

WHEN IS A “FIRM OFFER” REALLY FIRM WHEN NEGOTIATING TALENT AGREEMENTS? WHEN THE TERM SHEET SAYS SO

In talent contract negotiations, the talent’s agent often insists on what is commonly referred to as a “firm offer” to ensure that the negotiations are not just speculative. But when is a “firm offer” really firm and binding? A recent New York State Court decision concerning negotiations between E*TRADE representatives and the agent for the actor Harvey Keitel attempts to answer this question. The decision is instructive for anyone who uses term sheets as part of contract negotiations, and particularly when negotiating talent agreements.

FIRM OFFERS

A “firm offer” is commonly understood to be a definite and binding proposal to enter into a contract. The concept is that a party who makes a firm offer is agreeing that if the offer is accepted, then both parties will be bound by its terms and the offer may not then be withdrawn. Firm offers can be useful to lock in the terms of an agreement and to avoid protracted or competing negotiations with the same or another party.

One scenario in which firm offers often arise is in connection with talent contracts. It is commonplace for one side or the other to lay out the scope of the talent contract using a term sheet, which contains certain material terms of the agreement. It is not unusual for term sheets to include language emphasizing the preliminary nature of the document and expressly calling for execution of a longer, formal

THE BOTTOM LINE

Using words like “firm” and “binding” in emails or other documentation when sending over a term sheet to the other side does not necessarily create a firm offer, especially if there is contradictory language in the body of the actual term sheet. Contracting parties who wish to rely on a term sheet as a firm offer should make sure that it contains language establishing its binding nature or else risk a court’s determination that a valid contract was never entered. Further, even if a firm offer is made, the recipient of that offer must be sure to accept it. A party who purports to accept only a portion of the offer, asks for more information, or imposes conditions on the deal risks being viewed as having rejected the offer or made a counteroffer.

contract before the parties agree to be bound to the commitments stated therein.

*KEITEL V. E*TRADE FINANCIAL CORP.*

One alleged “firm offer” was the subject of a recent decision in New York State Court that involved Harvey Keitel and an ad campaign for E*TRADE. E*TRADE used a

talent procurement firm to help find talent for a new ad campaign. At that time, Mr. Keitel’s talent agent also happened to represent the actor Christopher Walken. E*TRADE’s representative initially inquired about Mr. Walken’s availability for the ad campaign and his agent responded that Mr. Walken was not interested, but that Mr. Keitel might be. Shortly after that, E*TRADE’s representative

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sent Mr. Keitel's agent a document titled "non-binding-Term Sheet." The term sheet set forth certain terms of the proposed agreement, including the scope of the campaign, which would include a series of television and radio commercials, as well as digital advertising and other use, and payment to Mr. Keitel of \$1.5 million. The term sheet also stated that neither party would be bound until the parties executed a more formal written agreement.

Before the term sheet was signed, however, the deal fell through as E*TRADE still wanted to pursue Christopher Walken. After Mr. Walken again confirmed that he was not interested, E*TRADE's representative again inquired about Mr. Keitel's interest. In response, Mr. Keitel's agent insisted that E*TRADE make a firm offer before Mr. Keitel would consider it. In response, E*TRADE's representative then resubmitted the same term sheet as before, but changed its title from "non-binding" to "firm and binding," and transmitted the term sheet in an email with the subject line "Harvey Keitel Firm Offer." In the text of the email, E*TRADE's representative stated: "Please consider the attached term sheet a firm and binding offer for the services of your client, Harvey Keitel on behalf of E*TRADE, contingent upon the results of the background check, and of course coming to terms on scripts,

compensation, etc." The attached term sheet, however, continued to include the language stating that neither party would be bound until the parties executed a formal written agreement.

Shortly after receiving the "firm offer," Mr. Keitel's agent replied in an email that "Harvey has agreed to do the 3 commercials for E Trade," and asked E*TRADE's representative to "get us the Long Form contract as soon as possible," as well as the city and days of shooting, which were "equally important." Mr. Keitel's agent also then verbally conveyed other objections to the scope of the term sheet, including the types of digital media and retail uses that were anticipated. The next day, E*TRADE's representative notified Mr. Keitel's agent that E*TRADE had decided to move in a different direction and would not continue negotiations with Mr. Keitel. Mr. Keitel then sued for breach of contract, seeking payment of the \$1.5 million fee set forth in the term sheet, which he argued was a firm and binding offer that he accepted and E*TRADE breached by backing out of the deal.

THE COURT'S DECISION

After the initial complaint was dismissed and then amended, E*TRADE filed a motion to dismiss the amended complaint, arguing that the term sheet was not binding on the

parties and, in any event, Mr. Keitel had not accepted E*TRADE's offer.

In opposition, Mr. Keitel argued that the email transmitting the term sheet, along with other internal communications, evidenced E*TRADE's intent to be bound by the agreement reflected in the term sheet and a waiver of the term sheet's language that it was not binding until the parties executed a more formal agreement.

The court found that because the language of the term sheet was unambiguous, there was no need to "look beyond the four corners of the term sheet" — i.e., to the communications and conduct Mr. Keitel had invoked — to determine whether there was an enforceable contract. Since the term sheet had called for entry of a formal written agreement with particular material terms before the parties would be bound, the term sheet was not, on its own, an enforceable contract. Nor had E*TRADE "unmistakably manifest[ed] a willingness to waive the clear language of the Term Sheet" by E*TRADE's statement that the term sheet was a "firm offer."

Moreover, even if the term sheet had been a firm offer, the court found that Mr. Keitel had not shown "unqualified acceptance of such offer." Instead, his agent's response to the term sheet had been to accept only part of the

offer on Mr. Keitel's behalf, singling out only the three television commercials for E*TRADE, and thus excluding the other two radio commercials and other components of the campaign that were reflected in the term sheet, and to indicate that further revisions would follow. As a result, Keitel's claimed acceptance was really a rejection of the offer and a counter-offer which E*TRADE quickly rejected the next day.

This decision serves as a reminder to negotiators to be sure that their term sheets accurately reflect their intent—either to make a firm offer or to merely engage in non-binding discussion over proposed contract points—and that such intent is clearly and unambiguously expressed, or else risk a contrary finding in court.

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