

THE PEPSI GENERATION GOES TO COURT: A TEACHING NOTE UTILIZING A NETFLIX DOCUMENTARY TO TEACH CONTRACTS AND ETHICS

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I. INTRODUCTION

This teaching note provides everything needed to utilize a recent Netflix documentary to illustrate various aspects of contract formation and legal ethics. This can be performed as an in-class discussion, as an optional extra credit assignment, or as a take-home assignment with in-class discussion. The documentary is an excellent catalyst for igniting discussion and demonstrating the real-world application of legal principles such as advertisements as offers, the objective theory of contract formation, the statute of frauds, inadmissibility of mitigation efforts, and contracts for an illegal purpose. It also demonstrates some of the more practical aspects of litigation that are often overlooked in legal education. Examples include power disparities between plaintiff and defendant, venue selection, delaying tactics, the discomfort incurred from legal uncertainties, the difference between “winning” a lawsuit and avoiding a lawsuit altogether, and the long-term costs of unethical behavior. Students find the ambitious college student plaintiff and his relentless pursuit of one of the largest corporations to be highly engaging. The documentary is also highly entertaining, as it accurately portrays extravagant 1990s pop culture, provides a behind-the-scenes perspective from those involved in the case, and has a surprise twist in how Leonard’s attorney was the brazen and now disgraced Michael Avenatti. This teaching note includes discussion questions with instructor notes and multiple-choice, attention check questions.

II. THE NETFLIX DOCUMENTARY

Pepsi, Where’s My Jet? is a compelling documentary released on Netflix in 2022.¹ It covers the background, litigation, and aftermath of the famous *John Leonard v. PepsiCo, Inc.* case.² The case involved an ambitious, 21-year-old college student who saw a Pepsi Points commercial that depicted a Harrier jet accompanied by the text “Harrier Fighter 7,000,000 Pepsi Points.”³ Leonard quickly realized that such a jet would be worth about \$32 million and, because Pepsi allowed for the purchase of Pepsi Points at \$0.10 each with no stated limit, this could be a very lucrative deal. Leonard acquired \$700,000 (7,000,000 × \$0.10) from financial backers and sent a cashier’s check to the Pepsi fulfillment center requesting his Harrier jet. Pepsi returned the check with a note explaining that the Harrier jet in the commercial “is fanciful and is simply included to create a

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¹ *Pepsi, Where’s My Jet?* (Netflix 2022).

² *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116 (S.D.N.Y. 1999).

³ *Pepsi Commercial*, YOUTUBE (2022), https://youtu.be/z9_4e4WUXr4.

humorous and entertaining ad.”⁴ Litigation then ensued, largely around whether the commercial constituted an offer for the Harrier jet that Leonard then accepted.

The Netflix documentary provides a highly entertaining look at 1990s pop culture. It truly captures the feel of a unique decade. Students will no doubt find the fashion, music, slang, and commercials to be highly amusing when compared to modern standards. The documentary also provides insightful backstory regarding Leonard; one of his eccentric financial backers; the Pepsi marketing team; Pepsi executives; and Leonard’s attorney, who was none other than the now disbarred and imprisoned Michael Avenatti.⁵ The documentary also brings to light aspects of the incident that were previously unknown.

By showing the viewer a behind-the-scenes look at the evolution of the case, students will gain valuable experience about the real-world implications and costs of litigation. This is something that is sadly often overlooked in legal education; reading one-page case summaries in a textbook provides a dangerously overly simplistic perception of the legal process. For example, Leonard describes how much of the litigation process was just waiting.⁶ He also talks about the mental hardship from the inherent uncertainty of not knowing what the outcome will be.⁷ This frustration is exacerbated when settlement offers are involved, which is also discussed in the documentary. Another aspect of litigation often overlooked in legal education is how trial outcomes are frequently contingent upon extra-legal occurrences. Issues of venue selection, litigation gamesmanship, jury makeup, delaying tactics, financial-resource disparities between plaintiff and defendant, and presiding judge assigned are all illuminated in the documentary and explained by the people who went through the process.

III. THE ACTIVITY

The primary issue at hand in the *Leonard* case is whether the Pepsi commercial constituted an offer that Leonard then accepted, forming a contract for the Harrier jet. The documentary provides in-depth background regarding Leonard, his financial backers, his attorneys, the marketing firm, Pepsi executives, and even U.S. Pentagon officials that weighed in on the matter. This allows students the ability to parse out the relevant facts and determine the likely outcome at trial. This background regarding the case also provides details that may initially appear to be relevant but upon closer consideration of the legal standards are not. This affords students the opportunity to practice identifying relevant legal factors.

This activity can be conducted in a variety of ways depending on the class’s modality, length of the semester, and professor’s preference. It can be given as an extra credit assignment, a graded homework assignment, or just an in-class activity for class participation credit. The heart of the assignment is to identify the factors of the case that favor each side to the litigation and be able to explain why each factor strengthens that side’s position. This can either be written up and submitted, discussed in a class activity, or first written up and submitted for an assignment and then discussed in class.

⁴ *Leonard*, 88 F. Supp. 2d at 120.

⁵ *Lawyer Michael Avenatti Sentenced to 14 Years in Federal Prison for Stealing Millions of Dollars from Clients and Tax Fraud*, U.S. ATT’Y OFF., CENT. DIST. CAL. (Dec. 5, 2022), <https://www.justice.gov/usao-cdca/pr/lawyer-michael-avenatti-sentenced-14-years-federal-prison-stealing-millions-dollars>.

⁶ *Pepsi, Where’s My Jet?: Let’s Make a Deal* (Netflix 2022), at 26:00.

⁷ *Id.*

Access to Netflix is required to watch the documentary. The vast majority of students will have access to Netflix from a personal account or through a friend or family member's account. In the unlikely event a student does not know anyone else with an account, it will cost \$8.99 for a one-month subscription. Netflix functionality allows playback to be increased to 1.25 or 1.5 times normal speed for students in a hurry. The documentary does contain some profanity, roughly on par with a PG-13 movie. There is no sexually suggestive material or any otherwise problematic material.

This is a convenient, standalone activity that can be conducted at the beginning, middle, or end of the semester. It may seem counterintuitive to conduct such a class activity at the beginning of the semester before the relevant material has been taught. However, this sequencing allows the professor to show the need for learning the material that will later be covered throughout the semester. This sparks interest in students by demonstrating the practical value of the class and how the study of law can be interesting. This practice of showing the need for the information first and only then providing the information is consistent with the pedagogical practice of the inductive teaching method.⁸ Unfortunately, business education frequently uses the direct instruction method, which involves first providing instruction followed by a corresponding problem.⁹ This is not practical, as it is unlikely to be the case in real-world business settings where business leaders generally are confronted with a problem first and then must seek out a solution through a process of discovery.¹⁰

This activity is also an excellent fit for a “down day” in the semester, such as the Tuesday before Thanksgiving when the professor does not want to start a new section. It is also a great cumulative event after covering contracts or for a final's week activity if a traditional, in-class final exam is not administered. Additionally, this activity is a great review for a contracts exam.

A modified version of this activity would also be great for a Marketing class. It provides insight into the “Cola Wars” of the 1990s; a behind-the-scenes look at the collaborative process of creating advertisements; legal implications of advertisements; target demographics; the use of celebrity endorsements; and numerous ethical issues, such as Pepsi's marketing fiasco in the Philippines.

IV. LEGAL ANALYSIS TEACHING NOTES

The basic legal issue presented in the case is whether or not Pepsi made an offer to Leonard such that his acceptance led to a valid contract. Generally, a valid offer requires that the offeror manifest a willingness to enter into a bargain in a manner that would justify another person believing that his or her assent will conclude the bargain.¹¹ This means that the words and/or conduct of the offeror must show that the offeror intends to make a commitment to be bound by

⁸ Torsor Kotee & Casey Nguyen, *How Can Business Educators Best Prepare Learners with Both the Foundational Knowledge and Self-Direction Needed for Career Success?*, AACSB (Jan. 20, 2023), <https://www.aacsb.edu/insights/articles/2021/07/instruction-vs-discovery-learning-in-the-business-classroom>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See RESTATEMENT (SECOND) OF CONTS. § 24 (AM. L. INST. 1981).

the offer.¹² This intent is measured by an objective, reasonable person standard.¹³ That is to say, whether or not an offeror’s actions manifested an intention to be bound is determined by whether a reasonable person in the position of the offeree would believe he or she did, not what the offeror or offeree subjectively believed.¹⁴ Thus, students should be able to identify that the key issue in this case is whether or not a reasonable person would believe that Pepsi actually manifested a serious intention to be bound to the bargain of exchanging a Harrier jet for \$700,000 worth of Pepsi Points.

A. *Evidence for Leonard*

Generally, Leonard has the weaker case—he ultimately lost on summary judgment—but there is evidence that students can offer to support his side. In the commercial, the point total for the Harrier jet is presented in the exact same manner as the other items, which, it could be argued, implies that they are to be treated as equally valid. There is no disclaimer in the advertisement to inform the viewer that the Harrier jet is unavailable. Such a disclaimer would have been easy to add and is common practice in television advertisements.¹⁵

The advertising executive who developed the commercial said he came up with the idea for putting the Harrier jet in the advertisement from the old Neiman Marcus Christmas Catalogue fantasy present.¹⁶ This fantasy present was an extravagant item listed for sale in the back of the catalogue, such as a his and hers mini submarine for \$18,700 in 1963.¹⁷ The fact that these were actual items available for purchase at the stated price lends some support for the notion that the Harrier jet was available.

The commercial was the result of a deliberate process involving the approval of multiple people at multiple stages of creation. This, it could be argued, supports the claim that it is to be taken seriously, as compared to something mentioned extemporaneously in a casual conversation.¹⁸ The unaired first draft of the commercial listed 700,000,000 points for the Harrier jet, which Pepsi changed to 7,000,000 before running the initial version of the commercial.¹⁹ While Pepsi explains that the change was simply to provide more aesthetically pleasing text, it could be argued that Pepsi was intentionally trying to make the Harrier jet appear obtainable.

Finally, the botched Pepsi marketing contest in the Philippines (discussed in Part VII) could perhaps be used to argue that Pepsi intentionally made “mistakes” in order to sell more product and therefore was not acting in good faith.

¹² *Id.* at § 2 (defining a “promise,” the underlying basis of a contract, as a “manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made”).

¹³ See Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1125 (2008) (discussing the objective theory of contracts).

¹⁴ *Id.*

¹⁵ Here, students often recount absurd examples they have seen, such as “do not attempt to drive car upside down,” or “product does not actually allow user to fly.” The *Leonard* case helps illustrate why such disclaimers are necessary—not because such a frivolous lawsuit regarding these issues would ultimately be successful but to avoid them in the first place.

¹⁶ *Pepsi, Where’s My Jet?: Let’s Make a Deal*, *supra* note 6, at 16:00.

¹⁷ *Id.*

¹⁸ See RESTATEMENT (SECOND) OF CONTS. § 22 (AM. L. INST. 1981) (requiring that an offer manifest a serious intention to be bound by its terms).

¹⁹ *Pepsi, Where’s My Jet?: Landing the Plane* (Netflix 2022), at 24:45.

B. Evidence for Pepsi

As explained by the judge in granting summary judgment, Pepsi had numerous grounds for why its commercial did not create a binding contract. The strongest is likely the general rule that advertisements do not constitute offers; rather, they function as invitations for offers.²⁰ The reason why can be easily illustrated by considering what would happen if Pepsi received \$700,000 from 3,000 people each demanding a Harrier jet. Since less than 1,000 Harrier jets were ever made,²¹ such an open invitation to anyone is not practical. There does exist a narrow exception to the general rule that advertisements are not offers. When the advertisement is “clear, definite, and explicit, and leaves nothing open for negotiation,”²² it may be treated as an offer. But this is not the case in the Pepsi Points commercial, as the commercial did not contain any limiting words such as “first come, first served.”²³

As previously discussed, under the objective theory of contract formation, it is largely irrelevant whether Pepsi actually intended to offer the Harrier jet or not; rather, what matters is whether a reasonable viewer of the commercial would believe that it did. Here, a reasonable person would likely comprehend the absurd nature of a business offering to give out \$32 million items to anyone who gave the company \$700,000. The depiction of the Harrier jet in the commercial is unrealistic and clearly intended for comedic purposes. It is flown by a teenager wearing no ear protection and holding a Pepsi in one hand and is landed on the front lawn of a high school, causing structural damage to the building and comically ripping off the clothes of a teacher. This is in contrast to how the other, legitimate items available in the catalogue are depicted in ordinary use.

Additionally, millions saw the advertisement, and only one person attempted to accept the offer. This is evidence that the average, objective, reasonable person understood that the commercial did not make an offer. There are numerous people who would have gladly paid \$700,000 for a \$32 million item if they believed that was what Pepsi was seriously offering. A final piece of evidence on this point is that the commercial directs viewers to the catalogue for full details on the Pepsi Points campaign. In the catalogue, all the other items from the commercial are depicted and have a checkbox to request in the order form, but there is no mention of the Harrier jet.²⁴

There is another potential contract formation issue related to the lack of a valid writing. The execution of this alleged agreement would constitute the “sale” of a good over \$500 and therefore invoke the statute of frauds and require a writing to be enforceable.²⁵ Here, there is no writing because neither the commercial nor the order form submitted satisfies the writing requirement.²⁶ Leonard alleged that there were various writings that, when considered together, met the statute of frauds requirement.²⁷ While the court noted that a combination of different signed and unsigned writings could satisfy the statute of frauds, there must be at least one signed writing that establishes the contractual relationship, and the additional unsigned writing(s) must on their

²⁰ 67 AM. JUR. 2D *Sales* § 114 (2021).

²¹ *Harrier II Plus (AV-8B) VSTOL Fighter and Attack Aircraft*, AIRFORCE TECH. (Nov. 7, 2000), <https://www.airforce-technology.com/projects/harrier/>.

²² *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689, 691 (Minn. 1957).

²³ *Leonard*, 88 F. Supp. 2d at 124.

²⁴ *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 6, at 2:30.

²⁵ *Leonard*, 88 F. Supp. 2d at 131.

²⁶ *Id.*

²⁷ *Id.*

face clearly refer to the same transaction.²⁸ In this case, the order form that Leonard alleges formed the contract was not signed by Pepsi, the party to be charged.²⁹ Leonard sought to obtain additional contracts between Pepsi and its advertisers, but the court noted that Leonard would be nothing more than a third party to such contracts.³⁰ Thus, Pepsi's signature on those documents would be irrelevant to the formation of any contract with Leonard. This case thus provides students with an excellent example of how the statute of frauds allows parties to be quite creative in using business documents to satisfy the writing requirement, but those documents still must meet certain basic requirements.

In addition to the basic issue of whether or not Pepsi made a valid offer, there are other potential enforceability issues related to consideration and unconscionability. Normally, courts do not evaluate the adequacy of consideration in a contract.³¹ However, a contract can be considered "unconscionable"³² and rendered voidable when disparities in consideration are so great to constitute "such an agreement as no sane man not acting under a delusion would make, and that no honest man would take advantage of."³³ It would be a highly peculiar business decision for a company that is not in the business of distributing \$32 million Harrier jets to agree to procure and distribute them to anyone who wrote a cashier's check for \$700,000. As the judge in *Leonard* described, such an extreme, 41:1 disparity is simply "a deal too good to be true."³⁴

A final legal issue that can be raised with students is the required contractual element of legality. To be enforceable, contracts must be for a legal purpose.³⁵ It is potentially illegal for a U.S. citizen to own a flight-capable Harrier jet.³⁶ The commercial that Leonard relies upon as creating an offer features a flight-capable jet, and thus this must be the subject matter that Leonard asserts is the basis of the contract. Demilitarizing a Harrier jet would likely render it incapable of flight.³⁷ Thus, the contract proposed by Leonard would either be illegal or for a different subject matter than what he alleges Pepsi offered.

Some of the evidence indicates that Leonard was not acting in good faith. He could have easily reached out to Pepsi to ask if it was serious about the Harrier jet before seeking out lawyers and acquiring \$700,000 from financial backers. He never obtained a location to store the Harrier jet he allegedly believed he would receive. Before moving forward with his scheme, Leonard learned that Harrier jets are sold in a minimum quantity of six,³⁸ which is an indication that Pepsi was not serious about the Harrier jet. Finally, the \$10 he included for shipping and handling would be vastly insufficient to cover the transportation of a Harrier jet.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ 17 C.J.S. *Contracts* § 175 (2021) ("In the absence of fraud, the law generally will not weigh the adequacy of the consideration for a contract; so long as it is something of real value, it is sufficient.").

³² 17 C.J.S. *Contracts* § 178 (2021).

³³ *R. L. Kimsey Cotton Co., Inc. v. Ferguson*, 233 Ga. 962, 966 (1975).

³⁴ *Leonard v. PepsiCo, Inc.*, 88 F. Supp. 2d 116, 130 (S.D.N.Y. 1999).

³⁵ 17 C.J.S. *Contracts* § 4 (2023) (discussing the requirement that a contract must be for a legal purpose).

³⁶ Susanne M. Schafer, *Pentagon: Pepsi Ad Not 'The Real Thing'*, AP NEWS (Aug. 9, 1996), <https://apnews.com/article/d4233cd81d28106f9b417931beb06479>.

³⁷ *Id.*

³⁸ *Pepsi, Where's My Jet?: The Kid from Seattle* (Netflix 2022), at 27:00.

C. Irrelevant Evidence

There are several pieces of evidence from the documentary that students might raise but that are irrelevant to resolving the legal issues affecting the formation of a contract. Thus, this exercise serves as an effective tool for helping students learn how to focus on the material facts given the applicable legal standard.

After Leonard attempted to acquire the Harrier jet, Pepsi changed the advertisement from 7,000,000 Pepsi Points to 700,000,000.³⁹ Students often view this as relevant evidence that serves as an admission of guilt by Pepsi. In the documentary, this behavior leads to the accusation that “they were admitting it’s an offer.”⁴⁰ The court in *Leonard* explained that this alteration was not “probative of the seriousness of the offer.”⁴¹ It was prompted “less by the fear that reasonable people would demand Harrier jets and more by the concern that unreasonable people would threaten frivolous litigation.”⁴² This is similar to the public policy grounds behind Federal Rule of Evidence 407 for allowing a business to correct the circumstances that caused an injury without having the correction used against it in court.⁴³

Leonard explains that he was concerned that if he planned on selling the Harrier jet immediately after acquisition, “that certainly would look like we were just trying to get Pepsi.”⁴⁴ So they came up with a plan to take the Harrier jet to airshows.⁴⁵ This plan would have been unlikely to recoup the initial \$700,000 investment plus attorney’s fees. What little they would be paid to perform at airshows would largely be offset by expenses, such as storage, jet fuel, insurance, pilot salary, transportation costs, maintenance, etc. Regardless, this is largely a moot point, as there is little relevance to what a party to a contract plans to do with the item after the contract is executed.

V. ETHICAL ANALYSIS TEACHING NOTES

The details surrounding this case provide colorful illustrations of various ethical principles. Regardless of legality, was it ethical to demand Pepsi acquire a \$32 million item in exchange for \$700,000? Here, providing the class an example in which the tables are turned may cause the students to change their minds. If a student mistakenly created an online advertisement to sell a \$3,200 baseball card for \$70, would it be ethical for someone to deliver the \$70 and demand the student acquire and deliver the \$3,200 baseball card?⁴⁶

Was it ethical for Pepsi to be the first to initiate a lawsuit, thus ensuring that the case would be litigated in New York, a venue that was both geographically convenient to Pepsi and likely a sympathetic jurisdiction to a corporate interest?⁴⁷ While this may initially strike students as unfair,

³⁹ *Pepsi, Where’s My Jet?: Let’s Make a Deal*, *supra* note 6, at 31:00.

⁴⁰ *Pepsi, Where’s My Jet?: Let’s Make a Deal*, *supra* note 6, at 31:30.

⁴¹ *Leonard*, 88 F. Supp. 2d at 130.

⁴² *Id.*

⁴³ FED. R. EVID. 407 (“When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product or its design, or a need for a warning or instruction.”).

⁴⁴ *Pepsi, Where’s My Jet?: The Kid from Seattle*, *supra* note 38, at 27:30.

⁴⁵ *Id.*

⁴⁶ Note that this is an intentionally generous analogy, as Pepsi did not make a mistake; rather, it made a fanciful commercial.

⁴⁷ *Pepsi, Where’s My Jet?: Let’s Make a Deal*, *supra* note 6, at 27:00.

this type of a tactic is perfectly legal. For example, in 2018 MGM sued the Mandalay Bay shooting victims for similar reasons.⁴⁸ In our adversarial legal system, attorneys are to do what is best for their clients, not what is best for the opposition. But how far is it appropriate to take this principle? What if Pepsi had the ability to control the times of the depositions and went out of its way to schedule them at dates and times that were the most inconvenient to the out-of-state plaintiff? What if Pepsi intentionally delayed the process solely so that Leonard would be more likely to take the settlement offer rather than continue with the hassle of litigation?

The documentary recounts a little-known aspect of the Leonard litigation. Michael Avenatti admitted that Leonard was “highly unlikely to win this case in a court of law. [Therefore,] we are going to have to bring public pressure to bear.”⁴⁹ Avenatti went digging for dirt on Pepsi to use against it to pressure it into a favorable settlement.⁵⁰ He eventually found out about a botched promotional campaign Pepsi ran in the Philippines in 1992 called “Pepsi Number Fever.”⁵¹ In this campaign, bottle tops of Pepsi had numbers printed on them, and one number was selected for recipients of bottles with that number to become millionaires.⁵² Due to a printing error, instead of only a few winning numbers printed, 600,000 were printed, and hundreds of Filipinos believed they had won.⁵³ Pepsi offered to pay these people only 1/2,000th of the promised payout, which led to riots, arson, and even the death of five people.⁵⁴ Avenatti’s plan was to threaten to run provocative advertisements referencing the “Pepsi Number Fever” contest if Pepsi did not agree to a favorable settlement offer.

This controversial scheme elicits various ethical considerations. First, ignoring the printing error, was it even ethical for Pepsi to run such a campaign in an impoverished country such as the Philippines? Manny Pacquiao, a Filipino boxer, politician, and advocate, implies that due to the poverty in the Philippines, advertising campaigns that offer the chance at a large reward are particularly suspect.⁵⁵ Pacquiao explains, “Because of the suffering of our people, when promotions like this happen, the people will try very hard.”⁵⁶ Does the fact that the Pepsi product leads to poor health outcomes—which require more money to be spent on health care—further affect the ethics of such a campaign?⁵⁷

This Philippines contest debacle and Avenatti’s attempt to exploit it for financial gain is illustrative of how unethical behavior catches up to people in the long run. Avenatti continued the practice of trying to extort large corporations, which, over twenty-five years later, led to a 2.5-year prison sentence and disbarment after attempting to extort Nike.⁵⁸ Unethical behavior may lead to

⁴⁸ Elliott Mest, *MGM Sues Mandalay Bay Shooting Victims*, HOTEL MGMT. (July 17, 2018), <https://www.hotelmanagement.net/legal/mgm-sues-mandalay-bay-shooting-victims>.

⁴⁹ *Pepsi, Where’s My Jet?: The Bad News Bears* (Netflix 2022), at 8:20.

⁵⁰ *Id.* at 31:40.

⁵¹ *Id.* at 33:15.

⁵² *Pepsi, Where’s My Jet?: Landing the Plane*, *supra* note 19, at 2:30. A million Philippine pesos was worth roughly \$40,000 in 1992. *Id.*

⁵³ Darian Woods & Stacey Vaneck Smith, *Pepsi’s Number Fever*, NPR (May 6, 2021, 2:47 PM), <https://www.npr.org/2021/05/06/994388441/pepsis-number-fever>.

⁵⁴ *Id.*

⁵⁵ *Pepsi, Where’s My Jet?: Landing the Plane*, *supra* note 19, at 3:00.

⁵⁶ *Pepsi, Where’s My Jet?: Landing the Plane*, *supra* note 19, at 3:00.

⁵⁷ Joe Leech, *13 Ways That Sugary Soda Is Bad for Your Health*, HEALTHLINE (Feb. 8, 2019), <https://www.healthline.com/nutrition/13-ways-sugary-soda-is-bad-for-you>.

⁵⁸ *Michael Avenatti Sentenced to Over Two Years in Prison for Attempting to Extort Nike and for Defrauding His Client*, U.S. DEPT. OF JUSTICE (July 8, 2021), <https://www.justice.gov/usao-sdny/pr/michael-avenatti-sentenced-over-two-years-prison-attempting-extort-nike-and-defrauding>.

short-term gains but almost always catches up to the person in the long run.⁵⁹ Additionally, even when unethical behavior is advantageous in the short run, it imposes a heavy toll in the form of guilt, the burden of maintaining lies, and the psychological cost of living with the fear of being caught.⁶⁰ As Tom Hoffman describes in the documentary, his ethical behavior resulted in a happy, guilt-free lifestyle, and Avenatti's behavior landed him in prison.⁶¹

VI. DISCUSSION QUESTIONS

Because of the number of contractual and ethical issues brought up in this activity, there is no shortage of discussion questions that can be posed either as take-home essay questions or in-class discussion questions. The following are just a few options, with accompanying information for the professor. Note that the footnotes in these questions are for instructor reference and should be deleted before assigning to students.

1. With the hindsight of knowing that Leonard lost his case, what advice would you give Pepsi in 1996 about running the advertisement?

Note: While Pepsi ultimately “won” the lawsuit, in litigation there is often no real winner, just varying degrees of losers. In order to “win,” Pepsi had to invest time and money throughout the three-year litigation process. This is an excellent illustration of this principle, as many students dismissively respond to the question by explaining that, since Pepsi won, there was no problem with running the advertisement. Such a response demonstrates as much of an understanding of the law as a misunderstanding of the costs of defending lawsuits. Additionally, this case focused on contract law, and there are other areas of law that could potentially be applicable, such as a state consumer protection act and the federal truth-in-advertising regulations.

2. Imagine Pepsi had a history of offering—and following through with—one extravagant prize in each of its previous promotional campaigns, how would that fact affect Leonard's case?

Note: This would certainly be a fact in favor of Leonard and might have gotten him past the summary judgment phase, but ultimately, the principle that advertisements are not offers would still be dispositive.⁶² As long as Pepsi did not include “clear, definite, and explicit [language that] leaves nothing open for negotiation,”⁶³ the rule that advertisements are not offers would be controlling.

3. Does the commercial constitute an offer for the other items, such as the sunglasses and jacket?

Note: Likely not. Again, the general rule is that advertisements are not offers. The commercial did not contain “clear, definite, and explicit [language that] leaves nothing

⁵⁹ See, e.g., *Ethics Pays*, BUS. ETHICS RES. CTR., <https://www.businessethicsresourcecenter.org/ethics-pays/> (last visited Mar. 9, 2023).

⁶⁰ See, e.g., John D. Kammeyer-Mueller, Lauren S. Simon & Bruce L. Rich, *The Psychic Cost of Doing Wrong: Ethical Conflict, Divestiture Socialization, and Emotional Exhaustion*, 38 J. MGT. 784 (2012).

⁶¹ *Pepsi, Where's My Jet?: Landing the Plane*, *supra* note 19, at 16:00.

⁶² See *supra* note 20 and accompanying text.

⁶³ *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689, 691 (Minn. 1957).

open for negotiation,”⁶⁴ so this general rule applies. Students often find this to be unfair. But the purpose for the general rule that advertisements are not offers can be explained by imagining a scenario whereby Pepsi had 5,000 jackets to meet the expected demand but was met with an unforeseeable demand for 10,000 jackets. Here, it would be unfair to force Pepsi to attempt to acquire 5,000 more jackets to meet this unforeseeable demand.

4. Todd Hoffman stated, “You can fight; you can always fight. You can always try. You can lose—you can win. But if you don’t fight you already lost. So you always fight.”⁶⁵ Is this a logical way to view the filing of lawsuits?

Note: This is ultimately an issue of personal preference, but the logic embodied in Hoffman’s quote is highly suspect. First, a more reasonable outlook on when to fight should consider the probabilistic outcome from fighting. In other words, one should choose to fight when the weighted probability of what is to be gained from a success is greater than the weighted probability of the total costs (financial, temporal, and psychological). Second, it is likely impossible to “always fight,” as people have finite financial and temporal resources to invest into fighting. If one attempted to “always fight,” he or she may find himself or herself unable to take on an additional, more advantageous fight in the future because all of his or her available resources are tied up fighting more trivial matters.

5. In the documentary, the advertising executives mention that part of the reason why they used the Harrier jet is because it was in the public domain.⁶⁶ What does it mean that an item is in the public domain and why was this beneficial to Pepsi?

Note: Works of authorship that are fixed in a tangible form of expression are protected by copyright law.⁶⁷ Examples include written works, photographs, paintings, and videos.⁶⁸ Copyright law grants authors the exclusive right to publish, reproduce, distribute, and publicly display or perform the copyrighted work for a specified statutory term.⁶⁹ Once the term of copyright protection has run, or if the author of the work has otherwise abandoned its copyright in the work, the work is said to be in the public domain.⁷⁰ This means that the previously copyrighted work is no longer subject to copyright protection and is able to be reproduced by the public without infringing on the copyright.⁷¹ Additionally, most U.S. government creative works are copyright-free from inception.⁷² Because the Harrier jet was in the public domain, using it in the commercial saved Pepsi the hassle of acquiring the rights to use it for commercial purposes.

⁶⁴ *Id.*

⁶⁵ *Pepsi, Where’s My Jet?: Let’s Make a Deal*, *supra* note 6, at 29:00.

⁶⁶ *Id.* at 19:30.

⁶⁷ See 18 C.J.S. *Copyrights & Intellectual Property* § 3 (2023).

⁶⁸ *Id.* at § 7 (discussing the general nature of copyright law).

⁶⁹ *Id.*

⁷⁰ *Id.* at § 65.

⁷¹ *Id.*

⁷² *Copyright Exceptions for U.S. Government Works*, USA.GOV (June 6, 2022), <https://www.usa.gov/government-works> (explaining the general rule and providing narrow exceptions such as works prepared for the government by independent contractors and the use of a government work which implies a governmental endorsement).

6. The documentary discusses in detail Leonard's rationale for why he rejected Pepsi's settlement offer.⁷³ If you were a twenty-one-year-old college student like Leonard, how would you decide whether to accept or decline Pepsi's offer? Conversely, if you were an attorney for Pepsi, how would you decide how much to offer Leonard? In either scenario, would it be a good idea to take into consideration the attitude of the other side (in other words, if the other side was acting like a jerk, should you be less likely to accept its offer)?

Note: The question about what the Pepsi attorneys should offer to Leonard has great potential for the agency problem. The interests of a Pepsi attorney may not be perfectly aligned with the interests of PepsiCo. For example, perhaps the attorney wants to go to court because of the potential to appear on national news programs. It is also important to note that, while Pepsi almost certainly would have been successful after a full trial, the discovery process would have likely uncovered some inconvenient facts, such as how the advertisement originally listed the Harrier jet for 700,000,000 Pepsi Points but was changed to 7,000,000 Pepsi Points at the request of Pepsi executives.

In addition to these prescribed questions, discussing the case in class will inevitably lead to numerous questions arising organically from the students. Often these involve a misunderstanding as to details mentioned in the documentary that are largely irrelevant to the case. Students also often ask about related, hypothetical scenarios; discussing these further helps illustrate the legal concepts.

VII. ATTENTION CHECK QUESTIONS

The following eight questions may be distributed for the students to answer while watching the documentary. These are simple questions, the purpose of which is just to provide confirmation that the student watched the documentary. These questions are evenly staggered throughout the documentary and are provided here in sequential order. The footnotes, which provide the exact time for where in the documentary the questions are answered, are for reference only and should be deleted before distributing to students. The correct answer is underlined.

1. What is the name of Todd Hoffman's mother, who lives in Palm Beach Florida?⁷⁴

- Ruth
- Phyllis
- Gertrude
- Edna

2. In the original business plan, John Leonard determined that he would need to acquire Pepsi Points from how many 12-packs to acquire the Harrier jet?⁷⁵

- 850,000
- 1,200,000
- 1,400,000
- 1,650,000

⁷³ *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 6, at 37:00.

⁷⁴ *Pepsi, Where's My Jet?: The Kid from Seattle*, *supra* note 38 at 16:00.

⁷⁵ *Id.* at 24:20.

3. What was the name of the advertising agency that produced the commercial?⁷⁶
Sterling Cooper Draper & Price
Hamlin Hamlin & McGill
Batton Barton Durstine & Osborn
Wyant Wheeler Hellerman Teltow & Brown
4. John Leonard's second attorney was a highly controversial attorney named what?⁷⁷
Michael Avanetti
G. Gordon Liddy
Mark Geragos
Denny Crane
5. John Leonard alleges that Pepsi stopped him from going on what show at the last minute?⁷⁸
The Oprah Winfrey Show
60 Minutes
The Jerry Springer Show
The Late Show with David Letterman
6. The alleged arms dealer was only able to produce what item?⁷⁹
Shrimp platter
Non-functioning helicopter
Harrier jet owner's manual
Speedboat
7. What was the winning number from the Pepsi contest in the Philippines?⁸⁰
42
140
349
789
8. The case was a question on which gameshow?⁸¹
Cash Cab
Jeopardy!
Who Wants to Be a Millionaire
The Hollywood Squares

⁷⁶ *Pepsi, Where's My Jet?: Let's Make a Deal*, *supra* note 6, at 14:00.

⁷⁷ *Id.* at 40:00.

⁷⁸ *Pepsi, Where's My Jet?: The Bad News Bears*, *supra* note 49, at 19:00.

⁷⁹ *Id.* at 25:15.

⁸⁰ *Pepsi, Where's My Jet?: Landing the Plane*, *supra* note 19, at 4:30.

⁸¹ *Id.* at 35:30.