Camel Cash certificates included in packages of Camel cigarettes, to enroll in the program and, ultimately, to redeem their certificates for merchandise featured in catalogs distributed by RJR. The plaintiffs allege that, in reliance on RJR's actions, they purchased Camel cigarettes, enrolled in the program and saved their certificates for future redemption. They allege that in 2006 RJR abruptly ceased accepting certificates for redemption, making the plaintiffs' unredeemed certificates worthless. The plaintiffs brought this action for breach of contract, promissory estoppel and violation of two California consumer protection laws. *** We hold that the plaintiffs have adequately alleged claims for breach of contract and promissory estoppel, but affirm dismissal of the plaintiffs' claims under the Unfair Competition Law and the Consumer Legal Remedies Act.

I. Background

RJR initiated the Camel Cash customer loyalty program in 1991. RJR represented on Camel Cash certificates, packages of Camel cigarettes and in the media that customers who saved the certificates—called C–Notes—could exchange them for merchandise according to terms provided in a catalog. The C–Notes stated:

USE THIS NEW C–NOTE AND THE C–NOTES YOU'VE BEEN SAVING TO GET THE BEST GOODS CAMEL HAS TO OFFER. CALL 1–800–CAMEL CASH (1800–266–3522) for a free catalog. Offer restricted to smokers 21 years of age or older. Value 1/1000 of 1¢. Offer good only in the USA, and void where restricted or prohibited by law. Check catalog for expiration date. Limit 5 requests for a catalog per household.

According to the complaint, “Certain (but not all) of the Camel Cash catalogs state[d] that Reynolds could terminate the Camel Cash program without notice.”

The plaintiffs are 10 individuals who joined the Camel Cash program by purchasing RJR's products and filling out and submitting signed registration forms to RJR. RJR sent each plaintiff a unique enrollment number that was used in communications between the parties. These communications included catalogs RJR distributed to the plaintiffs containing merchandise that could be obtained by redeeming Camel Cash certificates.

From time to time, RJR issued a new catalog with merchandise offered in exchange for Camel Cash, either upon request, or by mailing catalogs to consumers enrolled in the program. The number of Camel Cash certificates needed to obtain merchandise varied from as little as 100 to many thousands. This encouraged consumers to buy more packages of cigarettes together with Camel Cash and also to save or obtain Camel Cash certificates to redeem them for more valuable items.

RJR honored the program from 1991 to 2006, and during that time Camel's share of the cigarette market nearly doubled, from approximately 4 percent to more than 7 percent. In October 2006, however, RJR mailed a notice to program members announcing that the program would terminate as of March 31, 2007. The termination notice stated:

As a loyal Camel smoker, we [sic] wanted to tell you our Camel Cash program is expiring. C–Notes will no longer be included on packs, which means whatever Camel Cash you have is among the last of its kind.

Now this isn't happening overnight—there'll be plenty of time to redeem your C–Notes before the program ends. In fact, you'll have from OCTOBER '06 though MARCH '07 to go to camelsmokes.com to redeem your C–Notes. Supplies will be limited, so it won't hurt to get there before the rush.

The announcement advised members that they could continue to redeem their C–Notes until March 2007. Beginning in October 2006, however, RJR allegedly stopped printing and issuing catalogs and told consumers that it did not have any merchandise available for redemption. Several of the plaintiffs attempted, without success, to redeem C–Notes or obtain a catalog during the final six months of the program. The plaintiffs had saved hundreds or thousands of Camel Cash certificates that they were unable to redeem.

In November 2009, the plaintiffs filed a class action complaint against RJR.

III. Breach of Contract

We begin by addressing whether the plaintiffs have stated a claim for breach of contract. The plaintiffs do not dispute that RJR had the right to terminate the Camel Cash program effective March 31, 2007, but allege that RJR breached a contract by refusing to redeem C–Notes during the six months preceding program termination. RJR challenges the plaintiffs' contract claim on four grounds: the absence of an offer, indefiniteness, lack of mutuality of obligation

(premised on RJR's right to terminate its contractual obligations) and untimeliness. We address RJR's contentions in turn.

A. Existence of an Offer

1. Bilateral Contract

As an initial matter, we are not persuaded that the plaintiffs have alleged the existence of an offer to enter into a bilateral contract. “A bilateral contract consists of mutual promises made in exchange for each other by each of the two contracting parties.” *Sully–Miller Contracting Co. v. Gledson/Cashman Constr., Inc.*, 103 Cal.App.4th 30, 126 Cal.Rptr.2d 400, 403 (2002) (quoting Corbin on Contracts § 1.23 (rev. ed. 1993)) (internal quotation marks omitted). Both sides of the bargain must have made promises. Here, the plaintiffs have identified an alleged promise by RJR (to allow customers to redeem Camel Cash certificates for rewards), but they have not pointed to any promise they made to RJR. Nor do they argue that RJR sought a return promise in exchange for its own promise to allow consumers to exchange C–Notes for merchandise. They argue instead the requirements for a bilateral contract are met because they agreed to certain terms and conditions when they enrolled in the Camel Cash program. Nothing in the complaint, however, suggests that these terms were anything more than conditions that the plaintiffs were required to satisfy to trigger RJR's duty to perform, as opposed to promises that the plaintiffs were bound to perform to avoid incurring their own contractual liability. *** The plaintiffs have not alleged that they were bound to do anything. They therefore have not alleged the existence of an offer to enter into a bilateral contract.

2. Unilateral Contract

We reach a different conclusion as to the plaintiffs' theory that RJR made an offer to enter into a unilateral contract. In contrast to a bilateral contract, a unilateral contract involves the exchange of a promise for a performance. See *Harris v. Time, Inc.*, 191 Cal.App.3d 449, 237 Cal.Rptr. 584, 587 (1987). The offer is accepted by rendering a performance rather than providing a promise. See Restatement § 45 cmt. a. “Typical illustrations are found in offers of rewards or prizes....”

RJR argues that its C–Notes, whether read in isolation or in combination with the catalogs, were not offers, but invitations to make an offer. RJR relies on the common law's general rule that “[a]dvertisements of goods by display, sign, handbill, newspaper, radio or television are

not ordinarily intended or understood as offers to sell.” Id. § 26 cmt. b. RJR emphasizes that two judicial decisions have applied this general rule to customer rewards programs similar to the Camel Cash program, see *Leonard v. Pepsico, Inc.*, 88 F.Supp.2d 116, 122–27 (S.D.N.Y.1999); *Alligood v. Procter & Gamble Co.*, 72 Ohio App.3d 309, 594 N.E.2d 668, 668–70 (1991) (per curiam), and urges us to apply the rule here as well. We decline to do so.

. . . [A]ssuming California law incorporates the common law rule, that rule includes an exception for offers of a reward, including offers of a reward for the redemption of coupons. As a leading contract law treatise explains,

It is very common, where one desires to induce many people to action, to offer a reward for such action by general publication in some form. A statement that plausibly makes an offer of this kind must be reasonably interpreted according to its terms and the surrounding circumstances. If the statement, properly interpreted, calls for the performance or commencement of performance of specific acts, action in accordance with such an interpretation will close a contract or make the offer irrevocable. There are many cases of an offer of a reward for the capture of a person charged with crime, for desired information, for the return of a lost article, for the winning of a contest, or for the redemption of coupons. In addition, advertisements placed by buyers inviting sellers to ship goods without prior communication are clear cases of offers. The contracts so made are almost always unilateral.

Corbin on Contracts (hereinafter Corbin) § 2.4 (2012) (emphasis added) (footnotes omitted). RJR does not discuss this exception, relying instead on *Leonard* and *Alligood*. Several courts, however, have applied the exception to customer rewards programs. See, e.g., *Payne v. Lautz Bros.*, 166 N.Y.S. 844, 845–46, 848 (N.Y.City Ct.1916) (reward coupons included with packages of soap wrappers), aff'd without opinion, 168 N.Y.S. 369 (N.Y.Sup.), aff'd without opinion, 185 A.D. 904, 171 N.Y.S. 1094 (1918), cited with approval in Corbin § 2.4 n.14; *Reynolds v. Philip Morris U.S.A., Inc.*, No. 05–cv–1876 (S.D.Cal. June 5, 2007) (order denying defendant's motion for summary judgment) (reward points obtained by purchasing Marlboro cigarettes), rev'd on other grounds, 332 Fed.Appx. 397 (9th Cir.2009); *Wolens v. Am. Airlines, Inc.*, 157 Ill.2d 466, 193 Ill.Dec. 172, 626 N.E.2d 205, 208 (1993) (reward miles awarded for flying on American Airlines), rev'd on other grounds, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995).

Like these courts, we see no justification for applying the general common law rule, rather than the common law exception, to circumstances such as those presented here. The common

law rule that advertisements ordinarily do not constitute offers arose to address a specific problem—the potential for over-acceptance—not applicable here. Professor Farnsworth explains that an offer ordinarily does not exist

when a proposal for a limited quantity has been sent to more persons than its maker could accommodate. ... Otherwise, supposing a shopkeeper were sold out of a particular class of goods, thousands of members of the public might crowd into the shop and demand to be served, and each one would have a right of action against the proprietor for not performing his contract. A customer would not usually have reason to believe that the shopkeeper intended exposure to the risk of a multitude of acceptances resulting in a number of contracts exceeding the shopkeeper's inventory.

E. Allan Farnsworth, *Contracts* (hereinafter Farnsworth) § 3.10, at 134 (4th ed. 2004) (footnote and internal quotation marks omitted). This problem arises in the case of ordinary advertisements for the sale of goods or services, but not here. First, RJR's ostensible purpose in promoting the Camel Cash program was not to sell a limited inventory, but to induce as many consumers as possible to purchase Camel cigarettes. Second, RJR could not have been trapped into a situation in which acceptances exceeded inventory. RJR alone decided how many C-Notes to distribute, so it exercised absolute control over the number of acceptances. As Farnsworth explains, “if the very nature of a proposal restricts its maker's potential liability to a reasonable number of people, there is no reason why it cannot be an offer.” *Id.* at 135.

For these reasons, we find no reason to presume that RJR's communications did not constitute an offer merely because they were addressed to the general public in the form of advertisements. The operative question under California law, therefore, is simply “whether the advertiser, in clear and positive terms, promised to render performance in exchange for something requested by the advertiser, and whether the recipient of the advertisement reasonably might have concluded that by acting in accordance with the request a contract would be formed.” *Donovan*, 109 Cal.Rptr.2d 807, 27 P.3d at 710. Construing the complaint in the light most favorable to the plaintiffs, and drawing all reasonable inferences from the complaint in the plaintiffs' favor, see *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009); *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir.2005), we conclude that the plaintiffs have adequately alleged the existence of an offer to enter into a unilateral contract, whereby RJR promised to provide rewards to customers who purchased Camel cigarettes, saved Camel Cash certificates and redeemed their certificates in accordance with the catalogs' terms.

We reach this conclusion in light of the totality of the circumstances surrounding RJR's communications to consumers: the repeated use of the word "offer" in the C-Notes; the absence of any language disclaiming the intent to be bound; the inclusion of specific restrictions in the C-Notes ("Offer restricted to smokers 21 years of age or older"; "Offer good only in the USA, and void where restricted or prohibited by law"; "Check catalog for expiration date"; "Limit 5 requests for a catalog per household"); the formal enrollment process, through which consumers submitted registration forms and RJR issued enrollment numbers; and the substantial reliance expected from consumers.³ *Donovan* explains that under the common law "advertisements have been held to constitute offers where they invite the performance of a specific act without further communication and leave nothing for negotiation." 109 Cal.Rptr.2d 807, 27 P.3d at 710. These requirements are satisfied here. RJR's alleged offer invited the performance of specific acts (saving C-Notes and redeeming them for rewards in accordance with the catalog) without further communication, and leaving nothing for negotiation.

RJR properly emphasizes that the alleged offer left aspects of RJR's performance to RJR's discretion. The offer did not specify when future catalogs would be issued, what rewards merchandise they would include, what quantities of merchandise would be available or how many C-Notes would be required to exchange for particular items. The plaintiffs, however, do not allege that these were essential terms. See Compl. ¶ 31 ("[I]t was not a contract to obtain a specific item or good, such as a 'Joe Camel' jacket or ashtray."). Instead, they allege a contract the essence of which was their general right to redeem their Camel Cash certificates, during the life of the program, for whatever rewards merchandise RJR made available, with RJR's discretion limited only by the implied duty of good faith performance. The presence of discretion thus does not preclude the existence of an offer.

³ The plaintiffs' substantial reliance distinguishes this case from cases involving garden-variety advertisements. To take advantage of the Camel Cash program, consumers were expected to purchase Camel cigarettes and accumulate Camel Cash certificates for a period of weeks, months or even years. See Compl. ¶ 29 (alleging that "[t]he number of Camel Cash certificates needed to obtain merchandise ... varied from as little as one hundred to many thousands," and noting that RJR "further encouraged plaintiffs and other Class members to collect their Camel Cash (as opposed to redeeming them as soon as possible) because merchandise listed in defendant's catalogs for redemption by a greater number of coupons was disproportionately more valuable than the merchandise which could be redeemed by fewer coupons"). Citing an offer for a reward as an example, Corbin explains that "a proposal is likely to be deemed to be an offer if it is foreseeable that the addressee of the proposal will rely upon it." Corbin § 2.2. This is so because a member of the public is unlikely to undertake substantial reliance in the absence of a binding commitment from the offeror—i.e., on the mere chance that the offeror will perform.

B. Definiteness

RJR argues that, even if there was an offer, any contract arising from it would be too indefinite to be enforced. To be enforceable under California law, a contract must be sufficiently definite “for the court to ascertain the parties' obligations and to determine whether those obligations have been performed or breached.” *Bustamante v. Intuit, Inc.*, 141 Cal.App.4th 199, 45 Cal.Rptr.3d 692, 699 (2006) (quoting *Ersa Grae Corp. v. Fluor Corp.*, 1 Cal.App.4th 613, 2 Cal.Rptr.2d 288, 294 (1991)) (internal quotation marks omitted). “The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.” *Id.* (quoting Restatement § 33(2)) (internal quotation marks omitted).

1. *Existence of a Breach*

The first of these requirements is satisfied here. The plaintiffs do not claim that they were entitled to particular merchandise, but that RJR was required to make reasonable quantities of rewards merchandise available during the life of the Camel Cash program—a duty RJR allegedly breached by failing to make any merchandise available after October 1, 2006. This alleged breach is readily discernible. See Restatement § 33 cmt. b (“[T]he degree of certainty required may be affected by the dispute which arises and by the remedy sought. Courts decide the disputes before them, not other hypothetical disputes which might have arisen.”).

2. *Giving an Appropriate Remedy*

The second requirement—that the contract provide a basis for giving an appropriate remedy—presents a closer question. As noted, RJR exercised considerable discretion in deciding what rewards would be offered. We cannot know precisely what merchandise the plaintiffs might have received had RJR fully performed its obligations, an uncertainty that could inhibit the process of determining a remedy. ***

It is not clear, however, that damages could not be rationally assessed here. RJR's internal documents assigned C–Notes values, such as 15 cents per \$1 note, that might afford a basis for assessing damages. In the alternative, RJR's final rewards catalog and pre-breach performance might provide a basis for giving an appropriate remedy.

We should not lightly conclude, especially at this early stage in the proceedings, that there is no basis for determining an appropriate remedy where, as here, the allegations suggest that the parties intended to contract. *** Here, the allegations of the complaint support the inference

that the parties intended to contract. The plaintiffs enrolled in the Camel Cash program, purchased Camel cigarettes and collected Camel Cash certificates. RJR accepted the plaintiffs' registration forms, issued them enrollment numbers, performed under the program for 15 years and, according to internal RJR documents, treated outstanding C-Notes as a binding obligation and an outstanding financial liability. According to the documents, RJR closely monitored its exposure under the program, and even went so far as to create a financial reserve to cover that exposure—actions consistent with a legally binding commitment.

We also consider the plaintiffs' substantial reliance on RJR's promises, as well as the substantial benefits RJR accrued by virtue of consumers' reliance on the Camel Cash program. Corbin explains that, “[i]f one party has greatly benefited by part performance or if one party has relied extensively on the agreement, the court should go to great lengths to find a construction of the agreement that will salvage it.” Corbin § 4.3 (footnotes omitted). For these reasons, dismissal for indefiniteness is unwarranted.

C. Mutuality of Obligation & RJR's Right to Terminate

RJR argues that the plaintiffs' contract claim must be dismissed for lack of mutuality of obligation because RJR had an unrestricted right to terminate the Camel Cash program at will, and without notice. ***

Given our conclusion that the plaintiffs have alleged an offer to enter into a unilateral rather than a bilateral contract, RJR's reliance on mutuality of obligation necessarily fails: that doctrine does not apply to unilateral contracts. RJR's argument nonetheless raises important questions about the viability of the plaintiffs' contract claim. If, in fact, RJR reserved an unrestricted right to terminate the Camel Cash program, without notice, then the plaintiffs' contract claim may well be untenable.

First, a reservation of an unrestricted right to terminate could have precluded RJR's communications from constituting an offer. As Corbin explains, if an offeror expressly reserves not only the right to revoke the offer at will and without notice, but also the unrestricted right not to perform, then the offer is not legally effective as an offer at all: “A purported offer that reserves the power to withdraw at will even after an acceptance should not be described as an offer at all, but as an invitation to submit an offer.” Corbin § 2.19.8

Second, if RJR reserved an unrestricted right to terminate the Camel Cash program at any time and without notice, then RJR's promise to perform could be deemed illusory, and hence unenforceable. As Farnsworth explains, when a promise “appears on its face to be so

insubstantial as to impose no obligation at all on the promisor—who says, in effect, ‘I will if I want to’ ”—the promise is not enforceable. Farnsworth § 2.13, at 75. Accordingly, an enforceable termination clause that gives a promisor an unrestricted power to terminate a contract at any time, without notice, renders the promise illusory and unenforceable, at least so long as the purported contract remains wholly executory.

Either of the foregoing principles could possibly serve to defeat the plaintiffs' contract claim here. The complaint, however, does not definitively allege that RJR reserved an unrestricted right to terminate its duty to perform. The complaint alleges only that “[c]ertain (but not all) of the Camel Cash catalogs state that Reynolds could terminate the Camel Cash program without notice.” The complaint, moreover, alleges that RJR “waived any right to terminate without notice when, on or about October 1, 2006, it announced by mailing a notice to program members, that the program would terminate as of March 31, 2007.” Dismissal is therefore unwarranted on the current record.

The summary decree is reversed and the cause remanded for further proceedings.

Notes and Questions

1. Review the various points of the court’s decision. Which doctrinal determination do you think is weakest?
2. Is there a public policy argument against enforcement of the Camel Cash program, given the interest of not promoting smoking?