When Tweets Get Real: Applying Traditional Contract Law Theories to the World of Social Media

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Back in November 2010, rapper Ryan Leslie announced that his personal laptop had been stolen out of his Mercedes.[2] Leslie "tweeted" what appeared to be an offer of a million dollar reward for the safe return of the MacBook.[3] When one of his Twitter followers, Armin Augstein, found the laptop and attempted to return it to Leslie to collect the million dollar reward, Leslie refused to pay Augstein.[4] As a result, Augstein sued Leslie.[5]

Similarly, in May 2008, Pittsburgh Steelers running back Rashard Mendenhall entered into a three-year Talent

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[2] *See Ryan Leslie Offers One Million Dollars for Stolen Laptop Return*, SINGERSROOM (Nov. 8, 2010), http://singersroom.com/content/2010-11-08/Ryan-Leslie-Offers-One-Million-Dollars-For-Stolen-Laptop-Return/ (stating that Ryan Leslie had his laptop stolen out of his Mercedes).

[3] *See* Rob Markman, *Watch The Throne Tracks Lost With Ryan Leslie's Laptop,* MTV.COM (Oct 4, 2012, 1:07 PM), *http*://www.mtv.com/news/articles/1694935/ryan-leslie-watch-the-throne-lost-tracks-laptop.jhtml (explaining that, "desperate to reclaim the work that he'd lost, Leslie offered a million-dollar reward").

[4] *See* Rob Markman, *Ryan Leslie Sued For $1 Million Over Laptop Reward*, MTV.COM (Oct. 26, 2011, 6:01 PM), http://www.mtv.com/news/articles/1673241/ryan-leslie-laptop-lawsuit.jhtml

[5] *See* Markman, *Watch The Throne Tracks Lost With Ryan Leslie's Laptop,* (stating that "the singer is being sued in a trial that is scheduled to start on October 22").

Agreement with Hanesbrands[6] to promote and advertise Hanesbrands' products that were sold under the Champion trademark.[7] The Talent Agreement contained a Morals Clause that provided Hanesbrands the right to terminate the agreement if Mendenhall were to become the subject of a public controversy.[8] On May 2, 2011, just one day after the President announced the capture and death of Osama Bin Laden, Mendenhall put out a series of controversial tweets relating to the matter.[9] Based on these tweets, just a few days later on May 5, 2011, Hanesbrands informed Mendenhall of their intent to terminate their Talent Agreement and Mendenhall filed suit against Hanes for breach of contract.[10]

While the popularity of social networking in today's society continues to sky rocket, so do the inevitable issues surrounding the legality of statements and agreements made using social media sites such as Twitter. This paper will

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[6] *See* Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 719 (M.D.N.C. 2012) (stating that "In May 2008, Mr. Mendenhall and Hanesbrands, a Maryland corporation with its principal place of business located in Winston-Salem, North Carolina, entered into a Talent Agreement").

[7] *See id.* ("Under the terms of the Talent Agreement, Hanesbrands would use the services of Mr. Mendenhall to advertise and promote Hanesbrands' products sold under the Champion trademark.").

[8] *See id.* at 719-20 (citing the agreement that stated, "If Mendenhall commits or is arrested for any crime or becomes involved in any situation or occurrence (collectively, the 'Act') tending to bring Mendenhall into public disrepute, contempt, scandal, or ridicule, or tending to shock, insult or offend the majority of the consuming public or any protected class or group thereof, then we shall have the right to immediately terminate this Agreement.").

[9] Dan Pompei, *Mendenhall's Tweets Draw Criticism*, CHICAGO TRIBUNE (May 3, 2011), http://articles.chicagotribune.com/2011-05-03/sports/ct-spt-0504-rashard-mendenhall-osama-20110503_1_tweet-rashard-mendenhall-twitter-comments.

[10] *See Mendenhall*, 856 F. Supp. 2d at 721 ("In a letter dated May 5, 2011, and addressed to Rob Lefko, one of Mr. Mendenhall's representatives at Priority Sports and Entertainment, Hanesbrands' Associate General Counsel, L. Lynette Fuller–Andrews, indicated that it was Hanesbrands' intent to terminate the Talent Agreement effective Friday, May 13, 2011.").

address recent cases and controversies involving Twitter, while discussing and applying contract law—both traditional and modern—to such incidents.

Part I of this paper will give a background on Twitter, discussing its role and popularity in today's society. Part II will discuss the legal issues involved with contractual agreements made over Twitter, and whether the reward tweet authored by Ryan Leslie indeed constituted a valid offer. Part III of this paper will address the case of *Mendenhall v. Hanesbrands, Inc.*, and will discuss the issue of whether a tweet made in violation of a Morals Clause is sufficient grounds for termination of a Talent Agreement contract. Part IV will discuss scandals involving public figures that took place as a result of Twitter. Finally, part V will conclude and discuss legal issues that may arise in the future.

I. ABOUT TWITTER

Twitter, a social media site started in 2006[11], is a "real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting."[12] Users are able to create and share "tweets," which are postings that can be up to 140 characters in length.[13]

Unlike lengthy blog posts, Twitter gives users the opportunity to say what's on their mind without having to

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[11] *See* Eric Jackson, *Facebook's MySpace Moment: Why Twitter Is Already Bigger Than Facebook*, FORBES.COM (September 26, 2012, 4:05 PM), http://www.forbes.com/sites/ericjackson/2012/09/26/f acebooks- myspace-moment-why-twitter-is-already-bigger-than-facebook/ (The article states that "Twitter was started when Jack Dorsey sent an SMS message at 9:50pm PT on March 21, 2006.").

[12] *See* TWITTER, https://twitter.com/about.

[13] *See id.* ("At the heart of Twitter are small bursts of information called Tweets. Each Tweet is 140 characters long, but don't let the small size fool you—you can discover a lot in a little space. You can see photos, videos and conversations directly in Tweets to get the whole story at a glance, and all in one place.").

take the time or energy to write a full-length posting at regular intervals.[14] Twitter has been called "microblogging" due to the fact that a tweet contains 140 characters or less.[15] Each tweet is made in order to answer the question "what are you doing?" and is then published in the twitter feed of those users who "follow."[16]

Perhaps the most well-known Twitter feature is the hashtag. Hashtags are words or phrases that follow a "#" symbol.[17] They are used as a way for Twitter users to find others who are talking about the same subject.[18] For example, if someone hashtags the word "winning," the likely results following a click of the linked word would yield several others who are discussing things such as great accomplishments, competition results, or Charlie Sheen.[19]

Among the site's millions of users are several

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[14] *See* Anita Hamilton, *Why Everyone's Talking about Twitter*, TIME (March 27, 2007), http://www.time.com/time/business/article/0,8599,1603637,00.html#ixzz2CPC9Xncb (The article states that those who have "ever fancied yourself a blogger" but did not have the time to keep one can "set your inner blogger free" using Twitter.).

[15] *Id.* (stating that while some people refer to Twitter as microblogging or moblogging, the author likes to think of it as "simply blogging for regular people").

[16] *Id.* (explaining that tweets are limited to 140 characters, and are used to answer the question "what are you doing?").

[17] *See* Ashley Parker, *Twitter's Secret Handshake*, N.Y. TIMES (June 10, 2011), http://www.nytimes.com/2011/06/12/fashion/hashtags-a-new-way-for-tweets-cultural-studies.html?_r=1&pagewanted=all (defining hashtags as "words or phrases preceded by the # symbol").

[18] *See id.* (describing hastags as a way for users to "organize and search messages" with words or phrases within real-time updates).

[19] *See id.* (explaining that when Charlie Sheen had his "meltdown" back in 2011, he tweeted the phrase "#winning" and it immediately caught on and highlighted hashtags as "one of the newest ways technology has changed how we communicate").

celebrities and public figures.[20] While Twitter is a great way to instantly exchange information in "real-time," it is no stranger to public scandals[21] and legal issues.

II. TWEETS FOR KEEPS: CONTRACT FORMATION & SOCIAL MEDIA

On March 23, 2011, the United States District Court for the Southern District of Florida held that an instant message exchange effectively modified a written agreement which contained a "no-oral modification clause."[22] In the case of *CX Digital Media v. Smoking Everywhere*, CX Digital Media, Inc., ("CX") filed suit against Smoking Everywhere, Inc. ("Smoking Everywhere") for damages owed based on a modification agreement, which was made entirely through instant messages.[23]

Despite Smoking Everywhere's argument that an online conversation lacks the "specificity and directness" needed to form a valid contract, the court ruled otherwise.[24] Judge Cecilia Altonaga held that the conversation at issue was indeed an "unsigned writing" that contained valid offer and

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[20] *See* Kelly Phillips Erb, *Microblogging: Is Twitter the New Blog?*, 31-AUG PA. LAW 34 (2009) (stating that the "appeal of Twitter has gone beyond celebrities and politicians," including President Barack Obama, who has a Twitter account).

[21] *See* Porcher L. Taylor, III. et. al., *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in A New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT. L.J. 65, 110-11 (2010) (noting that "armed with Twitter, talent are just possibly one tweet away from scandal.").

[22] *See* CX Digital Media, Inc. v. Smoking Everywhere, Inc., No. 09-62020, 2011 U.S. Dist. LEXIS 29999, at *54-55 (S.D. Fla. Mar. 23, 2011) (holding that an instant messaging conversation could modify a contract).

[23] *See id.* at *7-11 (reviewing a day-long instant messaging conversation between the parties where they discussed a number of topics, one of which was the modification agreement in question).

[24] *See id.* at *30 (S.D. Fla. Mar. 23, 2011) (citing how Smoking Everywhere argued that an online conversation lacks the "specificity and directness" needed in order to modify a contract).

acceptance.[25] Essentially, the ruling made it clear that, where a contract requires a written and signed modification, an online instant message exchange is sufficient to meet that requirement.

The *Cx Digital Media* case tells us that contracts formed over the internet are just as binding and valid as those that are formed in person.[26] "Tweets" are similar to instant messages, and if a dispute involving a sales contract formed over Twitter takes place in the future, the *CX Digital Media* case will likely be persuasive authority. A similar decision was rendered in the case of *Augstein v. Leslie*, which involved a reward offer.

A. Tweeter Beware: Reward Offers Can Be Binding

While touring Germany, rapper Ryan Leslie's laptop was stolen.[27] The laptop's hard drive contained Leslie's intellectual property, including unreleased tracks that were scheduled to be included in his upcoming album.[28] As a result, Leslie posted a video to YouTube offering a million

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[25] *Id.* at *40 (the court reasoned that, because Smoking Everywhere was aware of the changes and did not complain, the "signed-writing" argument did not hold weight); *See* WILLISTON ON CONTRACTS § 29:43 (4th ed. 1999) ("[W]here, following the oral modification, one of the parties materially changes position in reliance on the oral modification, the courts are in general agreement that the other party will be held to have waived or be estopped from asserting the no oral modification clause.").

[26] *CX Digital Media*, 2011 U.S. Dist. LEXIS at 37 (ruling that the "instant-message conversation, as an unsigned writing" was sufficient enough under Delaware law to properly modify the "Insertion Order" in question).

[27] Augstein v. Leslie, 2012 U.S. Dist. LEXIS 2919, at *1 (S.D.N.Y. Jan. 10, 2012) ("Defendant, a New York resident, advertised a $1 million reward for the return of his laptop and other personal property that was stolen in Germany").

[28] *See* Rob Markman, *Ryan Leslie Sued For $1 Million Over Laptop Reward*, MTV.COM (Oct. 26, 2011, 6:01 PM), http://www.mtv.com/news/articles/1673241/ryan-leslie-laptop-lawsuit.jhtml (quoting Leslie stating that, "I lost my computer out here in Germany. I actually had my whole new album on there, which I had been working on in secret, and it got stolen.").

dollar reward for the return of the laptop and later "tweeted" the link to the video.[29] Armin Augstein found the laptop in a park while walking his dog.[30] However, Leslie refused to pay Augstein the promised million dollar reward.[31] As a result, Augstein brought suit against Leslie in the United States District Court for the Southern District of New York.

This first issue to be determined by the court was whether the tweet Leslie made containing the $1 million dollar reward for the return of the laptop constituted an offer, or whether it was simply an invitation to negotiate. Leslie argued that the reward was not an offer, it was simply "an advertisement."[32] According to Leslie, if it was indeed an advertisement, no contract resulted.[33] The test of whether a binding obligation may originate in advertisements addressed to the general public is "whether the facts show that some performance was promised in positive terms in return for something requested."[34]

In the classic case of *Lefkowitz v. Great Minneapolis Surplus Store, Inc*. a similar issue arose.[35] In *Lefkowitz,* the defendant, Great Minneapolis Surplus Store ("GMSS"),

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[29] *See* Greg Watkins, *Producer Ryan Leslie Sued For $1 Million Over Failed Laptop Reward Payment*, ALLHIPHOP.COM (Oct. 25, 2011, 9:30 AM), http://allhiphop.com/2011/10/25/producer-ryan-leslie-sued-for-1-million-over-failed-laptop-reward-payment/ (Stating that Ryan Leslie "took to Twitter" to eventually offer a $1 million reward).

[30] *See* Adrian Chen, *If You Offer a $1 Million Bounty for Your Missing Laptop, You Must Pay It*, GAWKER.COM (Oct. 25, 2011, 3:41 PM), http://gawker.com/5853256/if-you-offer-a-1-million-bounty-for-your-missing-laptop-you-must-pay-it (stating that Augstein found the missing laptop "while walking his dog in the park.").

[31] *See* Augstein v. Leslie, No. 11 Civ. 7512(HB), 2012 WL 4928914, at *1 (S.D.N.Y. Oct. 17, 2012) ("After Augstein returned the laptop and hard drive, Leslie refused to pay the reward . . . . ").

[32] *See id.* at *3.

[33] *See id.* ("Advertisements, Leslie argues, are generally considered offeres.").

[34] 1 WILLISTON ON CONTRACTS § 4:10 (4th ed. 1999).

[35] Lefkowitz v. Great Minneapolis Surplus Store, Inc., 86 N.W.2d 689 (1957).

placed an advertisement in a local newspaper stating that a stole worth $139.50 was available for only $1, on a first come first serve basis.[36]

Like Leslie, GMSS contended that it was simply an advertisement and a "unilateral offer" that could be withdrawn without notice.[37] GMSS also argued that an advertisement is not an offer, but rather an invitation for an offer.[38]

The court in *Lefkowitz* ruled for the plaintiff, concluding that the advertisement in question "was a clear, definite, and explicit offer of sale by defendant and left nothing open for negotiation, and plaintiff, who was first to appear at defendant's place of business to be served, was entitled to performance on part of defendant." Based on the *Lefkowitz* ruling, it appears Leslie's statement that "I am offering a reward of $20,000," followed later by a tweet which reaffirmed followers that Leslie was "absolutely continuing my Euro tour + I raised the reward for my intellectual property for $1mm" indeed constituted an offer and left nothing open for negotiation.

Leonard v. Pepsico, Inc. is another similar case which involved the question of whether a statement made was an

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[36] *See id.* at 690 (stating that the defendant published an advertisement that stated "Saturday 9 A.M. Sharp 3 Brand New Fur Coats. Worth to $100.00. First Come First Served $1 Each").

[37] *See id.* (explaining that the defendant contended that "a newspaper advertisement offering items of merchandise for sale at a named price is a 'unilateral offer' which may be withdrawn without notice").

[38] *See id.* at 690-91 (explaining that the defendant contended that "advertisements are not offers which become contracts as soon as any person to whose notice they may come signifies his acceptance by notifying the other that he will take a certain quantity of them", but rather "an invitation for an offer of sale on the terms stated, which offer, when received, may be accepted or rejected and which therefore does not become a contract of sale until accepted by the seller; and until a contract has been so made, the seller may modify or revoke such prices or terms").

offer or simply an advertisement.[39] In *Leonard*, a television commercial viewer brought suit against Pepsico, Inc., asking the court to enforce an alleged contractual commitment of Pepsico to provide a fighter jet aircraft in return for "Pepsi points."[40] The "Pepsi points" promotion in question "encouraged consumers to collect 'Pepsi Points' from specially marked packages of Pepsi or Diet Pepsi and redeem these points for merchandise featuring the Pepsi logo."[41]

In a commercial advertisement some of the "prizes," along with their point values, were displayed and towards the end of the commercial the words "HARRIER FIGHTER 7,000,000 PEPSI POINTS" appeared.[42] Leonard attempted to collect the 7,000,000 Pepsi Points needed, and when Pepsi refused to honor the offer and provide the fighter jet, Leonard brought suit against Pepsi.

The United States District Court for the Southern District of New York ruled in favor of defendant Pepsico. However, their reasoning for doing so was based on the fact that, although the fighter jet was featured on the commercial advertisement, the fighter jet did not appear in the product catalog featuring all of the items.[43] In contrast, the *Augstein* reward offer was *not* followed with a formal writing of any sort.

Unlike the commercial in question in the *Leonard* case, Leslie's conduct:

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[39] *See* Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff'd,* 210 F.3d 88 (2d Cir. 2000).
[40] *See generally id*.
[41] *Id.* at 118.
[42] *See id.* at 119 (explaining that the commercial ended by a military drumroll sounding, followed by the following words appearing on the screen: "HARRIER FIGHTER 7,000,000 PEPSI POINTS").
[43] *See id.* at 124 (stating that the case is distinguishable from *Lefkowitz* because "First, the commercial cannot be regarded in itself as sufficiently definite, because it specifically reserved the details of the offer to a separate writing, the Catalog").

> "was meant to induce performance. Leslie was not seeking a promise from an individual who would return belongings, rather he was seeking performance—the actual return of his property. In addition, his videos and other commentary cannot be reasonably understood as an invitation to negotiate because, similarly, Leslie was not soliciting help to find his property, but the actual return itself."[44]

B. Do Tweets Pass the Reasonable Objective Person Test?

The second issue involved in the case of *Augstein v. Leslie* was whether a reasonable person would have understood the offer made via Leslie's tweet to be an offer, rather than an invitation to negotiate.[45] Because there is sparse case law considering whether an offer can be made over Twitter, several factors should be considered. The traditional "reasonable objective person test" must be

[44] *See* Augstein v. Leslie, No. 11 Civ. 7512(HB), 2012 WL 4928914, at *3 (S.D.N.Y. Oct. 17, 2012).

[45] *See id.* (stating that Leslie relied "on the fact that the offer was conveyed over YouTube (a website where many advertisements and promotional videos are shared, along with any number of other types of video) to undermine the legitimacy of the offer.").

applied.[46]

In the classic well-known contracts law case *Lucy v. Zehmer*, the reasonable person standard is put to the test.[47] In this case, two men negotiate the sale of a farm after having some alcoholic drinks.[48] Zehmer wrote a statement on the back of a restaurant check offering the sale of his farm to Lucy for $50,000.[49]

Although Zehmer signed the written offer, Zehmer later claimed he was not serious about the offer and it was done in jest.[50] However, the court ruled that even if Zehmer was not serious about selling his farm to Lucy, the fact that Lucy believed it to be a serious offer—as would any other reasonable person—showed the offer was indeed a valid, binding offer.[51]

In the case of *Augstein v. Leslie*, the court found that "a reasonable person viewing the video would understand that Leslie was seeking the return of his property and that by returning it, the bargain would be concluded."[52] It is clear

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[46] Lucy v. Zehmer, 84 S.E.2d 516, 522 (Va. 1954) ("An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind.") (citing 17 C.J.S. *Contracts* § 32 at 361; 12 Am. Jur. *Contracts* § 19 at 515).

[47] *See generally id.*

[48] *See id.* at 518 (stating that Zehmer and Lucy "had one or two drinks together" the night of the agreement in question).

[49] *See id.* (stating that Zehmer "took a restaurant check and wrote on the back of it, 'I do hereby agree to sell to W. O. Lucy the Ferguson Farm for $50,000 complete.'").

[50] *See id.* at 517-18 (stating that Zehmer believed that the offer was "made in jest").

[51] *See id.* at 521 (stating that, "If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself.").

[52] *See* Augstein v. Leslie, 2012 WL 4928914 (S.D.N.Y. Oct. 17, 2012).

that, unlike in *Lucy*, Leslie's offer was a serious one and was not made in jest. The tweet that conveyed the reward offer was viewable by over 450,000 "followers."[53]

Leslie's reward offer was made several times through various social media outlets, including Twitter.[54] Thus, it is clear that any reasonable person who read the offer contained in the tweet would believe it to be a serious one. Therefore, the offer made by Leslie indeed passes the "reasonable objective person test."

C. Absence of Signature Not a Defense

When it comes to agreements formed online, including Twitter, the affirmative defense of the Statute of Frauds signature requirement would not hold much weight. This is because, at the turn of the millennium, two electronic contracting statutes were put in place: the Electronic Signatures in Global and National Commerce Act ("E-Sign") and the Uniform Electronic Transactions Act ("UETA").

The E-Sign and UETA were passed by congress and signed into law by President Bill Clinton in 2000, and they

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[53] *See Stats & Rankings for Ryan Leslie*, TWITAHOLIC.COM, http://twitaholic.com/ryanleslie/ (last visited Oct. 20, 2013).

[54] *See Augstein* at *2, ("Leslie mentioned the $20,000 reward for the return of his property in a YouTube video on October 24, 2010. In the video, Leslie says, 'I am offering a reward of $20,000.' He also implied that the lost property was worth much more than $20,000. On November 6, 2010, a video was posted increasing the reward to $1,000,000. At the end of the video, a message reads, 'In the interest of retrieving the invaluable intellectual property contained on his laptop & hard drive, Mr. Leslie has increased the reward offer from $20,000 to $1,000,000 USD.' The increase of the reward was publicized on Leslie's Facebook and Twitter accounts, including a post on Twitter which read, 'I'm absolutely continuing my Euro tour + I raised the reward for my intellectual property to $1mm' and included a link to the video on YouTube. News organizations also published reports on Leslie's reward offer, both in print and online. Finally, Leslie was interviewed on MTV on November 11, 2010, and reiterated the $1,000,000 reward, saying 'I got a million dollar reward for anybody that can return all my intellectual property to me.'").

were designed to eliminate barriers to electronic commerce.[55] The purpose of the laws was to establish that electronic signatures and electronic records generally satisfy the legal requirement set forth by the statute of fraud's signature requirement.[56] Thus, if a contract for the sale of a good is formed over Twitter, or any other type of online communication, an electronic signature would suffice.

III. LADY DUFF GORDON MEETS THE TWEETS

The classic contract law case of *Wood v. Lucy*, Lady Duff-Gordon establishes that there is an implied covenant of good faith and fair dealing present in every contract.[57] The recent case of *Hanesbrand v. Mendhenall* shows that this same covenant is present in Talent Agreements being challenged based on a series of controversial tweets.

The day after Osama Bin Laden's death was announced by President Barack Obama, Steelers running back Rashard Mendenhall released a series of controversial tweets regarding the capture and death of Bin Laden.[58] Mendenhall was a spokesman for Hanesbrands' Champion products, and

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[55] See Patricia Brumfield Fry, *Introduction to the Uniform Electronic Transactions Act: Principles, Policies and Provisions*, 37 Idaho L. Rev. 237 (2004), for a general overview and discussion of the Uniform Electronic Transactions Act.

[56] *See* U.C.C. § 2-201 (2012) ("(1) Except as otherwise provided in this section 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. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.").

[57] Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917).

[58] *See* Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 720 (M.D.N.C. 2012) (stating that on May 2, 2011 Plaintiff issued "tweets regarding Osama bin Laden, whose death had been announced by President Obama on May 1, 2011").

as a result of the tweets, Hanesbrands tried to terminate the Talent Agreement, contending that Mendenhall's tweets were in violation of a moral clause found within the agreement.[59]

Mendenhall has a history of using his Twitter partly as a political platform to express his views regarding parenting, relationships, women, Islam, and the ways in which the NFL is similar to a slave trade.[60] Hanesbrands never made any indication that they were not pleased with these tweets.[61] However, on May 2, 2011, Mendenhall issued the following tweets regarding the capture and killing of Osama bin Laden, just one day after President Obama announced bin Laden's death:

> *What kind of person celebrates death? It's amazing how people can HATE a man they never even heard speak. We've only heard one side ...*
> *I believe in God. I believe we're ALL his children. And I believe HE is the ONE and ONLY judge.*
> *Those who judge others, will also be judged themselves.*

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[59] *See id.* at 721 (stating that on May 5, 2011, Hanesbrand's general counsel sent Mendenhall's representatives a letter explaining that Hanesbrands intended to "terminate the Talent Agreement effective Friday, May 13, 2011").

[60] *See id.* at 720 ("Plaintiff used his Twitter account to candidly express his views about Islam, women, parenting and relationships, and made comments in which Plaintiff compared the NFL to the slave trade.").

[61] *See id.* ("Plaintiff alleges that in response to these tweets, 'Hanesbrands at no time suggested that it disagreed with Mr. Mendenhall's comments or that his tweets were in any way inconsistent with the values of the Champion brand or his obligations under the Talent Agreement, or that because of his tweets, Hanesbrands believed Mr. Mendenhall could no longer continue to effectively communicate on behalf of and represent Champion with consumers.'").

> *For those of you who said we want to see Bin Laden burn in hell and piss on his ashes, I ask how would God feel about your heart?*
> *There is not an ignorant bone in my body. I just encourage you to # think*
> *@dkller23 We'll never know what really happened. I just have a hard time believing a plane could take a skyscraper down demolition style.*[62]

The public reacted strongly to these tweets, which led Mendenhall to issue an explanation two days later.[63] On May

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[62] *See id.*

[63] *See id.* at 720-21 (stating that in response to some negative reaction to the May 2, 2011 tweets, Mr. Mendenhall issued the following explanation: "I appreciate those of you who have decided to read this letter and attain a greater understanding of my recent twitter posts. I see how they have gotten misconstrued, and wanted to use this outlet as a way to clear up all things that do not truthfully represent myself, what I stand for personally, and any organization that I am a part of. First, I want people to understand that I am not in support of Bin Laden, or against the USA. I understand how devastating 9/11 was to this country and to the people whose families were affected. Not just in the US, but families all over the world who had relatives in the World Trade Centers. My heart goes out to the troops who fight for our freedoms everyday, not being certain if they will have the opportunity to return home, and the families who watch their loved ones bravely go off to war. Last year, I was grateful enough to have the opportunity to travel over seas and participate in a football camp put on for the children of U.S. troops stationed in Germany. It was a special experience. These events have had a significant impact in my life. 'What kind of person celebrates death? It's amazing how people can HATE a man they have never even heard speak. We've only heard one side ...' This controversial statement was something I said in response to the amount of joy I saw in the event of a murder. I don't believe that this is an issue of politics or American pride; but one of religion, morality, and human ethics. In the bible, Ezekiel 33:11 states, 'Say to them, 'As surely as I live, [continued on the next page...]

5, 2011, just a few days after Mendenhall issued his explanation, Mendenhall's agent received a letter from Hanesbrands informing him that Hanesbrands would be terminating the Talent Agreement pursuant to the morals clause in the contract.[64] Hanesbrands also issued a public statement to ESPN that explained their decision to terminate the Talent Agreement.[65]

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declares the Sovereign LORD, I take no pleasure in the death of the wicked, but rather that they turn from their ways and live. Turn! Turn from your evil ways ...' I wasn't questioning Bin Laden's evil acts. I believe that he will have to face God for what he has done. I was reflecting on our own hypocrisy. During 9/11 we watched in horror as parts of the world celebrated death on our soil. Earlier this week, parts of the world watched us in horror celebrating a man's death. Nothing I said was meant to stir up controversy. It was my way to generate conversation. In looking at my timeline in its entirety, everything that I've said is with the intent of expressing a wide array of ideas and generating open and honest discussions, something I believe we as American citizens should be able to do. Most opinions will not be fully agreed upon and are not meant to be. However, I believe every opinion should be respected or at least given some thought. I apologize for the timing as such a sensitive matter, but it was not meant to do harm. I apologize to anyone I unintentionally harmed with anything that I said, or any hurtful interpretation that was made and put in my name. It was only meant to encourage everyone reading it to think.").

[64] *See id.* at 721 ("In a letter dated May 5, 2011, and addressed to Rob Lefko, one of Mr. Mendenhall's representatives at Priority Sports and Entertainment, Hanesbrands' Associate General Counsel, L. Lynette Fuller–Andrews, indicated that it was Hanesbrands' intent to terminate the Talent Agreement effective Friday, May 13, 2011, pursuant to Paragraph 17(a) of the Agreement. (Complaint, Ex. C).").

[65] *See id.* at 721-22 (M.D.N.C. 2012) (stating that on May 6, 2011, Hanesbrands stated the following to ESPN: "Champion is a strong supporter of the government's efforts to fight terrorism and is very appreciative of the dedication and commitment of the U.S. Armed Forces. Earlier this week, Rashard Mendenhall, who endorses Champion products, expressed personal comments and opinions regarding Osama bin Laden and the September 11 terrorist attacks that were inconsistent with the values of the Champion brand and with which we strongly disagreed. In light of these comments, Champion was obligated to conduct a business assessment to determine whether Mr. Mendenhall could continue to effectively communicate on behalf of and represent Champion with

[continued on the next page...]

As a result of Hanesbrands' attempt to cancel the Talent Agreement, Mendenhall filed suit against them on July 18, 2011.[66] Mendenhall alleged that Hanesbrands breached the Talent Agreement contract "[b]y its actions purporting to terminate the Talent Agreement and Extension under Section 17(a), and by its failure and refusal to pay amounts due Mr. Mendenhall."[67] Specifically, Mendenhall alleged that:

> "the unilateral action taken by Hanesbrands is unreasonable, violates the express terms of the Talent Agreement and Extension, is contrary to the course of dealing between the parties with regard to Mr. Mendenhall's use of Twitter to freely express opinions on controversial and non-controversial subjects, violates the covenant of good faith and fair dealing implied in every contract, and constitutes a breach of the Talent Agreement."[68]

Hanesbrands filed a motion for summary judgment.[69] However, Mendenhall defended his claim based on the notion that it was unreasonable for Hanesbrands to cancel the contract based on the tweets in question. Mendenhall argued that, although the Morals Clause allowed termination of the Talent Agreement contract if Mendenhall was involved with a

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consumers. While we respect Mr. Mendenhall's right to express sincere thoughts regarding potentially controversial topics, we no longer believe that Mr. Mendenhall can appropriately represent Champion and we have notified Mr. Mendenhall that we are ending our business relationship. Champion has appreciated its association with Mr. Mendenhall during his early professional football career and found him to be a dedicated and conscientious young athlete. We sincerely wish him all the best.").

[66] *See id.* at 722 (stating that Mendenhall filed action on July 18, 2011).

[67] *Id.* at 722.

[68] *Id.*.

[69] *See id.* ("Defendant, in its Motion for Judgment on the Pleadings, contends that it was within its rights under the express terms of Section 17(a) to terminate the Talent Agreement and Extension with Mr. Mendenhall pursuant to Section 17(a) of the Agreement.").

"public disrepute, contempt, scandal, or ridicule[70]", it does not grant Hanesbrands the right to terminate simply because the company disagreed with Mendenhall's personal tweets.[71]

Under New York law, in every contract there is an implied duty of good faith and fair dealing that prohibits the parties to the agreement from acting arbitrarily or irrationally in exercising their discretion.[72] Therefore, although Section 17(a) of the Talent Agreement contract provides Hanesbrands with discretionary termination rights, the discretion must be exercised under the implied covenant of good faith and fair dealing.[73] Thus, the Court determined that Hanesbrands' attempt to terminate the Talent Agreement contract based on mere disagreement with the statements contained in Mendenhall's tweets may have been unreasonable and denied Hanesbrands' Motion for Summary Judgment.[74]

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[70] *See id.* at 720 (citing Section 17(a) that states that if Mendenhall "commits or is arrested for any crime or becomes involved in any situation or occurrence tending to bring Mendenhall into public disrepute, contempt, scandal, or ridicule, or tending to shock, insult or offend the majority of the consuming public or any protected class or group thereof," Hanesbrands would have the right to terminate the contract.).

[71] *See id.* at 726 (stating that Mendenhall noted that Hanesbrands issued a public statement to ESPN indicating that the company's reasons for terminating the Talent Agreement contract was because Hanesbrands "strongly disagreed with Mr. Mendenhall's comments").

[72] *See* Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389, 663 N.E.2d 289, 291 (1995) (stating that where a contract allows for the exercise of discretion, "this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion").

[73] *See Mendenhall*, 856 F. Supp. 2d at 726 (stating that any discretion granted to Hanesbrands by Section 17(a) "is subject to the implied covenant of good faith and fair dealing").

[74] *See id.* at 728 (ruling that a judgment on the pleadings would not be warranted and denied Hanesbrands' Motion for Judgement on the Pleadings).

IV. TWITTER SCANDALS

As with any social network site, Twitter has seen its fair share of public scandals[75], many of which involve contract law related issues. For example, during a conversation believed to be off-the-record, President Obama voiced his opinion about the Kanye West and Taylor Switft incident at the 2009 MTV Video Music Awards.[76] After President Obama called Kanye West a "jackass" for the stunt, his remark ended up on Twitter.[77]

An ABC News employee by the name of Moran tweeted President Obama's comment just after hearing it.[78] However, little did Moran know, by doing so he breached an explicit agreement—made between the news station conducting the interview and the White House—that all of President Obama's "pre interview chitchat" was to be considered off the record.[79]

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[75] *See e.g.* Frances Romero, *Top 10 Twitter Controversies*, TIME (Jun. 6, 2011), http://www.time.com/time/specials/packages/article/0,28804,2075071_2075082_2075118,00.html.

[76] *See MTV awards: West Disrupts Swift's Speech*, CNN.COM (Sep. 14, 2009), http://articles.cnn.com/2009-09-14/entertainment/mtv.music.video.awards_1_taylor-swift-mtv-video-music-awards-awards-show?_s=PM:SHOWBIZ (stating that Kanye West rushed onstage and grabbed the microphone from Taylor Swift during her acceptance speech, in order to "let loose an outburst" on behalf of Beyonce Knowles, who he believed should have won).

[77] *See* Matea Gold, *Obama, Kanye West and trouble with Twitter*, LOS ANGELES TIMES (Sep. 16, 2009), http://articles.latimes.com/2009/sep/16/entertainment/et-abctwitter16 (explaining that the comment ended up on Twitter because an ABC News employee tweeted about it).

[78] *See id.* (recounting that after hearing President Barack Obama make the comment, ABC News employee Moran tweeted,"Pres. Obama just called Kanye West a 'jackass' for his outburst at VMAs when Taylor Swift won," Moran tweeted. "Now THAT'S presidential.").

[79] *See id.* ("the explicit agreement CNBC made with the White House that Obama's pre-interview chitchat was off the record.").

Within an hour, the tweet was deleted, but the story had already gotten out.[80] As a result, ABC News had to call the White House to apologize for the breach of contract caused by the tweets.[81]

The permanent nature of written tweets has caused great controversy in the past few years. For example, Chris Brown was involved in a Twitter scandal in late 2010.[82] In a series of angry tweets directed at former B2K artist Raz-B, Brown tweeted the "N-word"[83] along with other words associated with homophobia[84] and domestic violence. The day after the "tweet war" between Chris Brown and Raz-B,

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[80] *See id.* (explaining that within an hour, Moran realized the breach caused and deleted the tweet, but the story "was already out").

[81] *See id.* (stating that "ABC News quickly called CNBC and the White House to apologize").

[82] *See* Gil Kaufman, *Chris Brown, Raz-B In Bitter Twitter Feud Over Rihanna*, MTV.COM (Dec. 30, 2010, 9:01 AM), http://www.mtv.com/news/articles/1655091/chris-brown-raz-b-bitter-twitter-feud-over-rihanna.jhtml (stating that Chris Brown was involved in a "tweet war" with artist Raz-B. Brown described the incident as follows: "I was minding my damn business and Peter pan decides to pop off!!! I'm not mad though!!! I'm just not silent nor am i one of these scary R&B cats!!" Brown later tweeted, "I'm not homophobic! He's just disrespectful!!!").

[83] *See id.* (stating that according to reports, Brown got heated when another artist by the name of Raz-B tweeted "I'm just sittin here thinking how can n---as like [Eric Benet] and [Chris Brown] disrespect women as intelligent as Halle Berry, Rihanna." Brown tweeted back, "N---a you want attention! Grow up n---a!!! Di-- in da booty ass lil boy.").

[84] *See id.* (recounting that at one point, Brown tweeted to Raz-B, "Di-- in da boot ass lil boy.").

Brown issued a public apology.[85]

However, perhaps the most well-known Twitter scandal to date—at least in the world of politics—involved former United States Representative Anthony Weiner.[86] On Friday, May 27, Weiner tweeted a waist-down photograph of a man's briefs to a 21-year-old female college student in Seattle.[87] Shortly thereafter, Weiner removed the tweet, claiming that his account was hacked.[88]

However, the photo was eventually identified as being a photo of Weiner. And, a few days later, Weiner admitted that he was indeed the one who tweeted it.[89] This was only after the Twitter follower, to whom Weiner tweeted the photograph, came forward to offer evidence that she had been

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[85] *See* TMZ Staff, *Chris Brown Homophobic? – I Apologize, I'm Not Homophobic*, TMZ.COM (Dec. 30, 2010, 3:45 PM), http://www.tmz.com/2010/12/30/chris-brown-apologize-homophobic-twittter-raz-b-razb/ (reporting that Chris Brown issued the following statement to TMZ: "Yesterday was an unfortunate lack in judgment sparked by public Twitter attacks from Raz B, who was bent on getting attention. Words cannot begin to express how sorry and frustrated I am over what transpired publicly on Twitter. I have learned over the past few years to not condone or represent acts of violence against anyone. Molestation and victims of such acts are not to be taken lightly; and for my comments I apologize -- from the bottom of my heart. I love all of my fans, gay and straight. I have friends from all walks of life and I am committed, with God's help, to continue becoming a better person.").

[86] *See* Associated Press, *Timeline of Rep. Weiner's Online Sex Scandal*, FOXNEWS.COM (Jun. 11, 2011), http://www.foxnews.com/politics/2011/06/11/timeline-rep-weiners-online-sex-scandal/.

[87] *See id*.

[88] *See id.* (stating that shortly after the photograph was tweeted, Weiner "quickly deleted it and sends out a tweet saying that his Facebook account was hacked").

[89] *See* Chris Cuomo, *Rep. Anthony Weiner: 'The Picture Was of Me and I Sent It'*, ABC NEWS (Jun. 6, 2011), http://abcnews.go.com/Politics/rep-anthony-weiner-picture/story?id=13774605#.ULoZzYXQI1w (reporting that Weiner eventually admitted to tweet the photograph, stating "I take full responsibility for my actions. The picture was of me, and I sent it).

in an ongoing "sexting" conversation with the congressman.[90] Weiner ultimately resigned from his position as congressman as a result of the scandal, which came as a disappointment to those who elected him into office—especially since he was a leading candidate for the next mayor of New York.[91]

V. CONCLUSION

When it comes to the contract law issues associated with online agreements, the internet, and social media, it is clear that the law is evolving with the times. This first became evident in 2000, with the passing of acts such as E-Sign and UETA. These acts give validity to those contracts that are created and signed electronically. The evolution of contract law within the digital age continued with the ruling in the recent case of *CX Digital Media v. Smoking Everywhere, Inc*., where the court ruled that contracts formed using social media such as instant messages, and perhaps tweets, will be binding.

The decision in the case of *Augstein v. Leslie* further affirmed this.[92] *Augstein* made it clear that reward offers made over Twitter are also binding.[93] The court in *Augstein* concluded that if a

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[90] *See id.* (reporting that the woman involved in the conversation was Meagan Broussard, a 26-year-old nursing student and mother from Texas. Broussard provided, to the press, "dozens of photos, emails, Facebook messages, and cell phone call logs" to show the extent of the lewd exchanges between herself and Weiner. It was only after Broussard came forward that Weiner confessed to his actions.).

[91] *See* Raymond Hernandez, *Anthony D. Weiner Announces His Resignation*, NYTIMES.COM (Jun. 16, 2011), http://www.nytimes.com/2011/06/17/nyregion/anthony-d-weiner-tells-friends-he-will-resign.html?pagewanted=all&_r=0 (describing Weiner as a "once-promising politician whose Brooklyn roots and scrappy style made him a leading candidate to be the next mayor of New York" and explains that he made the decision to resign as congressman "after long and emotional discussions with his political advisers and his wife, whom friends described as devastated by the behavior of her husband of 11 months, and worried about the couple's financial future").

[92] *See* Augstein v. Leslie, 2012 WL 4928914, at *1-3 (S.D.N.Y. Oct. 17, 2012).

[93] *Id.*

reasonable objective person would find a tweet to contain an offer to perform in exchange for money, then such offer is valid.[94]

It is likely that litigation involving contract formation and Twitter will continue to increase in the future. In order to avoid excessive litigation, the solution could be for Congress to amend a law currently in place, such as E-Sign or UETA. Simply adding language to validate contracts formed over social media sites, in addition to the validation of those formed and signed electronically, would solve the issue.

While it is normally very difficult for government officials to regulate activities of the internet, in this instance it would take nothing more than an amendment. Doing so would not only prevent future litigation involving social media contracts from clogging up the court systems, but it would also force users of sites such as Twitter to use—or, tweet—with caution.

[94] *Id.*